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S. HRG. 104-694

TRIBAL SOVEREIGN IMMUNITY

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Tribal Sovereign Immunity, S. Hrg....

HEARING

BEFORE THE

COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

TRIBAL SOVEREIGN IMMUNITY

SEPTEMBER 24, 1996
WASHINGTON, DC

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TRIBAL SOVEREIGN IMMUNITY

TUESDAY, SEPTEMBER 24, 1996

U.S. SENATE,
COMMITTEE ON INDIAN AFFAIRS,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m. in room 106, Senate Hart Building, Hon. Daniel K. Inouye (vice chairman of the committee) presiding.

Present: Senators Inouye, Simon, Gorton, Dorgan, and Conrad.

STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII, VICE CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Senator INOUYE. Good morning. Delivering the opinion for a unanimous court in the Supreme Court's 1991 ruling in a case entitled *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma,* Chief Justice Rehnquist addressed the subject of the committee's hearing today, when he stated the law of the case, and I quote:

Indian tribes are 'domestic dependent nations' which exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or Congressional abrogation.

However, in his concurring opinion, Justice Stevens expressed a somewhat different view, and again I quote:

The doctrine of sovereign immunity is founded upon an anachronistic fiction. In my opinion, all governments—Federal, State, and tribal—should generally be accountable for their illegal conduct. The rule that an Indian tribe is immune from an action for damages absent its consent is, however, an established part of our law.

Such is the nature of the debate which is the focus of the committee's hearing today. Whether one views it as anachronistic or relevant in contemporary times, the assertion of sovereign immunity to suit is a right that is jealously guarded by most sovereign governments. The genesis of today's hearing arises out of a proposal that was contained in the Senate's fiscal year 1997 Interior Appropriations bill. Section 329 of that bill provided:

In cases in which the actions or proposed actions of an Indian tribe or its agents impact, or threaten to impact, the ownership or use of the private property of another person or entity, including access to such property that might arise from such impacts or which impact the receipt of water, electricity, or other utility to such property, an Indian tribe receiving funds under this Act or tribal official of such tribe, acting in an official capacity, shall——

No. 1, be subject to the jurisdiction, orders, and decrees of the appropriate State court of general jurisdiction or Federal district courts for requests of injunctive relief, damages or other appropriate remedies; and

No. 2, shall be deemed to have waived any sovereign immunity as a defense to such court's jurisdiction, orders and decrees.

When the bill was brought before the full Senate Appropriations Committee, the author of the proposal agreed to an amendment to delete the provisions from the bill, so that the authorizing committee of jurisdiction, the Committee on Indian Affairs, could conduct a hearing on the issue sought to be addressed by the provisions of section 329. However, the committee's hearing this morning also has a broader focus, which is the assertion of sovereign immunity by tribal governments.

In the Federalist No. 81, Alexander Hamilton wrote,

> It is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent. This is the general sense and the general practice of mankind, and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

The member States of our Union decided that this organizing principle was so fundamental to our constitutional framework that in 1795, they ratified the 11th Amendment to the U.S. Constitution, and by their action, made their sovereign immunity to suit part of the supreme law of the land. The doctrinal foundation of the concept of sovereign immunity has several sources. In English law, the traditional immunity of the English sovereign was expressed in the phrase, "The king can do no wrong."

Others attribute the doctrine of sovereign immunity to another constitutional doctrine of equal force in American law, the separation of powers, and conclude that the assertion of sovereign immunity is to protect the official actions of the Government from undue judicial interference. Or put another way, that the courts, as one branch of the government, cannot enforce judgments against another branch of the Government without the latter's consent.

Especially relevant to smaller governments is the notion that the doctrine prevents burdensome financial losses that could seriously impair or destroy governmental operations. In fact, this was the driving force behind the ratification of the 11th Amendment by the States. They feared suits to collect unpaid war debts and to recover property seized during the Revolutionary War.

As recently as March of this year, 32 States sought and successfully secured a reaffirmation of their sovereign immunity to suit in the Supreme Court of the United States, making clear to one and all that the several States which comprise our Union do not view their sovereign immunity to suit as anachronistic. Whatever may be one's views on the subject of sovereign immunity, and whether the Federal Government, the State governments, city and county governments or tribal governments should be able to assert their sovereign immunity to suit, I believe the underlying concern is actually a concern about due process.

Our Constitution also guarantees to all of its citizens a right to due process, an opportunity to be heard. What process is due to each citizen depends upon the nature of the affected interest. The Supreme Court has held that this right may be satisfied in any of a number of forums, including administrative proceedings or hearings of regulatory bodies, and may range from notice in the publications of general circulation to litigation in the courts of the various sovereign governments.

In Indian country, there are courts established either by a tribal government or by the Federal Government. For actions in tribal

courts involving non-Indians, there is an additional process afforded such citizens, which is the review by the Federal courts of the exercise of a tribal court's jurisdiction.

It was 5 years ago, this committee held a hearing on a report which had recently been completed by the U.S. Commission on Civil Rights. Following a comprehensive study of tribal courts nationwide, the U.S. Civil Rights Commission concluded that notwithstanding the meager resources with which they were forced to operate, tribal judicial systems were providing due process to all litigants, both Indian and non-Indian.

For over 200 years, the Nation has recognized the sovereignty of the Indian tribes. Federal law and policy has been built upon this foundation, which finds its expression in the Constitution of the United States, in treaties, in statutes, and in the rulings of the Supreme Court. Today we recognize that sovereignty is also a defining element of the economic future of governments. As a Harvard law professor informed this committee last week, after years of study in this area:

> If we look back on this history of Federal Indian policy in the 20th century, it is not a coincidence that it has only been in the era of self-determination that a significant number of reservations have begun to break the cycle of poverty and dependence. Sovereignty is one of the primary development resources tribes can have. And the reinforcement of tribal sovereignty under self-determination should be the central thrust of public policy. One of the quickest ways to bring development to a halt and prolong the impoverished conditions of reservations would be to further undermine the sovereignty of Indian tribes.

For the many representatives of the tribal governments gathered this morning for this hearing, there is much at stake. Just as the States have, over the years, sought to accord due process while protecting their rights as sovereigns to assert their immunities from suit, so do other sovereigns, including tribal governments.

In the course of our history as a Nation, we have learned that our constitutional framework has stood well the tests of time. So too have the fundamental principles which inform the powers and rights of the sovereign governments which make up our Union.

Our task this morning is not to revisit the provisions of our Constitution that recognize the Indian tribes as sovereigns, nor is it to overturn 200 years of Federal law. But rather, it is, I believe, to develop a better understanding of the rights and responsibilities that tribal governments have assumed in the exercise of their inherent sovereignty.

May I call upon my distinguished colleague, Senator Gorton.

STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM WASHINGTON

Senator GORTON. Thank you, Mr. Chairman.

You are certainly accurate in describing the genesis of this hearing, a hearing on a vitally important subject which I believe was last discussed in the late 1980's or early 1990's in connection with the Indian Civil Rights Act. The question before this committee, as it was in connection with the Appropriations Committee provisions, is the degree and the extent to which sovereign immunity is an appropriate or a live doctrine in the last decade of the 20th century, in connection with disputes over property rights, most broadly de-

scribed when the contending parties are Indian tribes or nations and non-Indians.

I think perhaps without meaning to, Mr. Chairman, you have stated better than I possibly can the total anachronistic nature of sovereign immunity for Indian tribes or any other, when you stated that one of the grounds, historic grounds for sovereign immunity was the traditional doctrine in England that the King can do no wrong. We know perfectly well that the king can do wrong. And that is the reason that every other government, I suspect in the free world, but certainly the Government of the United States and the government of each of the States and the local governments that are dependent on them have increasingly over the course of the last century either abolished or severely restricted the doctrine of immunity. It is only in connection with Indian tribes in the United States that it retains its original scope and extent.

And the real question in my view is not one of an abstraction, whether the King can do no wrong or not. It is one of simple justice. It is one of due process. Citizens of the United States of America have an inherent right to have their disputes decided by a neutral court or a neutral arbitrator. Citizens of the United States now who live on Indian reservations and have disputes with an Indian tribe lack that right. They are literally the only American citizens who lack that right.

And in my view, it is clear that tribal sovereign immunity, as it applies to Indian/non-Indian disputes is an anachronism. I do not here raise the question of whether or not it also ought to be abolished with respect to disputes between individual members of Indian tribes and their tribal governments, though I rather suspect it should be. But in any event, it has long since outlived its usefulness in this connection.

The Chairman also quoted the statement of Justice Rehnquist, which in turn is based on much earlier statements that Indian tribes are domestic dependent sovereigns. That is true. That is true because the Constitution of the United States grants specifically to the Congress the right to govern our relationships with Indian tribes. I think we ought to do so, because here we're dealing, as I've said, with the rights of individuals, with people who feel left out, who are not able to get a neutral decision with respect to very important, often life-important, problems that they have, simply because they own land or live on Indian reservations.

I think there are a number of really significant questions that we can ask and discuss here. One of course is whether or not sovereign immunity, if it is abolished, should be abolished only with respect to Federal courts. Perhaps it is an argument that at least at this point, only courts of the United States should have jurisdiction over these disputes—an original matter, rather than as an appeal with respect to jurisdictional questions from the decision of tribal courts.

Personally, I believe that citizens of a State ought to have access to their State courts for anything which takes place that they feel wrongs them within a State. But that question, the question of sovereign immunity from actions in State courts is a separate one from allowing all such courses of action to be tried in Federal courts themselves.

It is true that for Indians and for their tribal governments, much is at stake. But for non-Indians, who in many areas are a majority of the residents on Indian reservations, much is at stake as well. And essentially what is at stake, is their rights as American citizens and their rights to due process.

With that, Mr. Chairman, I'm ready to hear our witnesses. But I would ask for two favors. We have, I understand it, some hundreds of letters from non-Indians in various States across the country, from New York to the Pacific Coast, that I would appreciate being included in the record. And Senator Burns' office has called and asked that a statement from him on his behalf and for the Governor of Montana and various Montana citizens also be included in the record.

Senator INOUYE. Without objection, so ordered.

[Referenced material appears in appendix.]

Senator INOUYE. May I now call upon Senator Simon.

STATEMENT OF HON. PAUL SIMON, U.S. SENATOR FROM ILLINOIS

Senator SIMON. Thank you, Mr. Chairman.

I'm not going to comment on the question at hand, and I regret I'm going to have to be in and out for the Judiciary Committee meeting. But I think this will be my last meeting of this committee. And I just want to say what a great contribution you have made to this country, Mr. Chairman.

And I am pleased that Senator McCain has joined you in keeping this a bipartisan committee. And I think my colleague, Senator Gorton, would agree with this. This committee operates without partisan rancor more than any other committee on which I serve. And that is a tribute to you, Mr. Chairman, and to Senator McCain. And I really appreciate the contribution that you're making.

Senator INOUYE. Thank you very much, Senator Simon. As always, you are very generous.

And now it is my pleasure to call upon a Congressman from the State of Washington, who wishes to introduce his witnesses, his constituents, Congressman Jack Metcalf.

STATEMENT OF HON. JACK METCALF, U.S. REPRESENTATIVE FROM WASHINGTON

Mr. METCALF. Thank you very much, Mr. Chairman.

I appear here as a member of the Native American and Insular Affairs Committee of the Resources Committee of the House. And I'm very pleased to be here. I don't have an opening statement, other than to say it's my pleasure to introduce five different people from the State that are on the panels. On panel IV is Marlene Dawson, from Watkin County, Jim Johnson from Olympia. And I've known both of those people for quite some time and I welcome them here.

On panel V is Henry Cagey, Chairman of the Lummi Business Council of Bellingham, one of the seven tribes in my district. Don Hatch, Vice Chairman, Tulalip Tribes of Marysville. I was born in Marysville, so I'm very familiar with this area. Ron Allen, the President of the National Congress of American Indians, is from

the Jamestown S'Klallam Tribe, in Port Angeles, which is Norm Dicks' district.

So I'm just pleased to be here, and thank you for this opportunity.

Senator INOUYE. Thank you very much, sir.

And now it's my pleasure to call upon our colleague, U.S. Senator Larry Pressler.

STATEMENT OF HON. LARRY PRESSLER, U.S. SENATOR FROM SOUTH DAKOTA

Senator PRESSLER. Thank you, Mr. Chairman.

I'm pleased to be here today to discuss tribal sovereignty, an issue which is very important to my home State of South Dakota. I am particularly pleased that the committee has invited three distinguished South Dakotans to testify before you today.

Larry Long, the Deputy Attorney General for South Dakota, has had many years of hands-on experience working on tribal jurisdiction issues. Currently, he is working on several cases involving tribal sovereignty conflicts, including one case which may be heard by the Supreme Court as early as next January.

This court case could be a landmark decision. Specifically, the State of South Dakota and the city of Oacoma, South Dakota, appealed the transfer of 91 acres of non-reservation land into trust for the Lower Brule Sioux Tribe. Much of this land was located within the city's limits, approximately 7 miles away from the reservation.

The State argued against the loss of property taxes on the land, and against the loss of State and local jurisdiction over the lands to be transferred into trust.

The Eighth Circuit Court of Appeals ruled against the transfer. The Court deemed it unconstitutional for the Secretary of the Interior to take land into trust for Indian tribes or individual Indians without clearer direction from Congress. I'm sure we'll be watching this case carefully as the Supreme Court examines it.

In another unique case, a recent Federal district court decision reestablished the boundaries of the Yankton Sioux Indian Reservation, which now includes most of Charles Mix County. This decision could have drastic consequences on civil and criminal judicial jurisdiction within that county.

For nearly a century, ever since Congress opened the Yankton Sioux Indian Reservation to non-Indian settlement, residents of fee-owned land in the county understood themselves to be subject to the State of South Dakota law. The Eighth Circuit court reversed this. If this decision is upheld, the tribe could exercise jurisdiction over those landowners. Disagreements would have to be resolved in Federal court. Civil and criminal jurisdiction would become blurred.

The basic question of who's in charge would turn on the parties' involved and the particular set of circumstances present in the case. The court's reinstatement of the reservation also raises a number of concerns regarding the validity of prior State court judgments. This could result in years of costly new litigation testing the validity of prior court action.

Mr. Chairman, you also will be hearing testimony from Darrel Smith from Mobridge, SD. Darrel's ranch, located just west of the Missouri River, lies within the boundaries of the Standing Rock Sioux Indian Reservation. Darrel will be sharing his personal experiences as a non-Indian resident of a reservation.

As you know, Mr. Chairman, it has been almost a century since Congress and the President opened many of the reservations in the west to non-Indian settlement. In addition, Federal allotment policies divided up Indian reservations, giving tracts of lands to individual Indians. In many cases, these individual allotments were sold in fee to non-Indians.

As a result, we now have the situation where many acres of non-Indian, fee-owned land lie within the borders of Indian reservations. This has created a checkerboard ownership pattern. Non-Indians, such as Darrel Smith, own some of the land. Tribal members own other parcels of land. And finally, some land is held in trust by the Federal Government for the tribes.

This is a complex situation. It has prompted many court cases, which often must resolve the question of whether the State or the tribe has jurisdiction over non-Indians or non-Indians in Indian country. We now have four different jurisdictional layers in Indian country, the local, State, Federal and tribal. This is nothing less than confusion to the people living there. They have no clear understanding of which set of rules apply to them in varying situations. It is far too costly and far from practical to have a court hearing every time someone needs and answer to who's in charge. When I meet with people living in Indian country, this jurisdictional quagmire is cited as one of the most pressing problems facing them every day.

Finally, Mr. Chairman, the committee will hear testimony from Jesse Taken Alive, Chairman of the Standing Rock Sioux Indian Tribe. A couple of years ago, I attended a July 4 pow wow in McLaughlin, SD. I had the privilege of standing with Jesse during the opening ceremonies. It is something I'll never forget. I am pleased Jesse is here to testify of his own run-ins with sovereignty conflicts.

Mr. Chairman, it is time for Congress to address these problems. It is time to untangle the jurisdictional quagmire. This hearing is a good first step.

I thank you for allowing me to speak before you today. I look forward to working with you in the future as we consider legislation to resolve these jurisdictional conflicts, and I thank you very much for your time.

[Prepared statement of Senator Pressler appears in appendix.]

Senator INOUYE. I thank you very much, Senator Pressler. Thank you very much, sir.

And now it is my pleasure to call upon the Associate Solicitor of the Bureau of Indian Affairs, the Department of the Interior, Robert Anderson.

STATEMENT OF ROBERT T. ANDERSON, ASSOCIATE SOLICITOR, DIVISION OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. ANDERSON. Thank you, Mr. Chairman and members of the committee. I am pleased to be here this morning to present the Administration's views on this very important topic. Thank you for your interest generally in Indian affairs and for the improvement of tribal governments and tribal court systems. I believe that the self-determination era, the adoption of the Indian Civil Rights Act in 1968 and the continued support through the Indian Tribal Justice Act of 1992 have resulted in great strides within Indian country and that have allowed forth implementation of effective tribal forums to vindicate the rights of Indians, non-Indians and States and in some circumstances the Federal Government.

As you pointed out, Mr. Chairman, the genesis of this hearing is the proposal set forth in section 329 of the Interior Appropriations Bill, which would result in a blanket waiver of tribal sovereign immunity and authorize actions for injunctive relief and damages, in Federal and State courts.

Let me emphasize two points at the outset here, as I summarize my remarks. First, the administration firmly supports tribal self-determination and the doctrine of tribal immunity from lawsuits. We feel that Indian tribes, like States and the Federal Government, should and may waive their immunity under appropriate circumstances. But like States and the Federal Government, the choice of when and whether to waive tribal immunity is something the tribe should be free to decide for itself.

As the testimony of Doug Endreson, points out, there are numerous tribal court decisions citing to tribal codes, and tribal constitutions, wherein tribes have waived their immunity from suit to allow appeals from administrative actions and other actions of Indian tribes within Indian country. The administration supports the efforts of tribes to actively regulate activities within Indian country that affect their lands, health, and welfare of members generally, and views it as the ultimate aspect of self-determination—that the decision whether to waive immunity be left to the tribes.

What follows from that perspective is the administration's opposition to any blanket Congressional waiver of immunity without the consent of the tribes. Congress has legislated waivers of immunity, most notably in water rights settlements in the last 10 years. I hasten to say that those waivers of immunity were the result of negotiations between tribes, States, non-Indians and tribal members, relative to the use of those resources.

The waiver of tribal immunity provided in section 329 will not resolve the jurisdictional conflicts alluded to by Senator Pressler just a few minutes ago. Rather, such a waiver would simply spawn additional litigation within Indian country and result in great hardship to tribal economies, as tribes are forced to expend great resources in defending their actions in State and Federal courts, and tribes could also be subject to damage awards in State courts which could have the potential for bankrupting tribal governments.

The jurisdictional conflicts alluded to in checkerboard situations common on many Indian reservations are best dealt with through negotiations between tribes, States, the Federal Government, In-

dian and non-Indian neighbors. Such arrangements have already been worked out in Indian country, in many circumstances. These arrangements are typically difficult and require lengthy negotiations. Our view is that solutions to problems among tribes and their Indian and non-Indian neighbors are best dealt with at the local level through negotiations between the sovereign governments, so that solutions can be reached which will accommodate the interests of all the local parties and is not something that should be legislated in a blanket fashion from Washington, DC.

I also want to emphasize that Congress carefully considered the waiver of tribal immunity in 1968 when the Indian Civil Rights Act was passed, and decided, after great deliberation, on a limited waiver of tribal immunity to accommodate the interests of who might be incarcerated, and provided a habeas corpus relief in the Indian Civil Rights Act.

As you pointed out earlier, Mr. Chairman, the Civil Rights Commission conducted extensive hearings throughout Indian country and in major urban areas to consider the actions of tribal governments and the role of tribal courts in vindicating the rights of Indians and non-Indians within Indian country. They recommended that there not be a waiver of tribal immunity and that causes of action against Indian tribes in Federal courts not be provided. Rather, they recommended that additional funding and support be provided for the improvement of tribal justice systems within Indian country. I submit that their recommendation is still the wisest course.

Again, as Mr. Endreson's testimony states, tribes are making great strides. The Indian Law Reporter demonstrates the great activity within tribal courts, and demonstrates that tribal courts are fair and neutral forums. And they vindicate the rights of non-Indians and Indians alike. Tribal courts like State and Federal courts, are willing to rule against the tribal governments in appropriate circumstances, and a waiver of tribal immunity in such a blanket fashion is not appropriate.

Finally, the provision in section 329 would authorize actions for simply proposing tribal actions to regulate the conduct of non-Indians and their property within Indian country would have a negative effect on the operations of tribal government and the ability of tribes to assume and continue their proper role as governments regulating activities within Indian country. For example, a non-Indian with fee land might propose a toxic waste dump which could harm tribal natural resources, a river system and the reservation environment and its people generally.

If a tribal committee were to merely discuss a proposal to regulate that activity or to discuss possibly bringing a lawsuit in tribal or Federal court to halt that activity, the terms of this provision would allow the proponent of the toxic waste dump to bring an action in State or Federal court for damages that, if the individual were precluded from engaging in that activity. I submit that this type of action is not appropriate.

In closing, I would reiterate the administration's support for tribal immunity and self-determination and indicate our continued opposition to Section 329 in any legislated Congressional waiver of tribal immunity.

Thank you, Mr. Chairman.

[Prepared statement of Mr. Anderson appears in appendix.]

Senator INOUYE. Thank you very much, Mr. Anderson.

I note the presence of Senator Dorgan. Would you care to make an opening statement?

Senator DORGAN. I'll put a statement in the record.

[Prepared statement of Senator Dorgan appears in appendix.]

Senator INOUYE. Thank you very much.

Mr. Anderson, would you agree that an integral part of the Federal Government's trust responsibility to tribes is to protect their sovereignty, which also includes the protection of their sovereign immunity?

Mr. ANDERSON. Yes; I would, Mr. Chairman. I'd add that the Federal Government has an obligation to protect tribal trust resources: land, water, hunting and fishing rights, and that sovereign immunity is integral to the protection of those resources on the part of the tribes. Therefore, it's critical that tribal immunity be preserved and that the United States support that immunity.

Senator INOUYE. Are there any limitations on the types of activities for which tribes can waive their sovereign immunity?

Mr. ANDERSON. I believe that tribes would choose not to waive their immunity with regard to protection of trust resources. A tribe, for example, could not waive its immunity and authorize land that's subject to Federal restrictions to be taken without the consent of the United States. Likewise, I believe a tribe could not waive its immunity and authorize tribal trust funds to be taken without its consent or other resources that are, in essence, owned in fee by the United States. Because technically, the legal title is held by the United States and tribes could not authorize actions which would affect those resources.

However, tribes can waive their immunity and indeed, lack immunity generally, under the Ex parte Young doctrine, which allows non-Indians and Indians alike in States to bring actions against tribes to allege that a tribal government lacks a particular power to regulate some activity within Indian country. For example, the power to zone an action for prospective relief, can be brought in the Federal court against tribal officials for a determination of whether the tribe has that power.

Senator INOUYE. While in some cases dicta has suggested that the Congress has the power to waive tribal sovereign immunity, do you know of any cases which have upheld the legality of a Federal waiver of tribal sovereign immunity?

Mr. ANDERSON. I'm not aware of such a case, but I believe that it is certainly within Congress' power and really is a matter of horn book Federal Indian law that Congress, having the ultimate authority to terminate the Federal-tribal relationship, likely has the authority to eliminate tribal sovereign immunity under various circumstances.

Senator INOUYE. In your opinion, would conferring jurisdiction on State courts over matters governed by tribal law raise 10th amendment concerns about the power of the Congress to affect the jurisdiction of the State courts over matters not within the judicial power of the United States, or otherwise a subject of affirmative, substantive legislation by the Congress?

Mr. ANDERSON. I usually think of 10th Amendment concerns in terms of limiting the Federal Government's power to regulate and coerce action on the part of the States. That's where most of the litigation has been. Whether or not the 10th Amendment itself would be applicable here or whether an analogous Federal common law doctrine under Federal Indian law principles would apply is something I'm not certain of. However, I believe that the concerns over whether the Federal Government should regulate, as embodied in 10th Amendment limitations, are certainly applicable to consideration of whether Congress should engage in such interference with the exercise of inherent tribal sovereignty and sovereign immunity.

Senator INOUYE. Thank you very much. I have many other questions which I will submit and look forward to your responses.

[Referenced material appears in appendix.]

Senator INOUYE. Senator Gorton.

Senator GORTON. Mr. Anderson, I think the operative language in your statement, if I caught it correctly, was that the administration opposes any blanket waiver of the sovereign immunity of Indian tribes without their consent. Does that accurately state your position?

Mr. ANDERSON. That's our position. And in fact, I would elaborate that we oppose any waiver of tribal immunity, even a limited waiver, absent the consent of the tribe.

Senator GORTON. Well, you certainly anticipated my second question.

So the word blanket was not an operative word in your—you could rephrase that to say you oppose any waiver of Indian tribal sovereign immunity without the consent of the tribes?

Mr. ANDERSON. That's correct.

Senator GORTON. And while you worked around it, Mr. Anderson, you're not going to sit here and tell this committee that there are any limitations on the power of the Congress of the United States with respect to this matter?

Mr. ANDERSON. I am loathe to try to overturn the Supreme Court's clear statements to the effect, first in *Lone Wolf* v. *Hitchcock,* then as modified in Delaware Tribal Business Committee, that Congress has plenary power over Indian tribes and Indian affairs, so long as the Congress' action is tied rationally to its relationship with Indian tribes. So, I believe that it's quite clear that this body's power is quite strong.

Senator GORTON. And the 10th amendment to the Constitution of the United States reads that the power is not delegated to the United States by the Constitution, nor prohibited to it by the States or reserved to the States respectively, or to the people is irrelevant in this debate, is it not?

Mr. ANDERSON. It would seem to be, based on the plain language of the Constitution, but as we've learned from our 11th amendment jurisprudence, the court has from time to time interpreted provisions of the Constitution as embodying other common law notions. And as I pointed out to Chairman Inouye, it might be appropriate to consider whether, in the Federal Indian law context, similar limitations on Federal power might be applicable. I'm rather skeptical

that this would be the case, but it's something that I must think about further.

Senator GORTON. Now, is the position of the administration simply one of an abstract concern for Indian sovereignties and for the trust responsibility of the Federal Government, or is the position of the administration that non-Indian residents and landowners who live and own their land within the exterior boundaries of reservations are perfectly well served by their access to Indian tribal courts? And therefore the administration has no concern with respect to whether or not they are dealt with justly in connection with actions that relate to their land ownership or their rights as landowners?

Mr. ANDERSON. It's more than an abstract notion of protection of tribal sovereignty, Senator Gorton. The administration is concerned that justice be provided equally to all citizens of the United States, wherever they reside, including within Indian country. It is our view that tribal courts do in the vast majority of instances provide good access to justice for non-members. We often hear anecdotal evidence of injustices worked by tribal courts, just as we often hear anecdotal evidence of injustices wrought by State and Federal courts on other citizens.

To ensure that tribal courts and Indian tribes generally are able to provide justice to all, the Administration strongly supports and works with the Justice Department to improve the administration of tribal courts. We've worked with this committee and the Appropriations Committee to provide additional funding, so that tribes can administer justice effectively.

Senator GORTON. But from the point of view of the administration of justice with respect to these non-Indians, as a general proposition, they are as likely to obtain that justice in an Indian court as they are in a State or Federal court?

Mr. ANDERSON. That's correct.

Senator GORTON. Does the Department of Justice or the administration make any distinction with respect to sovereign immunity in connection with actions in State courts and sovereign immunity with respect to actions, based on the same complaints in Federal Court?

Mr. ANDERSON. Well, as I believe Senator Pressler pointed out, and as I believe that you pointed out in your opening remarks, some view tribal courts as unfair forums. As I noted earlier, that is not correct. I think many Indians and Indian tribes view State courts as biased forums against tribes. And while we oppose, and I believe all tribes would oppose the waiver of immunity in State and Federal courts as currently cast in section 329. The temperature gets a little hotter when you talk about subjecting tribes to the jurisdiction of State courts.

Senator GORTON. One other question, or set of questions, Mr. Anderson, while not directly relevant to this hearing, I think you brought the subject up.

Is it the position of the Administration and of the Department that Indian tribes have full, that is to say, the same degree of land use, regulatory authority and taxing authority over non-Indians on reservations and non-Indian lands as they do over Indians and Indian lands?

Mr. ANDERSON. That depends on the analysis of the factors laid out in the recent Supreme Court decisions. Specifically in the *Montana* case, where the activities of Indians or non-Indians who reside on fee lands affect the health, welfare and economy of the tribe, or where the non-Indians have entered into consensual relations with the tribe, then I believe that the tribe does have jurisdiction over those non-Indian activities. A fact-specific inquiry must be undertaken.

Senator GORTON. Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

Seems to me that in response to Senator Gorton's question, the nub of the question is, what you described as anecdotal evidence of abuses. Just as there are anecdotal evidence of abuses outside of tribal governments. Is what you have seen, on the basis of anecdotal evidence, is this so widespread that Congress has to act? I think that's the fundamental question. And I would be interested in your response.

Mr. ANDERSON. I don't believe that the, problems with tribal courts in Indian country are so widespread that Congress needs to act. And I would point out that the extensive hearings held by the Civil Rights Commission in the late 1980's and early 1990's to investigate problems or alleged problems with the administration of justice within Indian country came to that precise conclusion. There were extensive hearing in Indian country. And frankly, out of all the mail that we receive at the Interior Department, to the Secretary and to the Solicitor, problems associated with the administration of justice within Indian country are an extremely low and very insignificant portion of the matters that are brought to the attention of the Interior Department. So I don't believe that Congressional action is necessary or appropriate at this point.

Senator SIMON. I thank you.

Thank you, Mr. Chairman.

Senator INOUYE. Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Mr. Chairman, thank you.

Mr. Anderson, thank you for your testimony. I am, regrettably, Mr. Chairman, having to chair a hearing at 10:30. So I'm not able to stay for the entire hearing. But Chairman Jesse Taken Alive, Chairman of the Standing Rock Sioux Tribe, is going to be testifying a little later. And I want to welcome him here.

And I'd like to say to Mr. Anderson that I appreciate your testimony, because I think these jurisdictional issues involving non-Indians who live on or do business on an Indian reservation, these are very complex issues that have some serious consequences for all sides of the issues. And I think it's unwise to undo the basic notion of tribal sovereignty over civil legal matters without a lot of very careful consideration of what would all this mean.

When I was a State official, State tax commissioner in North Dakota, I was actually in court with some friendly suits to try to resolve a whole range of issues, to try to get some finality and cer-

tainty on some of these legal issues. And having just touched the surface of some of these issues, I understand how incredibly complex they are. And that's why I joined the vice chair in opposing the provision that was attached to an appropriations bill. I think these are very significant, very serious issues that need broad airing and a broad understanding of what all the consequences will be before anyone proposes action.

So, Mr. Chairman, thank you, and I did want to, again, I've read the testimony by Chairman Taken Alive from the Standing Rock Sioux Tribe. And I think he makes some excellent points, and I regret that I won't be able to attend the entire hearing.

Senator INOUYE. Mr. Anderson, is sovereignty determined by the size of that nation, population?

Mr. ANDERSON. No; all tribes, from the smallest to the largest, are acknowledged through the continuous line of Supreme Court cases as having inherent powers of self-government. There are certain limitations that the court has found to be implied in the fact that tribes exist within the United States. However, all tribes start out with the basic inherent power of self-government which may be modified by tribal law or treaty and other Federal law.

Senator INOUYE. Does the sovereignty of an entity depend upon the existence within that entity of a judicial system?

Mr. ANDERSON. No; it doesn't. And indeed, you know, many tribes have existed without one. It's been a relatively recent phenomenon for tribes to develop tribal court systems in the western mode of a separate branch of government. Many small tribes that I worked with before I came to government service administered justice very well through tribal councils. And tribal councils that sit as courts or that appoint special bodies to hear certain disputes also exist. Tribes have a great deal of flexibility in terms of establishing the matter in which they administer justice. And they work quite well.

Senator INOUYE. I thank you very much. And as I indicated, the committee would like to submit questions to your office and we look forward to your responses, sir.

Mr. ANDERSON. Thank you.

Senator INOUYE. Thank you.

Our next witness is the Chief Deputy Attorney General of the Office of Attorney General, State of South Dakota, Larry Long.

General Long, welcome, sir.

STATEMENT OF LAWRENCE LONG, CHIEF DEPUTY ATTORNEY GENERAL, SOUTH DAKOTA

Mr. LONG. Thank you, Mr. Chairman and members of the committee.

I appreciate the opportunity to come and address the committee on an issue which I personally have been involved with since I began practicing law in Indian country in 1972. I appreciated some of the questions which were asked in attempting to determine what the nature and the scope of the problem is out there in Indian country. And I would like to tell the committee what I did in an attempt to prepare for testimony in this proceeding.

Mr. Anderson referred to the Indian Law Reporter and indicated that one look at it would indicate that there is really no problem

in Indian country in terms of whether or not legitimate claims of Indians and non-Indians are being resolved on the basis of sovereign immunity. I attempted to do that.

I spent 3 or 4 days before preparing my testimony reviewing the summaries of Indian law cases that appear every month in the Indian Law Reporter, commencing at about 1980. I attempted to review the headnotes and to review the text of the cases which appear there, to ascertain which cases were resolved on the basis of a dismissal, a successful dismissal or an unsuccessful attempt to dismiss a case on the basis of tribal sovereign immunity.

I identified 214 cases since 1980 which appeared to have been resolved one way or another on a sovereign immunity issue asserted by a tribe or a tribal entity. And I have attempted to summarize those, and I have attached those to my testimony.

I found 56 cases that have been determined by the U.S. Court of Appeals since 1980. And in those cases, 44 of the 56 were disposed of based upon a determination that tribal sovereign immunity prevented the court from reaching the merits of the particular litigants' claim. In that particular situation, at the U.S. Court of Appeals levels, I determined that 14 of those litigants were Indians, 27 of them were non-Indians. And in 15 cases, I couldn't determine whether the litigant was Indian or non-Indian from reading the headnote or the text.

At the district court level in the same timeframe, I identified 64 cases. And in 52 of those 64 cases, the case was disposed of based upon a defense asserted by a tribe or tribal entity based on sovereign immunity. And in those cases, 18 of the complainants were Indian, 24 were non-Indian, and in 22 cases I couldn't determine from reading the headnote or the text whether the litigant was Indian or non-Indian.

At the State court level, I identified 33 cases with the same issues. Three of those litigants were Indian, four were non-Indian and in 26 cases, I could not make a determination. Eighteen of those 33 cases were resolved based upon the State court granting a tribe or a tribal entity's motion for dismissal based upon sovereign immunity. And the litigant never got his claim heard on the merits.

And finally, in tribal courts, the Indian Law Reporter I think is probably the only resource available that I know of where one can go and find reported Indian law cases. Because many tribal courts do not have their own reporter systems. And I know many tribes, Indian Law Reporter does not have access to, obviously, all the tribal court decisions. Many of them are not written, are not published, and are not available.

But of those that were available, and they seem to show up in approximately 1982 or 1983, I identified 61 cases from various tribal courts throughout the country where the issue of tribal sovereign immunity was utilized to dispose of a litigant's claim without hearing it on the merits. And in 33 of those cases, the litigant was Indian. In two of the cases he was non-Indian. And in 26 of the cases, I couldn't tell from reading the text whether he was Indian or not.

Now, the, and so I have attempted to, I have attempted, and admittedly, I will not, I will not say that this analysis was as in-depth as I could have done it had I had more time and obviously

access to tribal court decisions and unreported decisions. I know there are State and tribal court decisions out there that I do not have access to.

However, I do believe that the analysis I've done of the 214 cases that I've looked at suggest that in two out of three cases of these 214, the litigant's claim, whatever it was, whether it was civil rights or personal injury or a real estate dispute, or a contract, commercial deal with a tribe or tribal entity, in two out of those three cases, the litigant's claim, whatever the merit, was disposed of based on a sovereign immunity defense, and the litigant was left without a forum within which to assert his claim.

Now, so I believe that a detailed examination of the information which is available at the public level from sources like Indian Law Reporter and other sources like that, will demonstrate that the doctrine of tribal sovereign immunity is clearly alive and well in Indian country, and is recognized by courts at all levels. I think it also indicates that the doctrine is utilized widely and accepted widely to dispose of litigants' legitimate claims without those claims being heard on the merits. And that the harshness of the doctrine cuts across racial lines, and it cuts across all lines. Because an Indian litigant is inherently in no better shape to get his case heard at any court level than a non-Indian or in the many instances when I simply could not determine what the race of the litigant was.

A couple of other points I would like to make. I agree with the comments that have been made by the committee that at the bottom, this is a due process issue. In my judgment, it's a civil rights issue. It is true that the Federal Government has sovereign immunity. It is true that the State government has sovereign immunity. And clearly, tribes vigorously assert their sovereign immunity in court litigation on a regular basis.

However, because the remedy is so harsh, the Federal Government has seen fit to waive it in a variety of circumstances: the Federal Tort Claims Act, and in other situations. The Federal Congress has also seen fit to waive the State sovereign immunity. And this of course was effectively done right after the Civil War with the enactment of 42 U.S.C. 1983 and the associated statutes there, which give the opportunity to individuals to enter U.S. District Court and sue for money damages, attorneys fees and injunctive relief against State officials or against any person who under the color of State law invades the civil rights of any individual.

Those remedies are simply not available to these litigants at the tribal court level. I understand the committee's position with reference to protecting the sovereignty of tribal government. I would submit that the committee should also consider whether or not there is a responsibility to the individuals, both Indian and non-Indian, who live in Indian country, who have legitimate individual civil rights that also require protection, and to assure that with the support that this committee gives to sovereignty of tribal governments, they also require tribal governments to be responsible to the individuals over whom the tribal governments wish to and attempt to exercise jurisdiction.

I would point out that some tribal courts I think have moved forward. Some tribal councils have moved forward and made statutory

attempts to waive sovereign immunity in certain limited contexts. I see the Navajos apparently have enacted a sovereign immunity waiver in some limited circumstances. It appears from the case law that the Mashantucket Pequots have also enacted what appears to me from the case law to be what amounts to a procedure for people who are injured in their casino to be able to recover for personal injuries.

I applaud those efforts. However, there are over 500 tribes out there. And the Indian Law Reporter suggests that very few tribes have taken those types of responsible steps. And I think this committee has the power to consider whether or not it has also the responsibility to see that all tribes respond in a responsible way.

I have a, I guess I have a personal interest in making a request of the committee to consider whether or not they can ultimately make tribal government more responsible and in effect more sovereign by enacting a procedure such as is suggested by Senator Gorton. Because in my view it will have the effect of strengthening the tribal court systems. As I note in my text, it is my experience that judges, tribal court judges who feel the responsibility of enforcing the Indian Civil Rights Act in their courts, sometimes do so at their peril. They are subject to being discharged by tribal councils. And in many instances, they have no recourse for that action.

I believe that the, if a review system is put in place so that a tribal judge who rightly in face of the tribal council enforces an Indian Civil Rights Act violation of whatever variety, that there will be a Federal judge standing behind him who will pat him on the back and say, you've done it right and you've done a good job. On the other hand, if he does it wrong and does not enforce the Indian Civil Rights Act, there will be a Federal judge and a Federal judiciary who will say, go back and do it right.

I think that that would be the single thing that this committee could do to strengthen the tribal court systems on the reservation, would be to give the tribal judges the autonomy and the responsibility to enforce the Indian Civil Rights Act as the Supreme Court suggested in the Martinez decision that it ought to be done.

Again, I appreciate coming before the committee, Senator, and thank you for your time.

[Prepared statement of Mr. Long appears in appendix.]

Senator INOUYE. I thank you very much, Mr. Long.

Before proceeding, without objection, all of the statements of all witnesses will be made part of the record in total.

Mr. Long, your statement suggests that sovereign immunity of State and county and local governments have been substantially abrogated. But the sovereign immunity of tribal governments remains largely intact. I am certain you are aware that most of the tribes that administer Federal programs under the Self-Determination Act are subject to the provisions of the Federal Tort Claims Act. I think you indicated that.

Mr. LONG. We mentioned that in our text.

Senator INOUYE. Are you aware that the Congress has authorized waivers of tribal sovereign immunity in the Indian Reorganization Act of 1934? And in the Indian Civil Rights Act for purpose of habeas corpus actions? And the McCarran amendment for the adjudication of water rights?

Mr. LONG. My background, Senator, in water law, is very limited. I am familiar with the Indian Civil Rights Act is it relates particularly to the *Martinez* decision. And as I understand that, the Federal Courts will enforce Indian Civil Rights Act violations if habeas corpus in that context would be available. In other words, if the applicable is basically in custody or in jail. And in those circumstances, I think that the system works rather well, in terms of enforcing those rights. I'm not familiar with water law, so I cannot comment on that.

Senator INOUYE. I am certain you are aware that only the U.S. Government can waive sovereign immunity for purposes of suits involving tribal trust land, or land which is held in trust for individual Indians?

Mr. LONG. Well, I don't know that that's a sovereign immunity issue. I agree with the result that you state, Senator, but I think that perhaps is not a sovereign immunity issue so much as it is the fact that the U.S. literally owns the land. The land literally is owned by the United States. And so obviously United States consent would have to be obtained before something could be done relative to that property.

Senator INOUYE. And you are aware that most of the reservation lands are held in that status?

Mr. LONG. No question.

Senator INOUYE. In your written testimony, you suggest that a State court cannot sue a tribe because of tribal sovereign immunity, but you indicate that the reverse is not true. For example, you say, the reverse, of course, is not true, the tribe is free to sue a State in State court, and in most circumstances, also free to sue the State and Federal court. But I am certain you are aware that in March of this year, the Supreme Court held, as it had in an earlier *Alaska* case, that tribes cannot sue States in Federal court, because of the State's sovereign immunity guaranteed by the 11th amendment to the U.S. Constitution. Is that correct?

Mr. LONG. I'm aware of the *Seminole* decision, yes, Your Honor. In that context, Senator, the 11th amendment, there may be an emerging doctrine, and I will not attempt to predict what the Supreme Court will do, I don't know if there's an emerging doctrine relative to 11th amendment sovereignty or the reaffirmation of what the 11th amendment says in terms of the Supreme Court.

However, relative to that, I am familiar with State law, which indicates that sovereign immunity only exists in the State of South Dakota for money damage claims, and in very limited contexts. Any tribe obviously has access to State courts for declaratory relief, and I think that, I think the 11th amendment, I will be surprised, frankly, if the Federal courts hold that the 11th amendment does not allow the tribes to continue their very common practice of suing individual State officials for declaratory relief, and as long as the State itself is not named as a defendant the courts are going to continue to act and to determine those cases on the merits. And I think that will continue to happen.

Perhaps it will not, but I would be surprised if it does not.

Senator INOUYE. Thank you very much, sir.

Senator Gorton.

Senator GORTON. In your view, Mr. Long, has the State of South Dakota lost its sovereignty by reason of the close to total disappearance of sovereign immunity from suit granted by the State itself?

Mr. LONG. No, Senator Gorton; I note in my text, and I quote from a Cheyenne River Sioux tribal, superior court case, which suggests that it is a measure of the responsibility of a sovereign to assure that the wrongs which the sovereign does are handled responsibly in those courts. And I think that the limited analysis that I've done of the Indian Law Reporter decisions suggests that in many instances, tribal governments do not act responsibly to see that those wrongs done to the persons within their jurisdiction, or the persons against whom they attempt to assert jurisdiction are dealt with responsibly. I think that's the ultimate measure of a sovereign, is to be responsible to the citizens that they govern.

Senator GORTON. And so your answer would be the same if I were to ask you whether or not the Republic of France has lost its sovereignty because it can be sued in the courts of the United States under certain circumstances?

Mr. LONG. Well, the U.S. Congress, as we noted in the text, has waived the sovereignty of foreign governments to the extent that they engage in activity in the United States.

Senator GORTON. But that doesn't make France less a sovereign?

Mr. LONG. Not that I'm aware of, Senator.

Senator GORTON. So the rights of self-determination and self-government are not implicated by the extent or even the existence of sovereign immunity from lawsuits, when someone claims that he or she has been robbed?

Mr. LONG. I would agree with that.

Senator GORTON. Thank you, Mr. Chairman.

Senator INOUYE. Senator Conrad.

Senator CONRAD. Thank you, Mr. Chairman. I thank the witnesses who are here as well.

Last week, we had testimony from a Joseph Kalt, talking about economic development on Indian reservations, and making the observation based on analysis that he had done that you can't have successful economic development without the presence of, number one, sovereignty, that is, tribes being able to make their own decisions rather than them being made for them by some bureaucracy here in Washington.

And second, that to be effective, there needs to be separation of powers, just as we have it at the Federal level, that is that there be an administrative, a judicial and a legislative branch. And that because of the constitution that many of the tribes have been given, that there is an inadequate separation of powers, that is that there is not, in many cases, a fully independent judiciary.

And as I've listened to the testimony here this morning and read some of the testimony to be given here today, it strikes me that there may be a larger question and a larger problem here that goes to the question of an independent judiciary. Have you found that in your analysis of cases?

Mr. LONG. Yes, I have. Senator, I quote from two tribal court cases, one from the Lummi Tribe and one from the Lac du Flambeau Tribe, I believe. And as I understand those cases, each of

those tribal courts was asked to make a determination of the validity of some tribal ordinance that had been enacted. And they did an internal constitutional analysis in both of those cases, and determined that they had not been granted the power to make those determinations. In other words, they had not been given the power to, by the tribal council, to make a determination, for example, of the constitutionality of a statute or a tribal ordinance, because they were only allowed to exercise those powers that had been granted them by the council. And in both circumstances they concluded, our tribal form of government is not a separation of powers style government, as the Federal system is, and we simply don't have the power to make the determination that we've been asked to make.

I think that an independent judiciary could be established on reservations. And I think Federal court review of Indian Civil Rights Act violations, for example, or allegations of Indian Civil Rights Act violations, in a broad spectrum, could go a long way toward establishing or assisting the tribal courts to become independent. Let me give you an example.

I was, I served as counsel to the Rosebud Sioux Tribal Election Board for the elections of 1977 and 1979 and 1981. And the reason I was hired in 1977 was because there was a time period between the adoption of the Indian Civil Rights Act in 1968 and the issuance of the *Martinez* decision in 1978 where the Federal courts largely believed that the Indian Civil Rights Act allowed Federal court review of all allegations of civil rights violations in Indian country, much more broad than habeas corpus.

And I was hired by the election board and the tribe to be counsel to the election board, because the previous election in 1975 had been very fractious, had been highly litigated. And the resulting litigation had been very expensive and had been very disruptive to the tribe. And so they hired me and my directive was, do it right, and see that the election board does it right, so that if we go to Federal court, we will be sustained in whatever decisions have been made. And so I served for three elections in that capacity.

Shortly after the *Martinez* decision, we had a similar difficulty in the 1981 election, and of course there was no Federal court remedy at that point. A tribal judge on the eve of the general election, the night before the general election, attempted to issue a temporary restraining order to my clients to stop the election for what he perceived to be a civil rights act violation that had been brought before him.

He issued the TRO and I think legally he was wrong. But I don't question his power to issue the order. And we elected to follow the order. Well, the candidate for chairman and the opposition candidate got together about 2 o'clock in the morning and they rounded up the judiciary committee from the tribal council, and they fired the chief judge, and appointed a new chief judge, who lifted the restraining order. So by 8 o'clock, we had a new judiciary and we carried off the election the next morning, pretty much on schedule.

I don't think that was an independent judiciary, and I do not think that would have happened had the *Martinez* decision gone the other way.

Senator CONRAD. Would you, just my final question, would you say that one appropriate conclusion from the testimony that has been given, and I don't know if you have had a chance to look at testimony that will be given, but one appropriate conclusion is that an independent judiciary should be fostered on reservations. And that is one part of addressing the set of problems that are being discussed here.

Mr. LONG. I don't think that would be the cure-all, end-all. But I do believe it would be a vital first step.

Senator CONRAD. A vital first step?

Mr. LONG. Yes.

Senator CONRAD. Thank you.

Senator INOUYE. Mr. Long, I believe that the Supreme Court has also addressed tribal suits against State officials, and that the Supreme Court has barred these suits as a result of the 11th amendment, the most recent expression of which was in the *Seminole* case.

Mr. LONG. Excuse me?

Senator INOUYE. The Supreme Court has ruled that suits against State officials may be barred by the 11th amendment. You said that tribes are free to bring such suits but the Supreme Court has ruled otherwise.

Mr. LONG. I will be surprised, Senator, if—I've not reviewed the *Seminole* case recently, but I'll be surprised if that becomes a widespread position in the Federal courts, that actions where a tribe is seeking relief against State officials can be dismissed on 11th amendment grounds. We've attempted to do so under that theory in the lower courts, and we have cases pending where we've attempted to do that since the *Seminole* decision and have not been successful.

So I agree that some commentators read the *Seminole* case to say that, and believe that will be applied in a broad context. We have not seen it up to this point.

Senator INOUYE. In fact, this is the *Seminole* decision. The doctrine of ex parte Young may not be used to enforce that section against a State official.

Mr. LONG. I understand what it says, Senator. We have not seen that it has been applied by the courts in that broad context, although they may. I have not seen that it's happened.

Senator INOUYE. You spoke of waivers that your State has made. Do waivers vary from State to State or are they uniform throughout the Nation?

Mr. LONG. In the context of personal injury claims and that sort of thing, I do think they waive the, they vary from State to State. But the one which is universal is of course the waiver which exists for civil rights act violations under 42 U.S.C. 1983, and that's of course the one that was imposed by the Federal Congress on State officials.

Senator INOUYE. So with the exception of the civil rights waiver, it is up to the State to decide what to waive?

Mr. LONG. Each State does that individually, yes. And almost all have, at some level in some context.

Senator INOUYE. I thank you very much.

Senator Gorton.

Senator GORTON. No more questions.
Senator INOUYE. Senator Conrad.
Senator CONRAD. No more questions.
Senator INOUYE. Now it is my pleasure to call upon Susan Williams, Esquire, of Gover, Stetson and Williams law firm, and Douglas B.L. Endreson, Esquire, of Sonosky, Chambers, Sachse and Endreson, of Washington, DC.
Ms. Williams, it is good to see you.

STATEMENT OF SUSAN M. WILLIAMS, ESQUIRE, GOVER, STETSON AND WILLIAMS, P.C., ALBUQUERQUE, NM

Ms. WILLIAMS. Thank you, Mr. Chairman. Senator Gorton, good morning. Senator Conrad, good morning.
I'm pleased to be here to testify on the subject of tribal sovereign immunity and in the course of the hearing, some broader issues relating to tribal sovereignty with respect primarily to non-Indians within Indian reservations.
My testimony, which I have submitted to the committee for the record, basically makes two points. One is that the doctrine of tribal sovereign immunity, as it exists today, is not an unqualified immunity. And in fact, the U.S. Congress on several occasions in the exercise of its broad power over Indian tribes, has waived tribes' sovereign immunity from suit for limited purposes, such as the Indian Civil Rights Act and the citizen suits in the Resource Conservation and Recovery Act that was described in the *Blue Legs* decision.
In addition to that, tribes themselves have waived their immunity from suit in numerous contexts. In addition, the United States' Congress and tribes have provided for extensive participation in tribal government by not only tribal members, but also non-Indians. There is repeated examples of non- Indians participating in various agencies and tribal governments, such as on housing authority boards, water board allocating the use of water on reservations, Navajo Tax Commission in its creation contemplated that there would be non-tribal members participating in the tax commission. There's numerous examples of tribes providing much more than due process, but actual participation in tribal government.
But before I turn to my testimony on those two points, I wanted to raise and address a number of issues that have been discussed already here this morning, if I might, Mr. Chairman. First of all, I think it's very important as a backdrop to these questions about tribal sovereign immunity and tribal sovereignty today to understand the origins of tribal sovereignty in this country. Because I believe that Congress has long paid due respect to that sovereignty, that unique sovereignty and the unique tribal relationship in our government.
As this committee knows so well, tribal sovereignty predated United States' sovereignty in this country. The U.S. Supreme Court, since the early 1800's, has recognized that Indian tribes are sovereign governments, and that their governments predated the United States' colonization of this land.
Indian tribal governments in the course of U.S. tribal history, enjoy a unique standing of sovereignty, in that unique standing in sovereignty is also a great, great responsibility uniquely for the In-

dian tribes. Indian tribal governments, unlike State and Federal Governments, have the responsibility to provide protections, police power, fire services, et cetera, to all citizens of the reservation, not just the tribal members, not just non-Indians, but also non-member Indians, such as myself, who grew up on an Indian reservation other than the one that I was enrolled in.

Those tribal governments have these responsibilities at a time when there is very little support, diminishing Federal support for their activities and at the same time that there are very difficult questions of Federal law facing these governments: The jurisdictional quagmire discussed earlier. It's very difficult in these settings for Indian tribes to govern their reservations and take care of all the citizens. And it is a difficulty that I ask this Congress to understand and to respect.

But even broader than those difficult burdens that tribal governments uniquely face, I think it's very important to understand, and this Congress has long recognized, that tribes are sovereigns not only in the traditional sense as we know it, growing up and learning about social studies and government in our system. Because Indian tribes not only have the responsibility to exercise the police power, but Indian tribes also have the responsibility, and this Congress long has respected the right of Indian tribes, to protect their tribal traditions and their customs. And as the U.S. Supreme Court recognized in *Santa Clara Pueblo* v. *Martinez,* Congress has long considered the question of tribal sovereign immunity, and in so doing, has considered questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than Federal courts.

Quoting from Martinez:

> Our relations with Indian tribes have always been anomalous and of a complex character. Although we early rejected the notion that tribes are foreign states, we have also recognized that the tribes remain quasi-sovereign nations, which by government structure, culture and source of sovereignty, are in many ways foreign to the constitutional institutions of Federal and State governments.

Because Indian tribal governments have this responsibility, which was recognized in the Indian Civil Rights Act, in that Congress did not prohibit Indian tribes from establishing religion, the unique character of tribal sovereignty must be understood by this Congress and respected in any decisions this Congress may make under a purported power to affect tribal sovereignty.

Let me say also as to a question raised earlier, I believe by Senator Gorton, about whether Congress has the power to waive sovereign immunity, there is a long line of cases, beginning with *Lone Wolf* v. *Hitchcock,* which suggest that Congress has broad power over Indian property. And I would simply like to suggest that I do not believe that same broad power necessarily extends to broad, unrestricted Federal power over tribal sovereignty. The Federal trust relationship is to protect tribal lands, tribal property. I would suggest that trust relationship also extends to respect for tribal sovereignty. And I do not admit, nor do I see any case law supporting broad, unrestricted Federal power over sovereignty as compared with tribal property.

Let me turn to the point raised earlier about whether tribes have an immunity that somehow surpasses the immunity of Federal and State governments. Well, the simple fact of the matter is that sov-

ereign immunity is alive and well in both the State and Federal governments. They're not anachronisms for the Federal and State government, any more than sovereign immunity is an anachronism for tribal governments.

And in fact, the very question of whether or not a tribe would lose sovereignty by having its immunity waived is really the question at issue here. That is, the tribe, itself, can waive its sovereign immunity and has done so in repeated instances. Virtually every commercial transaction entered into on an Indian reservation today has a sovereign immunity waiver in there for usually the limited purposes of enforcing the commercial transaction. Tribal laws throughout this country have provisions in there under which appeals of agency actions in water codes, housing codes, zoning codes, tax codes, et cetera, in which appeals from those decisions can be taken into the tribal courts.

So yes, tribes have waived their sovereign immunity, just like the Federal Government waives its sovereign immunity and States waive their sovereign immunity for limited purposes, as earlier testimony provided, for usually injunctive relief, and rarely, and in few instances, damages. And in fact, this committee probably knows quite well, it's very difficult for Indian tribes to sue the United States for breach of its trust responsibility to Indian tribes in the court of claims to obtain monetary damage relief. If you look at the jurisprudence in the U.S. claims court, time after time again tribes have had trouble penetrating the United States' sovereign immunity from suit, even where there's a Federal solemn obligation to protect and defend tribal property.

So I would say the question of sovereign immunity is a broader one, not just one regarding tribal sovereignty and the appropriate scope of that sovereign immunity.

Let me turn now to my testimony and just tick through instances in which the United States has in fact waived tribal sovereign immunity from suit. Recall again that tribes in the first instance are immune from suit. And so then the question is, has Congress waived that immunity for certain purposes, and if Congress has not had tribes independently of Congress, and I think the case law now supports the ability of tribes to, independently of Congress, waive their immunity from suit, with the exception of exposing tribal trust assets, that is, trust assets held by the United States for the benefit of the tribes. With that exception, tribes can waive their own immunity from suit.

But again, the U.S. Congress already has faced this question of whether tribal sovereign immunity ought to be waived. And as the Supreme Court in *Santa Clara Pueblo* v. *Martinez* pointed out, the Congress has said in the context of whether or not there should be Federal court review of Indian civil rights actions, the Supreme Court noted that Congress,

> After considering numerous alternatives for review of tribal convictions, Congress apparently decided that review by way of habeas corpus would adequately protect the individual interests at stake while avoiding unnecessary intrusions on tribal governments.

Tribal governments today in the modern era, in the modern form of governments, usually promoted by the United States in the context of the Indian Reorganization Act, have tribal constitutions in

which very shortsighted notions of separation of power were imposed on many tribes, where separation of power into three disparate branches of government may not have been a great idea, given the size of the tribe, the resources of the tribe, and thus, these constitutions are very difficult to operate under. And many tribes are trying to update their constitutions into a more sensible form of government.

But the reality is, tribal governments today are relatively infant in their growth and their use of modern forms of government. Many tribal governments do not have extensive tribal treasuries. And this is the very reason why the United States and the State governments don't open up their tribal treasuries to unlimited judicial actions, because of the concern that the tribal government would be bankrupt, the State government would be bankrupt, the United States government would be bankrupt.

For those concerns that really were the basis for the common law notion of sovereign immunity today very much are alive and well on the Indian reservations. And because that's so, I would urge this Congress to appreciate that tribes have a very delicate balance to strike here, and they are balancing it tribe by tribe, just like the United States and each State balances the right of its individual citizens to obtain remedies with the very important objective of maintaining the integrity of those governments. Tribes are making those decisions on a daily, virtually a daily basis. And I would urge that this Congress not disturb those tribes in making those decisions. Because after all, in each of these decisions, tribes are making their courts, and in fact their governments, directly available to not only tribal members, but tribal non-members like myself and non-Indians as well.

Let me just give you some examples of how tribes are currently waiving their own sovereign immunity from suit, in addition to the Federal waivers that were talked about earlier in the context of the Indian Civil Rights Act, their Federal court review, their habeas corpus review. In the context of Resource Conservation and Recovery Act, tribes are subject to citizen suits. The McCarran amendment waives the United States' sovereign immunity for purposes of adjudicating tribal water rights. There are numerous other examples in which Congress has acted.

But in addition to that, take the example in Arizona of the Yavapai-Apache Tribe has a compact with the State of Arizona. Fortunately there, the State of Arizona didn't erect sovereign immunity as a barrier to have a neutral forum resolve the dispute between the State and the Indian tribe there. Unfortunately, after the *Seminole* decision, we now have a bigger problem, from my point of view, about sovereign immunity, and that is, what are we going to do to enforce Congress' wishes in the arrangements that tribes are trying to make with States? How do we get a neutral party there? How do we get a neutral forum there to resolve those disputes? That is a big problem indeed in sovereign immunity that I would hope this Congress would attend to.

But in Arizona, the Yavapai-Apache Tribe made a compact with the State of Arizona. And as part of that compact, the requirement was that the tribe enact a law protecting patrons of their casinos from slip and falls, torts. And that was done. The Yavapai-Apache

Tribe now has an ordinance that waives its sovereign immunity from suit for purposes of slip and falls of all citizens that come to the tribal casino, Indian and non-Indian alike. And that immunity is limited to the extent of insurance proceeds, just like States do it. There is a remedy there, and people are taking advantage of it, and we are solving those problems, even damage claim problems incurred by both non-Indians and Indians on that reservation. And that is a trend that you'll see nationwide, as tribes attend to the concerns, not only the injunctive relief concerns, but the damages concerns of individual citizens.

Numerous examples exist in tribal laws where, after an administrative process such as water codes or housing authority codes, a decision is taken by a tribal government. Those decisions are appealable to tribal courts. Mr. Chairman, I have been practicing in Indian tribal courts for over 10 years now. And I have seen repeated instances of individual citizens attacking the system and yet not taking advantage of it, not following the rules. Time and time again I've seen individual citizens come in, with and without attorneys, filing their complaints but forgetting to read the rules of civil procedure of these tribal courts. They file late, they don't file proper documents, and I'll tell you what, in State and Federal court if that happens, you're rarely given a second bite at the apple. But time and time again, I have seen the tribal courts extend themselves for these individuals to let them have their case be heard.

So in my view, I think that the tribal courts are providing ample opportunities for remedies where the tribal government has waived its immunity from suit. Testimony earlier from the Assistant Attorney General from South Dakota, going over the Indian Civil Rights Act cases, well, I've done that, too. And what you see in the tribal courts is a due regard and respect for the legislative power of the tribe in determining whether or not there has been an appropriate waiver of sovereign immunity in individual cases. And it has happened on many occasions.

Some tribal constitutions waive the tribe's sovereign immunity from suit for purposes of an Indian Civil Rights Act claim. Other tribes use their statutes. Some tribal courts are using the ex parte Young doctrine to restrain tribal officials who are acting outside the cloak of sovereign immunity.

So I do not believe it's true that there are a whole array of cases out there, even under the Indian Civil Rights Act, in which no remedy has been made available. If there are problems on individual Indian reservations, I'm sure that those individual tribes are investigating and having hearings about these problems, and are debating, what is an appropriate solution on a case by case basis. That ought to go on, and this Congress should not at this time step in and interfere with that delicate balance of the tribal government on the one hand, and the integrity of that government, and the rights of individuals as well.

Mr. Chairman, there is so much to say on the subjects facing this committee. The power of Indian tribes over non-members, non-Indians on Indian reservations, is a power that's under attack. And it's most unfortunate. Because just like myself, I'm a non-member Indian, I was raised on the Navajo Reservation. I grew up there, and I took advantage of Navajo tribal government. I took advantage of

the police power. I took advantage of their fire protection services. I took advantage of them giving me a civilized form of government. And I would never claim that the Navajo Tribe does not have authority over me. I lived on the Navajo Reservation, and I enjoyed the protections of that government, and I respected that government.

The concern about non-Indians on fee lands usually is that they don't get to vote in tribal elections. Well, there's many ways to participate in government. And tribes in fact have provided those many ways. At Lummi, for example, in Washington State, and as you know, Senator Gorton, I spent a lot of time up there trying to negotiate outside of court litigation the water rights solution up there, we're constantly distracted by numerous initiatives by other governments that keep us from the very important task of trying to resolve that water dispute on a local level, where it should be resolved. Nonetheless, we're here, and in an attempt to defend the sovereignty of Indian tribes.

It's very unfortunate, because tribes provide protections to these non-members. I see it over and over again, that frequently the non-members, they don't like the answers they get and the due process they get in tribal governments, so they attack the heart of tribal sovereignty itself. But they're not getting the answers they want.

I don't have the prerogative in State and Federal courts. I have to accept the decisions, rightly or wrongly, taken in a biased or unbiased fashion. I don't go attacking the power of States, the power of Federal Governments. Unfortunately, these non-members, even at Lummi, participate in tribal government. The Lummi water and sewer ordinance provides directly for an election by all reservation citizens for two members of their five member board to be on the Lummi water and sewer board. In fact, those non-members have a right to know and are agents of the tribal government. So there's full participation there.

There's a right to appeal to the tribal court and on to the Federal court. These remedies are already there, provided by the Lummi Nation, like other Indian tribes are providing remedies.

Nothing is perfect, especially when you live in the context of Indian country, where the tribal governments have the solemn obligations to protect all citizens where their authority is somewhat in question with respect to non-Indians on fee lands. That's a very difficult burden tribal governments face, because they are trying to govern their reservations in a uniform, careful manner, treating all citizens alike. But when some citizens can stand up and say, you have no power over me, therefore you cannot enforce your water laws, or you cannot enforce your zoning laws in the public interest of that tribe, that makes for very difficult burdens for tribal self-government.

I believe that the U.S. Supreme Court has strayed way afar in analyzing tribal sovereignty. The old rules in the early 1800's were States have no power over non-Indians on fee lands, much less anybody on Indian reservations, absent Congressional consent. And that is where I think the law ought to be today. Tribes should have unquestioned sovereignty over all persons on their reservations and their territories. And that would solve many of these problems.

Mr. Chairman, I appreciate again the opportunity to testify, and would be happy to answer any questions at this time.

[Prepared statement of Ms. Williams appears in appendix.]

Senator INOUYE. I thank you very much, Ms. Williams.

I was listening so intently to your statement that I failed to see the clock. But I should point out that there are many other activities scheduled today and many other witnesses, so Mr. Endreson, if you will keep in mind, the committee would be most grateful.

STATEMENT OF DOUGLAS B.L. ENDRESON, ESQUIRE, SONOSKY, CHAMBERS, SACHSE AND ENDRESON

Mr. ENDRESON. I will. Thank you, Mr. Vice Chairman, Senator Gorton.

I appreciate very much the opportunity to testify before you this morning. My name is Douglas Endreson, I'm with the law firm of Sonosky, Chambers, Sachse and Endreson.

I want to first express my appreciation to the committee for maintaining its commitment to ensure that Indian tribes are heard before action is considered that would affect their governmental rights. Recent attacks on tribal sovereignty have made it starkly apparent how important this committee is to the protection of Indian rights and to the tribal future.

If I may, I'd like to make two comments on those attacks, both of which I think are relevant to this hearing. First, the question is being asked of Indian tribes today in Congress, with respect to many issues, why? Why tribal sovereignty? Why Indian gaming rights? Why a right to have land put in trust? These are questions that ask tribes to justify their sovereignty, repeatedly.

The same questions, I would point out, are not asked of other governments. For States, the question is, why not State sovereign immunity? Why not State gaming rights? Why not a right to regulate, to tax? Indian tribes find themselves on the defensive, because the question that is being asked fails to recognize that the sovereignty of Indian tribes is established in Federal law, is changing the United States, and is good for the United States, Indian and non-Indian citizens alike.

Let me also make one comment about the nature of the discussion that we're having today, and express some mild discomfort with it. Many of the comments about tribal courts that are made are highly critical. Many of these comments are made by lawyers. We should not ignore the fact that lawyers are officers of the court. They have obligations to seek to improve the administration of justice in every tribunal that they appear in. One question, then, that ought to be asked, is what are members of the bar that appear in these courts doing to help address the problems that they see? What contributions are they making to the administration of justice in Indian country?

I doubt that Federal courts or State courts would sit quietly, as tribal courts have done, while their power was attacked, their integrity impugned, and their competence questioned.

You have my written testimony, so let me briefly summarize the points that I make there. Let me first talk briefly about what's at stake when a waiver of sovereign immunity is under consideration. In plain terms, sovereign immunity protects a government's right

to address and resolve disputes that arise in the course of its governance. It does this for all governments, Federal, tribal, State.

Here's what I mean. All governments seek to meet the needs of their citizens through the exercise of their sovereign authority. Today, as you've heard, Indian tribes are actively engaged in using their sovereign powers to tax, to regulate, to adjudicate disputes, to improve the quality of life on the reservation, to develop the reservation economy, to preserve law and order, to protect the rights of children and the elderly, to protect individual rights under tribal and Federal law. These are rights in which all members of the reservation community, Indian and non-Indian alike, have the same interests. That the tribes are able to pursue these goals today is largely a result of the success of the self-determination policy.

But let me point out that all governments, all governments from time to time find that the exercise of their powers creates disputes. Questions of individual rights, personal injury claims, questions about the scope of governmental authority, these questions arise with respect to tribal government as they do with respect to other governments.

The sovereign immunity of these governments, tribal, State and Federal, is a vital part of their right of self-government. This is so for the fundamental reason that it permits these governments to protect their right in resolving disputes that arise in the course of their exercise of their authority. For Indian tribes, this right is protected by the *Oklahoma* decision that the Vice Chairman cited, by the *Santa Clara Pueblo* decision, and it is protected as well by this country's commitment to the trust responsibility and this Congress' protection of that same obligation.

Let me turn to a discussion of what would happen, what the impact would be, of a waiver of tribal immunity, of an authorization to adjudicate disputes with Indian tribes in non-tribal forums. First, the judicial branch of tribal government would be rendered impotent, unable to enforce tribal law in tribal forums without the affirmation of the sovereign or sovereigns in whose courts Congress had permitted these actions to be heard. Second, all exercises of tribal power, whether involving children's rights, environmental rights, consumer law, commercial law, all exercises of power by any branch of tribal government would be subject to nullification by rulings of the courts of other sovereigns.

Third, Indian tribes would lose their fundamental right to bring justice to the tribal community, and to define the expectations on which Indians and non-Indians rely on a daily basis in living, working and visiting Indian reservations. Let me emphasize that that interest in protecting rights, meeting expectations, is no different for Indians than it is for non-Indians. There is no basis for the assumption that tribal government would somehow benefit by treating non-Indians less advantageously than Indians.

In sum, if immunity were waived, the tribal future would again depend on how another government made decisions concerning the rights of Indian tribes. The result would be the death of the self-determination policy.

To illustrate that point, let me quote briefly from the *Penhurst* decision before the Supreme Court, where the Court held that the ex parte Young doctrine does not apply to claims that a State offi-

cial is acting in violation of a State rather than Federal law. The Court's statement has, I believe, equal application with respect to tribal rights. The Court stated, it is difficult to think of a greater intrusion on State sovereignty than when a Federal court instructs State officials on how to conform their conduct to State law. I would submit that the same is true with respect to Indian tribes.

The Congress, since 1991, supported by the Civil Rights Commission report, has rejected calls to reverse the *Martinez* decision. Unlike tribal opponents, Congress has sought to define what tribal courts needed to enhance their administration of justice, has sought to meet those needs, by enacting the Indian Tribal Justice Act. Congress' judgment has been correct.

As you heard today, a number of tribes have enacted legislation, waiving immunity to permit actions to be heard in tribal courts. Administrative remedies have been created in a number of areas. A review of the tribal court decisions also establishes that tribal courts are committed to protecting individual rights under Federal and tribal law, and to effective enforcement of the Indian Civil Rights Act.

Let me note with respect to General Long's testimony that a review of the figures that he cites shows that in 30 of the 61 Indian law cases that he cites the Court found immunity not to apply. Thus, half of these cases preceded. Compare that figure with the two-thirds dismissal rate that he cites for State and Federal courts.

In reviewing his figures, it also occurred to me that one might reasonably point to certain subject areas that he examined and emphasize those. Only two of four civil rights claims that he identified were dismissed on immunity grounds. None were dismissed involving the regulation of non-Indians.

Let me also express some discomfort with the process of calculating wins and losses in an area such as sovereign immunity. Disputes get to court because they can't be settled without a judge. Disputes that can be resolved because the law is clear and the remedy apparent do not. Disputes that are resolved because the parties are either well represented or the parties are amenable to a reasonable solution do not get to court. The court deals with problems that can't be solved without its intervention.

Finally let me say that the decisions of the tribal courts that I focused on, with one exception, are decisions from 1988. I think it's clear that the tribal courts are in a process of rapid development, the whole of tribal government is. This Congress's enactment of the Indian Tribal Justice Act in 1991 set a course in favor of supporting these courts. The journey has just begun. But the progress that these courts have made is remarkable.

First, a number of the court decisions discuss the doctrine of judicial review, the threshold question of whether a court can exercise review over a legislative body's determination. This is an issue that Federal courts, the *Marbury, Madison* v. *Marbury* decision, is historic. I would suggest that these decisions are no less historic for the courts that handed them down among the Indian tribes.

Second, these decisions demonstrate that tribal forums often adjudicate whether the action before the court is barred by tribal sovereign immunity. When agencies and officials assert immunity, the tribal courts determine whether Congress or the tribes expressly

waived immunity from suit. Several courts have held that that immunity has been waived by provisions in the constitution or tribal code. Others have relied simply on the Indian Civil Rights Act.

Third, as my sister Sue Williams has described to you, my sister in the bar, a number of courts have adopted the doctrine of ex parte Young, making available as a matter of tribal common law the same remedy that's available in Federal courts to enforce Federal law.

In sum, these decisions show that tribal courts are committed to the protection of individual rights under both Federal and tribal law, and that as the Supreme Court said in *Santa Clara Pueblo* v. *Martinez,* tribal courts are

> appropriate forums for the adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

Congress should continue to reject calls to reverse the *Santa Clara Pueblo* decision and should continue its support for tribal courts. These courts are both bringing justice to the tribal community for Indians and non-Indians alike, and are defining the legal expectations on which members of that community, Indians and non-Indians alike, will rely on in the future.

The tribal courts' success calls for the continued pursuit and support of the self-determination policy, not its abandonment.

Thank you.

[Prepared statement of Mr. Endreson appears in appendix.]

Senator INOUYE. Thank you very much.

Ms. Williams, when the Federal Government has waived sovereign immunity, it is waived for suits in Federal courts, is that correct?

Ms. WILLIAMS. That's correct.

Senator INOUYE. With the exception of the——

Ms. WILLIAMS. Indian Civil Rights Act habeas corpus review.

Senator INOUYE [continuing]. the Indian Civil Right Act, the McCarran Act and such?

Ms. WILLIAMS. That's correct.

Senator INOUYE. In similar fashion, when Indian tribes waive their sovereign immunity, it is in tribal courts, is that correct, with other exceptions?

Ms. WILLIAMS. That's correct.

Senator INOUYE. Now, can you give this committee any examples that you feel would justify a Federal waiver of tribal sovereign immunity in the courts of another sovereign?

Ms. WILLIAMS. No; I cannot, Mr. Chairman. And in fact, I wish to reemphasize the Supreme Court's decision in *Santa Clara Pueblo* v. *Martinez* on that point, in which the Court there rejected any notion that Federal courts should have broad authority to review Indian Civil Rights Act decisions in light of Congress' very careful pact carved in this area. Because as the Supreme Court noted, Congress recognized that issues under the Indian Civil Rights Act will likely arise in this context of the Indian Civil Rights Act. And they will frequently depend on questions of tribal tradition and custom, which tribal forums may be in a better position to evaluate than Federal courts.

And as my brother in the bar said, it's very important in this day for the tribes to, either by legislation or by their courts, establish

the norms and the laws of the reservations in a clear fashion, so that all persons understand what the rules are, what the public interest is on the Indian reservations. So I believe it is not appropriate at this time for this Congress to authorize any more intrusion into tribal sovereignty and the tribal courts than has already been authorized in the context of the Indian Civil Rights Act.

Senator INOUYE. Thank you.

Mr. Endreson, how long have you practiced law?

Mr. ENDRESON. For 15 years.

Senator INOUYE. And during that time, have you practiced in tribal courts?

Mr. ENDRESON. Yes; I have.

Senator INOUYE. Now, in your experience, have you found the tribal courts to be biased and incompetent?

Mr. ENDRESON. I have not. If anything, my observations in tribal courts is that they are keenly aware that they are facing litigants who question their commitment, their competence, their ability to provide justice to non-Indians as well as Indians. That deep burden, which I believe neither the Federal nor the State court judges must deal with, hasn't stopped the courts in my observation, from doing anything other than providing the same quality of justice to Indian and non-Indian, and from making every effort to bring justice to the tribal community for the same purpose that the judiciary is established in other jurisdictions.

Senator INOUYE. We speak of due process. Do you believe that it is necessary to protect the due process of non-tribal members by this waiver of tribal sovereign immunity?

Mr. ENDRESON. I do not. Again, I believe that the interest an Indian tribe has in providing due process is an interest that is served without distinction in its dealings with Indians as well as non-Indians. And it seems to me that every government has found great benefit from being able to identify, address, resolve, the conflicts that inevitably arise from governance. So I believe that sovereign immunity is a tool that enhances a government's responsibility to deal with the problems that government raises.

Senator INOUYE. I have a multitude of questions I would like to submit to both of you, and I look forward to your responses.

[Referenced material appears in appendix.]

Senator INOUYE. Senator Gorton.

Senator GORTON. Thank you, Mr. Chairman.

Ms. Williams, I guess there really is a great gulf fixed between your views on this subject and mine. As I understood your concluding statement, it is that this whole series of problems, going far beyond sovereign immunity, would best be solved by granting to each Indian tribe or nation plenary authority over all persons and property located on its reservations, so that non-Indian American citizens on reservations would have no less but no more rights, even though they are in the United States, than American visitors have in France, Russia, or China. If I'm incorrect in that, you can correct me on it.

You did, however, recognize, and outline to us, a number of areas in which the courts or the Congress of the United States has unilaterally limited or waived a degree of sovereign immunity on the part of Indian tribes. And I take it, and this is a question, that

while you recognize those waivers, you disagree with them. And while you're here to oppose a blanket waiver of sovereign immunity, you would oppose Congressional actions to limit sovereign immunity in any respect that it has not already been limited, is that right?

Ms. WILLIAMS. That's correct.

Senator GORTON. Okay. Even though the committee addressed appropriations bill dealt only with property rights disputes involving the property of non-Indians and mostly non- Indian residents on Indian reservations, to allow such persons general open access to either State or Federal courts with respect to those property disputes, in your view, is wrong?

Ms. WILLIAMS. That's correct.

Senator GORTON. And that's based partly on the importance of sovereign immunity to the tribal government itself, but also significantly on the proposition that those people simply don't need the access to any courts other than the tribal courts for the resolution of their disputes, is that correct?

Ms. WILLIAMS. That's correct.

Senator GORTON. Now, do those views also apply to any land taken in trust, either in the past or in the future, and grant a trust status by the Department of the Interior, off of reservation, outside of reservation boundaries?

Ms. WILLIAMS. The Federal law on tribal sovereignty and Federal authority on an Indian community extends to all of Indian country, which includes all lands within a reservation and also trust lands dependent Indian communities. So to the extent that land becomes part of Indian country, yes, I think that tribes should have sovereignty there as does the Federal Government.

Senator GORTON. So the Department of the Interior therefore has the right and should exercise the right to deprive States and for that matter the Federal courts of jurisdiction over land outside of reservation boundaries, simply by reason of taking it into trust?

Ms. WILLIAMS. Just as one treaty set aside Indian reservations and limited our authority to our own territories, I think yes, once the land is recovered back into our territories and our communities, yes, we should have power.

Senator GORTON. Thank you, Mr. Chairman. I think I understand her views perfectly.

Senator INOUYE. Thank you. Senator Conrad.

Senator CONRAD. Thank you, Mr. Chairman. I'll try not to prolong this unduly.

This is really a question of competing rights, and it is a question of balance. And I would ask the witnesses if this committee were to find a pattern of property rights being violated or a pattern of personal injury claims that were not addressed, if we were to find in our judgment a pattern in those areas, what in your judgment would be the appropriate solution for this committee to come to? Because I hear you saying very clearly sovereign immunity ought to be retained. What would the remedies be? If this committee became convinced that in fact there were a problem, what would you propose?

Ms. WILLIAMS. Senator Conrad, I think that if this committee were to find such a pattern throughout Indian country, I would

urge the committee first to give forewarning to the tribal governments that the committee is contemplating or this Congress is contemplating the severe action of extending the Indian Civil Rights Act or some other Federal law even further into tribal sovereignty. And give the tribes the chance, the opportunity, to correct these wrongs.

Often you will find, I believe, as part of that pattern, that the tribal courts suffer from the terrible problem of inadequate resources. And I guess I would urge this Congress to find every available means to help the tribes in their tribal governments improve the quality of that tribal government with some clear mandates or directives from the Congress in terms of the kinds of things tribes should consider doing.

And then and only then, if that doesn't work and the pattern persists, then I think Congress has broad authority over tribal property, at least. And might consider at that time further extending the Indian Civil Rights Act waiver of sovereign immunity to include certain types of Indian Civil Rights actions.

But even in that area, Senator, there are so many, having looked at this Indian Civil Rights Act and looked at the kinds of claims that come up against tribal governments, this Congress should be very, very careful in looking at how to extend that sovereign immunity waiver.

Because oftentimes, tribal custom and tradition, which is very important and vital to the heart of tribal sovereignty, is very much at stake. And to impose standards that are borrowed from the United States Constitution and State constitutions and impose them wholesale on tribal government, I think would be a serious misstep on the part of this Congress.

So we'd have to look very, very carefully at how that sovereign immunity would be lifted even further than it is today for the limited purpose of habeas corpus review.

Senator CONRAD. If I could pursue this 1 minute more, I'd be interested in your answer too, sir.

I go back to the testimony of Mr. Kalt, who was with us, I believe it was last week. And he said, I found it quite interesting, he said in the constitutions that were given many of our tribes, there was not provision for an independent judiciary. But he said in the tribal tradition, and he talked specifically about the Sioux tribal tradition, there was an independent judiciary in the way the Sioux Tribes functioned before they had a constitution that in many cases was given to them by us. They had an independent judiciary. And they don't now, or at least in many cases do not.

Would you see this as something that ought to be pursued in terms of this committee and this Congress urging tribes to pursue constitutional reform that would give them an independent judiciary?

Ms. WILLIAMS. The essence of due process is that there be a full and fair opportunity to be heard regarding the dispute, and a fair and impartial hearing on that dispute. Now, for some tribes, that is provided, not necessarily by an independent judiciary as we understand it in the classic three part government that the U.S. Government is patterned after. The Pueblos in New Mexico, for example, some have judiciaries that are independent, some don't. But in

the process of adjudicating disputes by the Pueblo councils, what's important is that there be a full and fair opportunity to be heard and for that council sitting as a decider of disputes to render a decision in a neutral and impartial way. And that often does take place.

So I would counsel caution in urging tribes to pattern themselves directly after the United States. Now, some tribes have, in fact, there are many tribal constitutions that have now been revised to establish by constitution an independent judiciary. That is a judiciary that is either elected or appointed and cannot be removed except for very severe breaches of tribal law. Other tribes have set up tribal judiciaries for certain limited functions to review disputes arising under tribal codes, or commercial transactions, but not necessarily to review all legislative actions.

So depending on the tribe's resources, size and maybe other factors that are relevant, the question of an independent judiciary has to be examined very, very closely. But the bottomline is that I think each tribe does need to establish some mechanism by some entity in which disputes are heard in a manner that provides due process, and the dispute is heard by an impartial, fair entity.

Senator CONRAD. Sir.

Mr. ENDRESON. If I could just add a couple of comments. I think it's a very perceptive question, because it goes right the heart of the reason that I think we're here, one of the big reasons, and that is that proponents of Federal court review or waivers of immunity or other actions of the kinds we've been talking about typically suggest, seek to suggest to the Congress, to you, that the problem that they present is, exists everywhere. And they do that using a device that, here's what happened.

Well, that may or may not be so, but what they then say is, this could happen to you, too. And they then ask Indian tribes to prove that it couldn't. They then say, here's a case where justice misfired. Prove this can't happen everywhere.

Well, the pattern that you referred to, let me respond to it much as Sue Williams did. I think if there were problems in tribal courts that were understood and recognized to exist with regard to a tribe or several tribes that the correct approach is the one that your comment about constitutional reform suggested, which is to deal with the problem on a tribe by tribe basis, to seek to provide the resources, the expertise, the financial resources as well as the technical expertise, I should say, to help the tribe deal with the problem.

Your statement is correct, in my experience. The tribal justice systems that I'm familiar with that predated the European arrival did recognize that disputes should be resolved by someone other than a participant in the dispute. I once researched that and found some old articles in a periodical called the Journal of Criminal Law and Criminology, that described in great detail the systems of the Huron, the Potawatomi, the Menominee and other tribes, and illustrated the very point that you made. Many of the constitutions in existence now were constitutions drafted by the Bureau of Indian affairs following the Indian Reorganization Act.

In some ways it would be the height of hypocrisy for the United States to force a constitution on Indian tribes that lacks an element

that Congress later finds compels the Government to waive the tribe's immunity. If a tribe wants to revise and amend its constitution, it should certainly be given support in trying to do that.

I do think that I should add one other point about this kind of debate, and that is, in many ways, this is an argument that the end justifies the means, that a single case justifies a waiver of immunity. Let me point out that that argument ignores the balance of the benefits that organized government provides to everyone. To illustrate, when the Los Angeles police department was found to have problems following the Rodney King incident, no one suggested that the police powers of Los Angeles should be divested. No one suggested in Chicago after the Greylord scandal in the courts in Chicago, no one suggested that Chicago's judicial power should be withdrawn.

Indian tribes operate governments for the same purposes that the United States and the States do, within the limits of the resources available to them. And they should be treated the same as the other governments are when problems of the kind that your question refers to arises. I should say finally, I don't believe there is any such pattern presently.

Senator INOUYE. Thank you very much, Ms. Williams, Mr. Endreson.

And now may I call on a member of the Whatcom County Council of Ferndale, Washington, Marlene Dawson; Jennifer Coleman, Esquire, of Buffalo, New York; Lana Marcussen, Esquire, of Albuquerque, New Mexico; Darrel Smith of Mobridge, South Dakota; and Jim Johnson, Esquire, of Olympia, Washington.

Ladies and gentlemen, welcome to the committee. May I first call upon Ms. Dawson.

STATEMENT OF MARLENE DAWSON, COUNCIL MEMBER AT LARGE, WHATCOM COUNTY, WA

Ms. DAWSON. Thank you, Mr. Chairman, and members of the committee.

I am Marlene Dawson and reside within the exterior boundaries of the Lummi Reservation in the State of Washington. It is with utmost gratitude that I wish to thank you for allowing this hearing.

The Lummi leadership on this reservation is violating good faith negotiations that occurred with the city of Bellingham by denying public waters to non-Indian property owners. They are interfering with non-Indian aquifers, and despite a Federal consent decree that requires sewer service on a first come, first served basis, the tribe is denying sewer extensions and hookups so as to prevent non-Indian development, sewer and water lines, I must add, which have all been federally funded.

The tribe is collecting illegal taxes from non-Indian businesses operating on fee land. The taxes have never received Department of the Interior approval per the tribal constitution requirement, and the tribe uses threats and intimidation, not consent, to secure payment.

One tax the tribe coerced was an employment tax from a construction company called Wilder. The tribe used the threat of confiscation of road equipment from this construction company,

which was a county subcontractor. The tribe is currently collecting taxes from public utility companies, even though company lines cross county roads and their easements, which qualify the land as property in fee, and outside tribal jurisdiction.

Since all the taxed parties were unfamiliar with the Lummi tribal constitution which required Department of the Interior approval for the ordinance affecting non-Indians, the Utility and Transportation Commission approved rolling the tax to the ratepayers. They felt the cost of potential litigation by the tribe outweighed the personal rights of the consumer. Unfortunately, litigation is now required to reverse the action of the U.T.C.

In the meantime, tribal membership recently voted to eliminate the need of Department of the Interior approval for ordinances affecting non-Indians from their constitution. And we have no reason to expect the Department of the Interior not to validate this tribal amendment. Based on my experiences, the Department of the Interior turns a deaf ear to non-Indian civil rights violations.

In included in my written testimony is the extent of my Alice in Wonderland experiences in tribal court with the tax issues. The tribal attorney who wrote the utility tax ordinance for Lummi Indian Business Council also represents them. In addition, he represents the Lummi Sewer and Water District, which collect the utility tax from consumer, and as well, served as the hearing examiner at the sewer board tax case where my hearing originated.

My written testimony mentioned my private meeting with the tribal judge, and the court intimidation, after explaining I was there for a personal appearance and was not consenting to tribal court jurisdiction. There is no question in my mind that my private meeting with the tribal judge, which included his statement to me that my legal argument was good, but which still resulted in his determination that I had insufficient evidence, clearly demonstrates that one cannot expect justice in tribal court when there is no separation of powers.

While the tax issues are important, of greater concern is the denial of basic utilities to our property which affect the health, safety and utilization of our land. When a tribe can come onto a fee residential development, erect a huge storage tank next to a resident, construct a pump house, install a chain link fence with barbed and razor wire, and proceed to drill a well 100 feet away and below the association's outtake, which serves over 600 homes on fee land without permits, then something is basically wrong. To further illustrate the blatant, hostile nature of acts like this, one needs to understand, the tribe had available road access, several lots from their well site, to a huge tract of trust land where they could have erected their well 1,000 feet away and avoided interference.

Senator Slade Gorton and Congressman Jack Metcalf, to their credit, interceded. When you have a tribal government that uses their Lummi law and order to physically accost people on their private beach, who threaten confiscation of well drillers equipment, who refuse to pay their educators the full payment due their contract, when you have a tribal government whose leader threatens a road closure and even goes so far as to try to eject a candidate for Congress from the reservation when that candidate is on private property at personal invitation, then something must be done.

I respectfully plead, give non-Indian residents who thought that they would be living in a community where diversity was celebrated, the opportunity to protect themselves and their property from tribal tyranny. At the same time, you'll be benefiting the livelihood of tribal members. If tribes cannot be held accountable, economic development on reservations will continue to be stunted and non-existent.

Thank you very much, and I'm sorry if I got a little emotional.

[Prepared statement of Ms. Dawson appears in appendix.]

Senator INOUYE. I thank you very much, Ms. Dawson. At times it helps to be a little emotional in getting your message across, and I believe your message was very eloquently presented.

May I now call upon Ms. Coleman.

STATEMENT OF JENNIFER A. COLEMAN, ESQUIRE

Ms. COLEMAN. Thank you, Senator Inouye and members of the committee.

I'm an attorney in private practice in Buffalo, New York. For the past 6 years, I've been representing a group of non-Indian lessees of the Seneca Nation of New York Indians.

Before I begin my remarks, let me just point out some ways in which the New York Indian situation is very different and unique from the western Indian and indeed, Federal Indian, situations generally. We are not dealing here with fee land. My clients reside on Indian reservation land pursuant to land leases that were granted by Congress in 1875 and 1890.

The enabling statutes that authorized these leases clearly state that the non-Indian lessees are the owners of the improvements on the leased land. There were provisions made in the statutes and in the leases for renewals. And without getting into the merits of the renewal process, let me just say, it called for negotiations for new leases. Failing negotiations, it called for arbitration. That is, one arbitrator selected by the nation, one arbitrator selected by the non-Indian lessees, and those two arbitrators to select a third arbitrator who would then, the panel would then propose the terms and conditions of the new leases.

Second, the Seneca Nation of Indians has never exercised police powers or other sovereign powers over the boundaries, over the people within the boundaries of the city of Salamanca. That also is pursuant to the 1875 Congressional act, which explicitly states that city and local law applies within the boundaries of the city of Salamanca.

Furthermore, by State law and pursuant to the Federal statutes I've mentioned and those I will mention, the Seneca Nation Peacemakers Court has no jurisdiction over non-Indians or disputes involving non-Indians, and explicitly, no jurisdiction over matters arising from these land leases. In other words, tribal court is not an option.

In 1990, Congress acted in a manner that completely upset the renewal expectations of the United States, the State of New York, the Seneca Nation of Indians and the non-Indian lessees. It did so by enacting the Seneca Nation Settlement Act of 1990, which purported to adjust past inequities in terms of low rentals that were paid for more than a century to the Seneca Nation.

In so doing, Congress acted over the objections of the representative of the Department of the Interior Walter Mills and effectively ratified and imposed a 40 year lease on my clients. Let me repeat. Congress imposed a lease on my clients. At the time hearings were held, my clients had the lease in their possession for a matter of days. The leases and the statutes incorporate by reference agreements that they did not see until 1 month after Congress held hearings on this matter. Needless to say, the lessees did not accept or approve this lease.

It's also worthy of note that in the 1990 act, perhaps realizing there may be a problem, Congress provided, and I will quote, at section 1774(g),

Notwithstanding any other provision of law, any action to contest the constitutionality or validity under law of this Act shall be barred unless the action is filed on or before the date which is 180 days after the date of enactment of this act. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the Western District of New York.

Now, surely, Congress intended that a challenge to the constitutionality of the 1990 act could be maintained, provided it was brought within 180 days, and brought within the Western District Court. Within 1 month, we commenced a lawsuit in Western District Court, challenging among other things the constitutionality of the Settlement Act of 1990.

The outcome at the district court level, at the court of appeals level, and at the Supreme Court level by virtue of its denial of certiorari, was this: Because the 1990 Settlement Act affected the rights of the Seneca Nation and the interests of the Seneca Nation under the settlement act, these U.S. citizens were unable to challenge the constitutionality of an act of Congress because of Indian sovereign immunity.

Effectively, the ruling of the court, which I attach to my statement, is that Indian legislation from Congress is immune from judicial review unless the party seeking judicial review is an Indian tribal government.

The Second Circuit, which has dealt with the unique problems of New York Indians, recently stated that the availability of a forum should not turn on the ancestry, or shall I say, race, of the party seeking the claim to be resolved. The Court stated,

There is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to communities whose distinctive sovereignty our country has long recognized and sustained.

Adding insult to injury, after four separate opportunities to sign this lease, after the Supreme Court refused to hear the case, most people signed. They wanted to sign under protest. The Seneca Nation said that if they indicated under protest beneath their signature, it would be treated as if they rejected the lease.

Sixteen people still refused to sign, placing their houses, their businesses, on the line. It's not about rent, by the way. The rental on these parcels would be approximately $100 to $200 a year under the Settlement Act of 1990. Rather, it's that the Settlement Act of 1990 and the agreements it ratifies transfers ownership of the improvements to the Seneca Nation of Indians. It furthermore imposes zoning rules of the Seneca Nation of Indians within the city of Salamanca, and there are other infirmities with the statute.

At this point in time, as I sit here today, there is pending before the District Court judge in the Western District of New York, a motion, not by the Seneca Nation of Indians, but by the U.S. Government through its Department of Justice, to evict these 16 people from their homes. They have argued, so far successfully, to the magistrate judge that these citizens, my clients, these non- Indian, U.S. citizens, who bought their homes pursuant to federally-approved mortgages, are to be evicted from their homes without an opportunity to defend on the merits.

We understand there can be no counterclaims because of Indian sovereign immunity. There can be no counterclaims because the Nation is not even in court seeking eviction. But the United States, acting on its behalf, has argued successfully to the magistrate judge that my clients may not defend the action based on the prior rulings where the court held that they could not maintain a challenge to the constitutionality of the Settlement Act of 1990.

They are going to lose their homes. And the reason they are going to lose their homes is that Congress entered into an area and upset the settled expectations of all parties, and failed to provide a forum for resolution of this dispute.

I'll end, again quoting the Second Circuit in its recent decision:

> Indian nations will continue to use their connection with Federal authorities as a sword, while employing notions of cultural relativism as a shield from Federal court jurisdiction.

I thank you.

[Prepared statement of Ms. Coleman appears in appendix.]

Senator INOUYE. Thank you very much.

Ms. Marcussen.

STATEMENT OF LANA E. MARCUSSEN, ESQUIRE

Ms. MARCUSSEN. Thank you, Senator Inouye.

Let me first introduce myself. My name is Lana Marcussen. I want to thank the committee today for holding this hearing and giving us the opportunity to be heard. It's quite a change.

I practice in several Federal districts, Federal district courts representing Indians and non-Indians who have felt that they have not received due process of law in a tribal court and want political accountability. Political accountability is the new test that the U.S. Supreme Court has been using. It is this new argument that appears to be changing a lot of court tribal policy. It's hard to say at this time how far it's going to go. But by the time clients come to me, usually through the Citizens Equal Rights Alliance, they're pretty frustrated.

The first thing I always have to do when they walk into my office or they call me on the phone is explain to them why they've lost their rights. They don't understand. I mean, when people are out there and they're doing business with the tribe, when they're living on lands and suddenly those lands are declared to be in a reservation, and they find out, just like these people in Seneca, New York, did, that they don't have any rights, they're on the phones. They call everybody trying to figure out what happened.

These people are very upset. They have believed in this country. I'm from New Mexico. New Mexico has one of the largest public lands movements anywhere going on. These people are firm believ-

ers in the Constitution. They're firm believers in the power of Congress. They're firm believers in all of the things this country is supposed to stand for. And all of a sudden, they have no rights.

It is very difficult to explain to someone why they have no choice but to litigate in an Indian court because of Indian sovereign immunity. I have been trying to do it now for several years, and frankly, I'm not good at it. I don't think I'm ever going to get good at it. Because frankly, I don't understand it.

My clients not only don't understand it, but they additionally don't understand why they don't have the right to claim reverse discrimination. I mean, they walk in and the first thing they see is a tribal court where they have no right to vote, they have no representation, they have no voice, they don't have any of the constitutional rights, and they're sitting there saying, well, isn't this a violation of my basic civil rights? Isn't there a civil rights action here? And I have to tell them basically, no. There isn't.

Because of the territorial status of that land and the exclusive powers of the United States Government under the property clause, you don't have any rights. That's the way it works. I know that's a very complicated explanation. There's a lot of case law that explains it. And I'm going to just move forward here.

Let me give you some very, very specific details. I represent a Navajo man by the name of Dennis Williams. Mr. Williams had land that he inherited from his mother that was probated through the Navajo Probate Court and awarded to him. Two years later, 2 years after all litigation had ceased on this matter, he is told that the Navajo Court of Appeals is going to hold a hearing to determine whether or not he actually inherited this land, or whether this land belongs to his cousin.

He finds out through his attorney that the case had been telephonically reopened by an opposing counsel. He was given no notice, he was given no right to be there, because he objected to the Navajo court doing this. He turns around, he loses his land, two years after this case was totally closed.

He pursues the matter, goes in, he starts searching around, goes to the Navajo Supreme Court Building, pulls records. It turns out that on the records, and we have this, and they have been introduced in the Federal court, that the case numbers of the appeals documents had actually been switched. Someone had actually gone in and taken a number of a case that had been properly put on appeal and stuck it on his probate action, 2 years after the fact.

When he found that, he went to the Navajo District Court and said, fix this. He didn't get all upset, he just thought it was going to be a matter of, fix this. The Navajo Tribal Court not only refused, they sent him all the way through the appeals process, all the way through the Navajo Supreme Court, nobody disputed the case numbers had been switched. This man didn't get his land. He gets done with the Navajo Supreme Court. His cousin initiates a damages action against him, which he refuses to pay, because he feels like he's been totally deprived of his rights. He gets thrown in jail for civil contempt, and we end up with a Federal habeas corpus petition. That's how far this has gone.

Now, my client spent 18 days in jail, until he was released by Judge Parker. Now, I think because of the sheer egregiousness of

this particular case and our ability to produce the documents, the United States Federal District Court in the District of Arizona has actually agreed to hear the review of the Navajo court decisions that created this situation. To my knowledge, it's the first time that a Federal district court has claimed judicial review authority over Indian court decisions. I may be wrong on that.

The Navajo Nation, of course, is challenging that. But I think at this time that's exactly what's going to happen. It would be very helpful, though, if we didn't have to go through any further claims of tribal sovereign immunity.

Another case that I have is for a man by the name of Bruce Williams. Mr. Williams was arrested by the Navajo Police Department for refusing to sign a Navajo ticket. Now, unlike Susan Williams, who's from the same town I'm from, Albuquerque, NM, I believe *Oliphant* v. *Susquamish Tribes* makes it very clear that the Indian nations are not supposed to be exercising police power authority over non-Indians. But Bruce Williams was thrown in jail for refusing to sign a Navajo citation.

Now, that Navajo officer was State certified, and my client expressly told this Navajo officer that he would sign a State citation. He didn't object to the race of the officer. He didn't have any problem with that. He objected to the loss of his rights of being cited, by the Navajo Nation actually claiming police power authority over him.

That case is now in the New Mexico State court. By the way, since my client objected to this, his business has been attacked. There are three tribal court actions that have been brought against my client in the tribal courts since he made this objection and filed this lawsuit. That is not unusual in these cases. This one just happens to be very specific.

Another situation is in Arizona against the CRIT Tribe, the Colorado River Indian Tribe. My clients happened to have some very valuable land that they had leased. They made some people angry in the tribal council, the leases were revoked. When the Talleys objected to the leases being revoked, all of their leases were canceled. This family had been farming on the CRIT Reservation for 50 years. And every single lease that they had was canceled by the tribe.

Now, they didn't have any rights. A Federal judge in Arizona has just accepted our civil rights action against the Colorado River Indian Tribe.

I represent people at Lake Havasu that have a situation, on the California side, that have a situation almost identical to the Seneca situation. They were leaseholders under a BLM lease. All of a sudden, the Secretary of the Interior in 1974 corrects the reservation designation, and they're suddenly on an Indian reservation, and told that their leases, their brand new BLM leases, are being revoked. And that's exactly what happened. We are now locked in litigation in the court of appeals of the Ninth Circuit.

These are individual cases. But tribal sovereign immunity has gone far beyond just the implication of individual rights. Now in Montana, there's all kinds of discussion of serious taxation on fee owned lands. I mean, tribal sovereign immunity is so strong that you can't object to anything that a tribe does.

The other thing that's happening in Montana is that there's some outrageous tribal court judgments. The one that I'm specifically involved with in the *Marchington* case is for $65 million. Another tribal court has awarded a $250 million claim for a wrongful death action.

Now, that's not punitive damages. The tribes are real smart, the Indian people are very capable of making good decisions. What do you do?

More bluntly, the worst problems that are going on right now have to do with gaming. And of course, I'm coming from New Mexico. And I'm wondering today whether or not the Mescalero Apache Reservation is actually going to close their casino per the Federal court order. Now, I haven't heard anything yet, and I hope the committee takes that into consideration today. Tribal sovereign immunity has become so extreme that there is now, there are now tribes in New Mexico claiming that they don't have to obey Federal court orders. And it's quite a few of them over what's happened with the gaming.

Senator Conrad, this is a question of competing rights. It's a question of whether we're going to have constitutional rights to due process and equal protection, or we're going to have tribal sovereign immunity. Senator Gorton's proposal to waive tribal sovereign immunity is a measured response choosing the rights of the Constitution over the right to tribal sovereign immunity.

I urge the committee to adopt section 329.

Thank you, Mr. Chairman.

[Prepared statement of Ms. Marcussen appears in appendix.]

Senator INOUYE. I thank you very much, Ms. Marcussen.

May I now call upon Mr. Smith.

STATEMENT OF DARREL SMITH, MOBRIDGE, SD

Mr. SMITH. Thank you, Senator.

I ranch near Mobridge, SD on the Standing Rock and Cheyenne River Indian Reservations. I'm a third generation reservation resident, and one of over 370,000 non-Indians that live on Indian reservations in this country. Both my grandparents moved to the Cheyenne River Indian Reservation in the 1920's, where my father and my mother met and married in the early 1930's.

My parents bought the ranch that I presently live on in 1946, and I inherited part of that ranch from my dad, and have bought part of it from other family members, and I'm continuing to buy some from my mother.

I live in an area that was opened up to homesteading by a 1908 Surplus Land Act, a phrase in this act refers to the respective reservations thus diminished. Based on the Surplus Land Acts and the Dawes Act, early homesteaders did not think they lived on reservations. Based on the Dawes Act, they expected even neighboring reservations to cease to exist within a short time.

They couldn't have anticipated or imagined the problems we face today. Over the years, non-Indians have been put back onto reservations and subjected to tribal taxes, license and regulations without the right to vote or participate in tribal government. A controversial Supreme Court decision put me back on the reservation in 1984. Both the tribes and the BIA have the legal right to dis-

criminate. And since tribes are governed by Federal law, governmental powers that are granted to one tribe generally can be adopted by others.

In contrast, tribal members can rightly participate in county and local governments. Because of the reservation boundaries, the tribes and their members are exempt from paying the taxes or obeying the laws that they make as participants in city and county government. This threatens non-Indians in towns and counties on reservations. Thus, non-members are being forced to pay taxes, obtain licenses and obey regulations of a government that they are excluded from, while tribal members can participate in local governments that they may not have to support or obey.

Tribes are asserting the right to collect many different kinds of taxes from non-members. I pay tribal tax that tribal members are exempted from paying. What limits taxes that can be discriminately collected from people that are excluded from the political process? How do these taxes differ from the British tax on tea imports prior to the Revolutionary War?

Tribal taxation also results in double taxation and raises business costs for non-member reservation businesses. A neighboring tribe has required that non-Indian businesses, even those located on non-Indian land, must have tribal business licenses. License applicants must agree to comply with tribal laws, including tax and preference laws. Applicants also must consent to the jurisdiction of tribal courts over any business conducted on reservations.

Inherent in the power to license is also the power not to license. These powers can, and I might add are being used to intimidate or force non-members off reservations. Few reservation businesses can afford effective legal remedies.

Contracts with tribes or tribal members can only be enforced in tribal court and sovereign immunity protects them from being sued. Recently, a tribal casino was built near me. Two contracts were entered into by the tribe and unilaterally canceled after considerable money was spent by the non-tribal party before a third contract was honored. This risk greatly reduces commerce with tribes.

Non-Indian communities and whole counties can't enforce regulations against tribal members. In a neighboring community, four Indian youths vandalized the public school. Protected from effective prosecution by their immunity, several of them vandalized a business a few months later. In the business, they left Polaroid pictures of themselves behind. Less than 2 months later, they desecrated a church, spreading excrement on walls and also on floors with a buffer. Available chemicals were dumped everywhere. And again, they left photocopies of their faces and genitals.

Law enforcement is severely impaired on reservations. Economic prosperity requires certain conditions, and is difficult in rural areas, in the best of circumstances. These added problems and uncertainties resulting from the inability of non-Indians to sue a tribe because of sovereign immunity and other uncertainties related to tribal court devastate the economies of many reservations, negatively affecting everyone. It is no accident that my county is one of the poorest in the country.

In addition, many potential purchasers of reservation assets are simply not interested when they find out they will be confronted by these problems. When purchasers can be found, asset prices are regularly discounted about 25 percent. These facts make it difficult for non-Indians to either stay or leave.

I have a beautiful ranch that is close to town and has miles of shoreline. But I have considered selling it just to avoid these problems for myself and my children. I heard about a potential ranch purchaser that was interested in a ranch like mine. When I contacted the realtor that was involved, he said that the word was out about reservations, and he didn't think it was ethical for him to even talk to this purchaser about my ranch.

I estimate that if my ranch were sold, I would have to discount it at least $400,000, making it very difficult for me to replace it somewhere else. It is time to end the sovereign immunity of Indian tribes, and at least to make them subject to suit for violation of constitutional rights for torts and for breach of contract.

Thank you.

[Prepared statement of Mr. Smith appears in appendix.]

Senator INOUYE. Thank you very much, Mr. Smith.

Mr. Johnson.

STATEMENT OF JAMES J. JOHNSON, ESQUIRE, OLYMPIA, WA

Mr. JOHNSON. Mr. Chairman, members of the committee, thank you for this opportunity.

My name is James Johnson. I am an attorney now in private practice in Olympia, WA. Preceding entry into private practice, I worked for about 20 years in the Attorney General's office in the State of Washington.

We're here today to ask you to finish the job Congress commenced with the Indian Civil Rights Act many years ago. In the interim, you have spent millions of dollars. It's now time to help, allow or even force the tribes into our constitutional judicial system.

Chief Deputy Long from South Dakota systematically analyzed and others have, including my testimony, has anecdotally shown hundreds of cases of allegations of tribal abuse of both members and non-members, in which there is no remedy in court. Not shown among those reported cases, of course, are the thousands of cases not reported because this arcane English sovereign immunity, to which both the Chair and Senator Gorton alluded, has blocked people from even having the opportunity to get into court, to repeat; the cases which A.G. Long summarized, are those where people have tried to get into court and have usually been frustrated.

At the extreme in my testimony, I observe that when tribes act more like gangs than governments, there must be a remedy. That remedy in our society must be judicial. I take Mr. Endreson's criticism, by the way, members of the committee, very seriously. I shouldn't speak of the extremes. Because we do too often call to the attention these anecdotal examples of the extreme. We should talk about the general proposition. And the general proposition is this: that the smaller cases; the trip and falls, the general kinds of land use problems and the others illustrated in this testimony, also cry out for a judicial remedy, in the event there is a problem occurring.

And not to be overlooked is the salutary effect even the Indian Civil Rights Act has had on avoiding those things.

We provide remedies in the hope not that there will be more and more violations, we provide remedies in the hope there won't be violations, that either the tribal courts or the tribal performance will improve just as by analogy State courts and States improve under the impetus of an earlier Congress adopting the Civil Rights Act to force them to be accountable in Federal court if necessary. And surely enough, in 25 years, the judicial system, the justice system improved. It is our hope, and I'm sure that of those who reside on reservations, that would be the effect here.

As I walked over here this morning, I walked by the U.S. Supreme Court and noted, as I'm sure others have in their testimony here, the porticos have "Equal Justice Under Law," a promise to all United States citizens that remedies will be found in a court somewhere, and theoretically all the way to the U.S. Supreme Court. As you know for most of the anecdotes which have been told here and most of the cases Mr. Long describes, the hundreds, there is no remedy. And by the way, even if you get into tribal court, there is no review into the U.S. Supreme Court.

I digress for a moment to an exchange between Mr. Anderson and I think Senator Conrad, because an attorney general once told me, answer the judge's questions first of all, get to what they're interested in. And a couple of propositions are important here. Mr. Anderson said, many tribes have recently adopted courts. But a piece of what my testimony notes is that many tribes don't have courts today. Many tribes of the 560 odd that are now shown as tribes, and entitled to sovereign immunity under Interior's listing of tribes and the regulation which I cite don't even have courts even as we speak. There is no judicial remedy. Others of them have C.F.R. courts and some others share courts.

A second and important proposition, Senator Conrad, we should all remember, is there are limited constraints of the Indian Civil Rights Act. But as a general proposition, tribal courts do not enforce the United States constitutional provisions such as due process in civil cases. As just one example, you don't get a jury of your peers. Whether those who have to go into those courts correctly or incorrectly perceive that they're not getting a fair hearing, the fact is, they can't be on that jury. And if they believe their peers can't be on that jury, it adds to the impression that they're not getting a fair hearing.

But I digress, as I say.

Mr. Long has also shown, I think, a very important proposition here, that the impacts are on non-Indians and Indian members almost equally among the reported cases. My anecdotal part of the testimony, which I shan't go back through in length, is an off-reservation illustration of a recent Federal court degree involving tens of thousands of private landowners in the State of Washington. And I call it to your attention, as most lawyers do, their own cases are real important. Of course, my case is important because of that, and because there are lots of private landowners on what used to be peaceful Puget Sound.

But also because the judge held that a remedy was necessary. His original decree said, here are conditions to avoid conflict be-

tween the tribal treaty citizens and non-Indian citizens owning the land. And he included those conditions and a remedy. Only when the United States and the tribes came back and said, sorry, this remedy is not available because it's barred by sovereign immunity, did he reluctantly, I believe, amend his judgment, and remove that remedy.

It is an illustration, I think, of a kind of civil remedy, I hope an illustration also of the point I was earlier making: Do I expect to get my clients damage claims for the tens of thousand, hundreds of thousands? Absolutely not. And I have told them it's not work that I could or would want to do. The salutary effect would be, hopefully, that there would be no such claims. That if there is a remedy available, it has this constraint of avoiding these kinds of problems. And that general proposition, I think is true with the waiver of immunity we seek here. At a second level, I think it would improve the tribal courts just as it has improved State courts, as I had earlier mentioned.

One final point, the argument has been made, I think by Ms. Williams most recently, and it's an aged, historic argument that somehow tribes would be bankrupted by this waiver of immunity. I think I have responded to one point. She says, the tribes need fair warning. I say, Congress gave them fair warning when they passed the Indian Civil Rights Act. It's now time to finish that job. The courts have progressed.

More directly on point, you will hear testimony from three Washington tribes following me. And at least several of those illustrate quite clearly why the so-called fear of tribal bankruptcy is unlikely. A first and separate proposition is for two of those tribes, the Tulalips, Congress has granted over $9 million last year, to the Lummi Tribe, over $11 million. And those figures are taken from 92 audits that were submitted in this very same case.

The point is, it's not just the money. The point is that many of these actions are actually taken under funding by the United States. And therefore citizens such as Ms. Dawson are doubly aggrieved in that not only have they no remedy, but some of the actions that are taken with respect to their property are funded by their own tax dollars and funded by this Congress. And it is not too much to ask that at least to that extent the tribes be held responsible.

In my testimony, I've gone back through acts of Congress in the last century in which this was a fairly common practice, that Congress would hold the tribes responsible at least up to the amount of dollars made available.

A separate and important proposition is of these two tribes, actually three who will be testifying to you later, at least the one, the Tulalip Tribe, we know what their casino gambling revenues are. Last year, the public figures show they made $24,800,000 in profits. I highlight that point to say they're in business, they're big business now. And second, unlikely to be bankrupted by the kinds of claims which, as I've already said, we hope will not be made.

That this waiver of immunity will not necessarily bring big claims, but big responsibility, which the big tribal governments should have, big responsibility.

I know it's late, Mr. Chairman. I suspect I had best conclude, and conclude, as lawyers are wont to do, with the quote from the Supreme Court, 16, 17, 18 years ago, Justice Blackmun wrote: "I entertain doubts about the continuing vitality in this day of the doctrine of tribal immunity. I am of the view that the doctrine may well merit reexamination." He was speaking of reexamination by the Supreme Court.

I suggest a more appropriate place for such reexamination is the body with plenary authority over the tribes, and you and the Congress are that body. Now is the time for that reexamination. They have, in Ms. Williams' terms, been given fair warning that they will be held accountable and all deliberate speed requires that the total implementation of constitutional rights now be done by waiving those tribes' immunity.

Thank you.

[Prepared statement of Mr. Johnson appears appendix.]

Senator INOUYE. I thank you very much, Mr. Johnson. I am certain that the assembled leaders of Indian country in the audience have taken note of the testimony of all of you here.

Ms. Dawson, I will most certainly review your statement, as I will all statements. And I will further confer with the Lummi Nation to see what is going on there. Because obviously, I am not aware of the specifics of your problem and your case. But I will most certainly discuss this matter with them. And if I feel that something can be resolved here, I will communicate with you, if I may.

Ms. DAWSON. Yes, Senator.

Senator INOUYE. And Ms. Coleman, I recall that this committee did handle the Seneca legislation. What you are speaking of, if I am not mistaken, is Federal immunity, isn't it?

Ms. COLEMAN. No, Your Honor. It's that Indian sovereign immunity has been applied to bar Federal judicial review of an act of Congress. It's not Federal immunity at all. It's the immunity claimed by the Seneca Nation of Indians.

Senator INOUYE. But your suit is against the Federal Government?

Ms. COLEMAN. No; it's not. It originally was against the Seneca Nation of Indians, to enforce the renewal provisions in the expiring leases and in the 1875 and 1895 statutes. We also brought the constitutional claim, which required joinder of the U.S. Government as well. But it was dismissed solely on grounds of Indian sovereign immunity.

Senator INOUYE. I will most certainly review your testimony and confer with my staff on that matter.

Ms. COLEMAN. Thank you.

Senator INOUYE. Ms. Marcussen, I listened to your testimony with great interest. If I am not mistaken, there have been hundreds of tribal court cases reviewed by the Federal courts. The Supreme Court has held that the exercise of jurisdiction is a Federal question over which Federal courts have exclusive jurisdiction. But usually, the Federal courts will insist that all tribal remedies have been exhausted before they exercise jurisdiction. Is that correct?

Ms. MARCUSSEN. Senator Inouye, I basically agree with you. When I stated what I did about the Dennis Williams case, what is

unusual about the case is that they're actually going to review the Navajo judgment. Now, to my knowledge, there had been exhaustion, you're right, there's has been exhaustion of remedies, and that's a normal process. But I've never actually seen, in a matter of internal self-governance like this, where you actually have Indian lands on an Indian reservation where they would actually go through and make a due process determination like that.

Now, I may be wrong, Your Honor—excuse me, Senator, you know how trial lawyers are. [Laughter.]

But this to my knowledge, and certainly the way the Federal District Court in Phoenix is treating this matter, they've never actually gone through that due process analysis like that. I mean, they may disagree, they may turn around and do a de novo review. De novo review after exhaustion of tribal remedies has happened many, many times. But I've never actually gone, I've never actually seen the court go back and actually look and see if the process it was given was really fair.

Senator INOUYE. Your example of your Navajo client is one in which your client went before the tribal probate court, is that correct?

Ms. MARCUSSEN. That's correct.

Senator INOUYE. Did you appeal to the Interior Board of Indian Appeals?

Ms. MARCUSSEN. Yes, Your Honor, my client did. And he exhausted all of the DOI process.

Senator INOUYE. Was that trust land?

Ms. MARCUSSEN. It is trust land.

Senator INOUYE. So I would think that the trust land would give the Federal court jurisdiction, it is a Federal question.

Ms. MARCUSSEN. Actually, Your Honor, there are other questions. Tribal sovereign immunity is a big issue. When you're actually dealing with public lands questions, the Federal courts have often disclaimed jurisdiction also under the quiet title act. There's more than just one immunity problem to overcome in most cases like this.

In this particular situation, Senator Inouye, the court expressly took jurisdiction under the Indian Civil Rights Act, under the habeas petition of the Indian Civil Rights Act, and based on the 14th amendment, because of the Adaran decision. And that's the express order of the court.

Senator INOUYE. In the New Mexico gaming case, if I recall, with regard to the order to close the tribes casinos, that has been stayed pending appeal to the 10th Circuit, is that correct?

Ms. MARCUSSEN. Senator Inouye, there are actually three different suits. The main suit against the Nine Pueblos was stayed. I do know that as I was leaving New Mexico yesterday that Chairman Wendell Chino had requested Judge Vasquez to stay the closure order of Judge Parker. I have not heard whether or not that stay was granted in that case.

Senator INOUYE. Mr. Smith, you have presented a very compelling case. But I do not think that individual Indians, the ones that had their pictures taken, have any sovereign immunity. If these perpetrators were not prosecuted, I do not think that it is because of sovereign immunity. So I will most certainly discuss this matter

with their tribe. But can you tell me the name of the tribe involved?

Mr. SMITH. That particular case was the Standing Rock. I think that you'll have that opportunity this afternoon.

Senator INOUYE. The Standing Rock Tribe?

Mr. SMITH. Yes.

Senator INOUYE. I thank you very much.

Mr. Johnson, your suggestion that Indian nations should take note of some of the concerns expressed by you and others I hope will be seriously taken. I take them very seriously.

Mr. JOHNSON. Thank you, Senator.

Senator INOUYE. Senator Gorton.

Senator GORTON. Ms. Coleman, your testimony is the first I've ever heard in connection with a statute recommended by a committee of which I was a member at the time in a Congress of which I was a part. I'm not sure whether Senator Conrad was here or on the committee then. But certainly Senator Inouye was chairman.

At least from my own point of view, I can't imagine that any of the members of the committee believed that in passing a section that expressly disallowed for a constitutional challenge, that we would be, that we were engaged in a frivolous or a meaningless act. The Chairman can speak for himself in that connection.

But I take it that the decision in the district court and the court of appeals was on the basis that that section didn't expressly waive the sovereign immunity of the Indians to be sued, and that if wanted to do so, we would have had to have done so in the act?

Ms. COLEMAN. It's more fully expounded in the district court opinion, which is unpublished. But that's precisely it, that this language by Congress, which I read to you, was not explicit enough to authorize suit in the face of Indian sovereign immunity.

Senator GORTON. Well, as I said, I can't imagine that there was anything in the committee report, if there was a committee report to that effect, I can't imagine that there was anything in the memoranda that our staff present to us when we're considering a case to that effect. But I can tell you, as cold comfort as it may be to yours, that I think I can assure you that while I'm here, there won't be another such statute that grants those rights without an express waiver of sovereign immunity. You've described the true outrage. I don't know at this point what if anything there is that we can do about it. But it was certainly wrong.

Now, for Ms. Dawson and for Mr. Johnson, in answer to the very last question by Senator Conrad, Mr. Endreson analogized his defense to a proposition in the Rodney King case in Los Angeles, when there was a feeling that an injustice had been done, we didn't deprive the Los Angeles police department of its police powers. What we did do, however, was when a jury of their peers in a State court found those police officers to be not guilty, the Department of Justice and the Federal Government started an entirely new action in Federal district court and successfully prosecuted them.

My question to you is, I assume that you would be perfectly amenable to an analogous set of remedies in your case, in your cases, that if when you go to a tribal court and feel that you have not been dealt with justly, as was the case in the *Rodney King* case, you would find it a perfectly appropriate remedy if you could then

go to a Federal district court and get a decision de novo on the merits of your case, would you not?

Mr. JOHNSON. Yes; I believe the answer to that is yes, Senator Gorton. There are circumstances, however, where exhaustion of remedies is exhaustion of plaintiff. And there are certain causes of action that ought to be brought originally in the Federal court and against the tribe. And so some of those cases, it seems to me, should be brought directly into Federal court.

Senator GORTON. Ms. Dawson, in your case, if you could get a decision of a court outside of a tribal court on the merits, you would perforce have to be satisfied with whatever that decision was, would you not?

Ms. DAWSON. Yes.

Senator GORTON. Mr. Smith, in your case, have you told us in effect that for the purposes of a proposed sale, your realtor has told you that your property is worthless, that it can't be sold?

Mr. SMITH. No; I've actually had several situations. That particular realtor with that particular purchaser basically said that he would not talk to that purchaser about my ranch. That doesn't make it worthless, because there's other people out there.

But I've had that particular situation in relationship to my ranch. I also had another guy come to me and ask if I'd be interested in selling. And after some consideration, I said, yes, I would, for this amount of money. And after we talked about it and thought about it, he said, well, if your ranch wasn't on the reservation, I might be willing to pay that amount for it. But I'm not, since it's on a reservation.

So as a practical matter, because you're dealing with a lot of people, you're dealing with a discount. And the situation varies, depending on who you are, what the situation is, how much that is. But I think in most cases it's 25 percent. And I think there's a lot of cases where it's considerably more than that.

Mr. JOHNSON. Senator Gorton, in my testimony, I recount one witness testifying, an appraiser who had done over 150 waterfront property appraisals, that the diminishment in value was up to 40 percent. And so it is not a total taking, which might give you different causes of action. This diminishment, there is no remedy for that.

Senator GORTON. One final question, I think, really for the three of you in the middle. One of the objections of great emphasis on the part of those who are opposed to the bill has to do with the potential of a damage judgment bankrupting a tribe or particularly a smaller tribe. Mr. Johnson, you spoke to that situation. But let me present this question to the three of you.

Would your concerns about tribal sovereign immunity and the ability to get what you consider to be due process, an objective decision of controversies, largely be served if the waiver of sovereign immunity affected only a suit for a declaratory judgment or a suit for an injunction and suits for damages were not waived?

Mr. JOHNSON. I think that would be an appropriate remedy, Senator Gorton, with this caveat, that as the historic statutes which I alluded to in my testimony today, and have summarized in the written testimony with reference to Felix Cohen's book, as with those statutes, it seems to me that you, Congress, should provide

a remedy up to the amount that is made available to the tribe from tax revenues. So in the example I used, if the Lummi Tribe gets $12 million this year, it seems that Ms. Dawson should be able to get declaratory relief, injunctive. But there shouldn't be an impunity with respect to the damage claim. But I would say yes to your first proposition, and say if I could get a little more, it seems like this additional remedy would be appropriate under those circumstances.

Ms. MARCUSSEN. Senator Gorton, it's kind of a tough question. Because by the time clients come to me, they're so angry and they're so frustrated that they are typical clients walking into your office, they want to go for the jugular. So, you know, they would not want me to say what I'm about to say.

I think what you are proposing by giving just a, even a more limited waiver than what section 329 does at this time, for the declaratory judgment actions, and just for injunctive relief, would be very acceptable. It would allow the concept of accountability and some review to actually be introduced with respect to the Indian tribes without being a total waiver of their immunity or a threat to their pocketbooks.

I would say 95 percent of my, of the people I see, once they calmed down and actually started thinking about what the implications would be for these huge damages claims, would agree that tribal sovereignty in general needs to be protected. I have found that the clients that walk in my door, once you get them past that point of what just happened to them, most of them really do believe and respect the Indian nations. And what you're talking about I think would be a very balanced remedy.

Ms. DAWSON. When you were talking about the real estate, I think you'd have a lot of declaratory relief being asked for by tribal members as well as non-tribal. And Senator Inouye was so kind as to say he would follow through on some of the issues. I talked to a Grace Ericson, who is up in years, she is one of three tribal members, sisters, two of the sisters were able to sell their property before the tribe became a tribe of self-governing. And she recently has tried to sell her property, I guess it's been in the last five or six years, since the Lummis were appointed a self-governing tribe.

And she has been unable to sell her property, even though there's a Federal consent decree that says that the tribe is not to interfere with the buying and selling of property. They will not release it. And she had a real estate person that had negotiated in good faith a good sale, the tribe had the first option of refusal in terms of buying that property. And I talked to her before I came. And she's one-half Indian. She married a non-Indian. She has grandchildren who are one-eighth Indian. She has pursued the American dream off the reservation years and years ago, after she was married. And she is unable to sell her property.

And she is at her wits end. If she could have some kind of a remedy, I think that the tribe would not be doing this to their own people, their own members.

Senator INOUYE. Thank you.

Senator Conrad.

Senator CONRAD. What is your intention with respect to the next panel?

Senator INOUYE. I have learned a long time ago that once you recess, it is almost impossible to get everyone back again. While I realize lunch is upon us, I would like to stay here until we finish.

Senator CONRAD. Then I will forego questions of this panel.

Senator INOUYE. Well, ladies and gentlemen, I thank you once again.

And I will now call upon the next panel. The Chair of the Confederated Salish and Kootenai Tribes of Flathead Nation, Pablo, MT, Rhonda S. Swaney; the Chairman of the Lummi Business Council, Bellingham, WA, Henry Cagey; Bill Anoatubby, the Governor of the Chickasaw Nation of Oklahoma; the Chairman of Standing Rock Sioux Tribe of South Dakota and of North Dakota, Jesse Taken Alive; the President of the Navajo Nation Council of Window Rock, AZ, Albert Hale; the Vice Chairman of the Tulalip Tribes of Washington, Donald Hatch; and the President of the National Congress of American Indians, W. Ron Allen.

I have been advised that there is a slight change. We have Herb Yazzie, the Attorney General of the Navajo Nation.

May I now call upon the Chairwoman of the Confederated States, Rhonda Swaney.

STATEMENT OF RHONDA R. SWANEY, CHAIRWOMAN, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD NATION, PABLO, MT, ACCOMPANIED BY DANIEL BECKER, ESQUIRE

Ms. SWANEY. Good morning, Chairman and members of the committee.

I'm honored today to represent the Salish and Kootenai Tribes of the Flathead Reservation of Montana in presenting testimony to you concerning tribal civil jurisdiction in Indian country and tribal sovereign immunity.

I'm accompanied today by my attorney, Daniel Becker. And if we have any legal questions following my testimony, he will assist me in answering those questions.

We would like to offer today some of the many examples of how an inclusive, creative approach to tribal protection of the rights of all citizens living on or near reservations and the implementation of successful dispute resolution mechanisms offer alternatives to unnecessary legislation intended to correct a perceived problem. Perception is one of the major limitations of all of us legislators. We focus on a complaint, dispute, or problem, based on our personal experiences, our knowledge or our feelings. This committee is attempting to deal with the perception that non-tribal members living on or near reservations have no civil remedies because of tribal sovereign immunity. That's simply not the truth.

I would share with you our tribe's perspective of the rights of all people living on or near reservations, and the resolution of conflicts between, among those people and a tribal government. Tribal governments all over the Nation, whether they're traditional or reorganized forms of government, are all too familiar with the distrust, anger and fear associated with lost property or property rights. For example, my forefathers, by agreement made in good faith with the Federal Government, ceded, relinquished and conveyed to the Unit-

ed States property outside an area that we reserved for our exclusive use.

As with every treaty made, the U.S. Government broke nearly all the promises made in the treaty, including the right to use the reserved area exclusively. By 1934, only 75 years after the treaty ratification, we have lost approximately 66 percent of our reserved land base. Today we own about 60 percent. But we represent only about 30 percent of the population.

We realize that the traditional ways of protecting our property and property rights have not worked. And so we turned to innovative means of protecting, preserving and enhancing our homeland. This approach benefits all the residents of the reservation. It also provides all types of civil remedies, and provides for governmental participation by non-tribal members.

The primary responsibility of any government is to regulate the conduct and the activities permitted within the government's jurisdiction. On the Flathead Reservation, we've taken steps to protect the health, safety of persons on the reservation, and to encourage productive enterprise, while attempting to protect natural resources. We've also taken many steps to ensure that non-members have the opportunity to play an active role in the promulgation and implementation of government regulations and ordinances.

Let me tell you about some other things we've done and are doing. First of all, I'd like to talk about two ordinances: the shoreline protection ordinance and the aquatic lands conservation ordinance. The shoreline protection ordinance is an ordinance intended to regulate the kind of construction that takes place below the high water mark in Flathead Lake. As a result of a challenge the tribes made about development of a commercial breakwater and dock, constructed by a non-Indian in Flathead Lake, the Ninth Circuit Court affirmed that the tribes owned the bed and banks of the south half of Flathead Lake. They determined that the Flathead Nation had not been disestablished, and they determined that the tribes were the ones to rightfully exercise regulatory authority over structures constructed below the high water mark.

The tribe's regulatory authority in this ordinance is exercised by a seven member board. Three of them are non-members and four are tribal members. The board also oversees implementation of the aquatic lands conservation ordinance, which regulates construction in riparian and wetlands on the reservation. It also acts in conjunction with the Army Corps of Engineers dredge and fill permitting program.

Again, that board representatives containing both non-members and members, actually implement the tribes regulatory authority.

We also have a Flathead Lake fisheries comanagement plan, because our ownership extends only to the middle of the lake, we comanage Flathead Lake fisheries pursuant to an agreement between the tribes and the Montana Department of Fish, Wildlife and Parks.

We've also, as a result of litigation, reached agreement with the State of Montana as to regulation of non-member hunting and fishing on the reservation. All reservation residents who are non-members have to buy a tribal permit to hunt and fish tribal resources.

But tribal, State and Federal officers all enforce the regulations, citing violators into courts of appropriate jurisdiction.

We also operate the reservation utility, an electrical utility. We serve over 16,000 meters, which represents most of the businesses and homes on the reservation. When we took over operation of the utility, pursuant to a self-determination contract, we instituted an independent utility board to manage the utility, and we instituted a consumer council to represent consumer interests. Both entities contain non-member representatives and tribal representatives. And it was a first that a consumer council be given equal power to the utility board in recommending rate changes.

Actually, the Federal Government conducts the rate changing or rate change process. But it's pursuant to recommendations made by both of these entities and the tribal council.

We also have a tribal administrative procedures ordinance which sets forth a process by which administrative decisions can be challenged by any affected party. The law judge hearing most of these cases is a non-member attorney. Several years ago, our tribes withdrew from concurrent criminal misdemeanor jurisdiction with the State of Montana over tribal members committing offenses on the reservation. This decision came about because we had an extremely high percentage of tribal members incarcerated in the State prison. Actually, we represent about 1 percent of the State population, but our tribal member inmate population is 60 percent of the Indian inmate total—which is about 40 percent of the inmate total.

The cooperative agreement reached between the tribes, States and local governments implementing the retrocession provides for cross-citation authority, stop and detain provisions, and emergency powers. Anticipating the increased work load connected with this retrocession, we took steps with tribal funds before retrocession took place to improve and expand our tribal court system. We have an independent prosecutor's office, a separate defender's office, an expanded legal services program, and adult-juvenile probation services. Most of the attorneys working in each of these different offices are all non-member attorneys.

We also provide civil representation to individuals meeting our representation guidelines. And we provide criminal representation in all matters where people face a criminal charge in our tribal court system.

We've also instituted and expanded our appellate court. We have a full panel consisting of three attorney justices and two lay justices. The three attorney justices, including the chief justice, have been non-members and the two lay justices tribal members. Additionally, each side in an appeal has a right to recuse one justice without stating cause. We feel this is a method to provide additional fair and impartial decision making.

We also have an instituted regulation development process. Whenever regulations asserting jurisdiction over non-tribal members and members are adopted, we adopt a fully inclusive public comment process. We include notice and hearing. And the kind of regulations that we promulgate are water quality standards, hunting and fishing and recreation regulations, migratory water fowl regulations, shoreline protection regulations, aquatic lands conservation ordinance regulations, and many more.

Over the years we've also developed many environmental initiatives, including establishment of a 90,000 acre wilderness, minimum in-stream flow protections, establishment of water quality standards for the reservation, closures for grizzly bear, bull trout, nesting water fowl, elk, bighorn sheep, and other species that have been reintroduced. We've accomplished redesignation of air quality to class 1 status.

All of these kinds of initiatives protected and improved the quality of life for all reservation residents. Consequently, the property values for non-members on our reservation have substantially increased. In fact, they've appreciated at about the rate of 15 percent the last 4 or 5 years.

We also have a governmental immunity ordinance. Section 2 of the ordinance contains limited waivers of immunity for injunctive, declaratory or mandamus relief. And it allows waivers for such things as infringement of any civil or constitutional right of an individual arising under the tribal constitution or the Indian Civil Rights Act; for specific waiver of immunity by resolution or ordinance, and judicial review of the governmental implementation of those ordinances; for intervention as a party in a lawsuit, except for counterclaims; for agreements with the United States which require us to purchase liability insurance, and then we consent to waiver of liability up to the policy limit; when we enter into agreements expressly waiving sovereign immunity and when an agent or officer of the tribe, acting within the scope of authority of his position, causes serious personal injury or death through negligently breaching a duty of care owed to another individual.

Finally, section 2 of the ordinance contains a provision that addresses situations where we've chartered tribally owned businesses. Those businesses operate pursuant to direction given by an independent board of directors which include non-members, and all articles of incorporation include sue and be sued provisions.

While there are many more stories we could share, we believe that the examples given here indicate that an inclusive, rather than exclusive, approach to tribal civil jurisdiction works. Additionally, our experience has shown that tribal civil jurisdiction is not something that needs to be fixed. More to the point, the solution proposed by section 329 would virtually eliminate all these creative and inclusive methods. This would occur, because there would be no incentive for non-tribal members to work within our administrative and judicial processes.

A waiver of any government's sovereign immunity, whether it's tribal, State or Federal government, would result in judicial chaos by authorizing any one person or entity to file frivolous lawsuits that could virtually bring justice to a standstill.

Although it's possible to find anecdotal stories that justify extreme remedial responses, as you've been asked to do today, we believe that cooperative examples cited in our testimony prove that tribal and Federal laws as they presently exist already provide sufficient authority to protect interests of all concerned parties. We appreciate the efforts of this committee to examine allegations and to hear from tribal witnesses, and we look forward to working with you on this and future matters.

Thanks very much for the opportunity to present these comments today. And we will be submitting more detailed testimony for the record.

[Prepared statement of Ms. Swaney appears in appendix.]

Senator INOUYE. All right, thank you very much, Ms. Swaney.

May I now call upon Chairman Cagey.

STATEMENT OF HENRY CAGEY, CHAIRMAN, LUMMI NATION

Mr. CAGEY. Yes; thank you, Mr. Chairman.

My name is Henry Cagey, Chairman of the Lummi Nation. And I'm here today to express some concerns that the committee has about I guess due process for Indians and non-Indians on the Lummi Reservation.

The hearing today is really, it's not simply a question on due process. But really it's a whether or not the tribe is really competent enough to do the things a government needs to do in working for its people. And some of our people have really traced these arguments back to some of the Pope's legal arguments back to the 1500's. And the non-Indian acquisition of the Indians lacking self-governance capacity is over 460 years old. The whole problem is based on the Government's reliance on the doctrines of conquest and discovery, which are legal fictions created for the benefit of non-Indians.

Speaking in a more contemporary vein, the tribe has four points that we'd like to make to the committee. First, our rights began not with treaties, but with the historic fact that the Lummi people have never been conquered, nor have they relinquished their inherent sovereignty. Second, the treaties are bilateral agreements between the Indian nations and the United States, and cannot unilaterally be altered. Third, the government-to-government relationship between the Indian tribes and the United States is embedded in the U.S. Constitution.

Permit me to refer to Concurrent Resolution No. 76, in which it states:

> The Congress—hereby reaffirms the constitutionally recognized government-to-government relationship with Indian tribes which historically have been the cornerstone of the Nation's official Indian policy.

Last, I'd like to quote from the Treaty of Point Elliott that

> the reservations were set apart for the exclusive use of Indians, nor shall any white man be permitted to reside upon the same without permission of the said tribes and the Superintendent or his agents.

Reflecting on some of the things that we're doing at home, as you heard a previous witness, Sue Williams stated that the tribe is doing different things with due process for Indians and non-Indians on the reservation. We have a water and sewer board in place that is elected by the resident of the reservation, Indian and non-Indian, which has three members from the tribe and two members from the reservation.

For the last 14 years now we've had only two appeals, one of which was Marlene Dawson herself, a non-Indian resident and also a county council member. And she did stipulate that the hearings were fair and in accordance with due process.

Other areas that we're working with in due process is that the tribe does have a permitting process in natural resources, which include licensing, a hearing in tribal courts for citations, availability

of tribal courts for de novo trial. In the area of zoning on the reservation, we have in place comprehensive procedures that include a permitting process for open public hearings, and a process for review and appeals based on written record.

In contrast, we've had a few problems working with the system on the reservation. For example, we've had a non-Indian resident who basically had some land cleared on the reservation which we did note that there was eagle nests in the area. We noted that there was a fish bearing stream also in that area. We also noted that there was an archaeological site. To date there has been no, nothing done about this issue. There has been nothing done between the Federal Government or the State government to address these concerns that we pointed out before this land was cleared.

Also, we recognize, Mr. Chairman, that really no system is perfect. We have been making great strides since self-government to improve our codes and ordinances for the nation and for the people. And it does take time. And we're doing the best we can to keep up with some of the things that need to be fixed on the reservation. We have a lot of problems. We have a lot of problems in the fact that we have things happening around us today. We have wells being put on the reservation right now in consideration that we're also in negotiations for the Federal negotiating team. And it's been ignored by certain citizens, non-Indian citizens, on the reservation today.

We have also witnessed in an area of due process Congressional legislation that directly adversely affects our abilities to exercise treaties on the reservation. And we also look forward to the day, I'm sorry to see Mr. Gordon leave, but we're also looking forward to the day that we can be cooperative and begin to look at how we can better work together on some of these things that we're hearing and seeing the effects of Indians and non-Indians on the reservation.

And it is going to take some time, Mr. Chairman. But we think about the negative energy that is being spent, we could spend better positive energy working together.

I guess I'd like to close our remarks with a quote from the minutes of the treaty. This is from Isaac Stevens, the Governor of Washington Territory, as recorded in the minutes of the signing of the Treaty of Point Elliott in 1855:

> There will be witnesses. These witnesses will be tides. You Indians know that the tide goes out and comes in, that it never fails to go in our out; you people know that streams that flow from the mountains never cease flowing. You people know the sun rises and sets and never fails to do so. Those are my witnesses, and you Indians, your witnesses, and these promises will be carried out, and your promises to me and the promises the Great Father made to you will be carried out as long as these three witnesses continue.

Mr. Chairman, tribal members, I think we've got a lot of work to do ahead of us. I'd hate to see this committee take such drastic action because of a few people. And we should not be judging problems based on patterns, as I heard Senator Gorton talk about. There's a lot of problems out there, not just with our system, but with the whole system. And I, as a tribal leader, elected official for the Lummi Nation, look forward to seeing the day that we can do this. And I think there's a lot of things that we can begin to talk about.

One other point, Mr. Chairman, is that I'd like to reserve some time here to respond to Marlene Dawson's comments about some of the things that she was making. You mentioned that you wanted to hear about it. I would also like to extend some of those concerns that Mr. Gorton has on her testimony as well.

And thank you, Mr. Chairman.

[Prepared statement of Mr. Cagey appears in appendix.]

Senator INOUYE. Thank you very much, Chairman Cagey.

Now may I call upon Governor Anoatubby of the Chickasaw Nation.

STATEMENT OF BILL ANOATUBBY, GOVERNOR, CHICKASAW NATION

Mr. ANOATUBBY. Good afternoon, Mr. Chairman.

I'm Bill Anoatubby, Governor of the Chickasaw Nation from Oklahoma. I'm very thankful for the opportunity to be here today. And I thank this Congress and you, Senator, for your effort in allowing us to have input.

I sat very quietly here today listening to much of the testimony. When you hear both sides of an issue, it tends to shed considerable light. However, I think that when instances are verbalized, such as those of the previous panel, we must examine both sides of those questions and those issues as well. I don't think that sovereign immunity is entirely the problem having to do with these matters.

I come from a tribe that believes itself to be very progressive, and has shown it in its actions. We do not condone mistreatment of anyone by anyone. It's just not in our code of ethics. We believe that we must be responsible in our approach to tribal government. In the case of those who may have been damaged in some way, we do our best to provide an avenue for them to be made whole.

An example would be one that was given by a previous person who testified, having to do with insurance for liability claims. We carry insurance, we carry that because we believe that the individuals who may be harmed in some way deserve to be made whole. And we do not allow, in fact we bar, sovereign immunity as a defense by the insurance carrier. In our business agreements with others, we allow that that particular agreement be enforced by either party, whether it be the tribe or the other party to the agreement. In our case, it would require us to waive sovereign immunity at least in the enforcement of that agreement.

We heard this morning the testimony, I believe it was Senator Pressler, and the dilemma about who is in charge, who has jurisdiction. And that's not a new question. That question's been there for generations. In fact, it dates back to the time of expansion of this great United States from eastern to western United States. Oftentimes, the American Indian has seemed to be in the way. In fact, we were in the way. And oftentimes, the argument that was given is that we weren't taking care, we were not showing our responsibility. And even today, we hear some of those same arguments. And such is not always the case. We know that we have competing interests. And I believe that these things can be worked out without a blanket waiver of sovereign immunity.

Oftentimes the argument is a level playing field. And for tribes, a level playing field can only be maintained if we maintain our im-

munity from suit and we maintain our sovereignty. Without it, the tribe itself then will be controlled. With it, we can deal with others. Because then we are on a level playing field. With it, we can find common ground and can reach agreements. Without it, history has proven that we are subject to one-sided, and often discompassionate rule.

The answer to our questions today I think rest in our deliberation with one with the other, one sovereign with another, and working to reach agreements, agreements that will not only benefit the tribes, but will benefit those around us. And when it comes to the waiver of sovereign immunity, it should be up to the tribe to determine when and how sovereign immunity will be waived.

The Chickasaw Nation strongly opposes the language in Section 329. We truly believe that there is another way, and we need to look for those ways, not trash all the work that's been accomplished by tribes to this point and the progress that's been achieved in developing our tribal governments, but to continue the process and sit down across the table and do our best to work together cooperatively.

Thank you.

[Prepared statement of Mr. Anoatubby appears in appendix.]

Senator INOUYE. I thank you very much, Governor Anoatubby.

May I now call upon the Chairman of the Standing Rock Sioux Tribe, Chairman Taken Alive.

STATEMENT OF JESSE TAKEN ALIVE, CHAIRMAN, STANDING ROCK SIOUX TRIBE

Mr. TAKEN ALIVE. [Remarks given in native tongue.]

My friend Senator Inouye, I thank you for this opportunity you have given to us to talk about the tribe's waiver of sovereign immunity. I first want to say, as I did in our language, that these laws are your laws. When I go back home to Standing Rock amongst the Lakota people, the descendants of Sitting Bull and Gaul and Rain In The Face, I can't find any of these laws. These are your laws. So most graciously, humbly, I thank you for this opportunity to respond to these.

Senator Inouye, members of the committee, for the record, the interpretations of these laws is what we're talking about. The reason we are here today is simple. The reason we are here today is because we represent nations. Just because we have situations that plague us socially and economically does not make us less than nations. As we look at these situations, we are finding the resolve to these situations in only a short period of time. The resolve that we find is within our own cultures. The resolve that we find are within our own languages. The resolve that we find are in the ways that the Creator has given to us.

So respectfully, again, I appreciate this opportunity to offer to you and this committee and this Congress and this Government our interpretation of these laws, because truly we are nations, and we are rebuilding. We are living in a prophecy today that our forefathers gave to us when we were put on those concentration camps, that what's going to return is now here.

As I stated, this is a clear and simple example that yes, there are jurisdictional issues. Ours come from the fact that we have

treaties in your interpretation. But in our interpretation, ours come before treaties. Ours come before nationhood of the United States. That is what is still alive and well out there.

Having said that, this is an issue of respect, respecting those laws, respecting those issues. As you have given us this opportunity to offer our comments, our recommendations, our responses to what's being said about our little nations, because we've abided by those land lease documents, and have maintained in those little boxes called reservations. We've abided by those. We haven't abrogated. We haven't broken any laws. It's imperative that we offer these responses.

First of all, to the gentleman from South Dakota, I would not talk about juveniles publicly. As a matter of fact, the juveniles, one of the mothers I talked to recently involved in this matter that he cited, I will take this testimony and share it with her. Share it with her, because she knows well the truth that there was prosecution. There was things done for these, two of these juveniles in our court system. I say that reluctantly, but I know I must respond. The taxes he mentions are taxes about lands on trust lands. And they've already been heard in court. Trust lands which he's been able to lease 1,250 acres of tribal land from the Standing Rock Sioux Tribe.

We talk about economic development, I appreciate his assessment. But economic development goes beyond his assessment. Economic development is something, again, that we know we have resolve to. But I must respond to those. Yes, we do have and are working cooperatively and do have cooperative agreements with fellow States, in particular with North Dakota. We would like to do likewise with South Dakota. We have an accord with the State of North Dakota, signed by myself and the Honorable Governor Schafer of the State of North Dakota. As a result of that accord, many, many meetings have followed. Many, many other attempts to work jointly and together are being talked about. For example, we are working jointly with our highway department. Most recently, there's discussions now to turn over the highway maintenance to the Standing Rock Sioux Tribe. I can go on and on and on.

Likewise, within our judicial system, there's a Northern Plains Court body that meets periodically. This body is made up of tribal, State and Federal court judges to talk about the jurisdictional matters and look to resolve. And some of the resolve has already been reached.

So as we take a look at all of these issues that are in front of us, again, it's important for me to state that I appreciate this opportunity to be in front of you, Senator Inouye, who represents the United States. I want to say that the tribes that were mentioned here should also be given an opportunity to respond here in person. Because that's the Indian way, to give each other that respect. And I hope in the future that that can happen.

I concur with the good Senator from Washington, Senator Gorton, when he looks for neutral decisions, our interpretation of that, yes, let's find an international court system to hear issues between indigenous nations of North America and the United States of America. I agree with Senator Pressler when he references Indian

country, particularly the Lakotas, because we live there yet. That's where our origins developed from.

I agree with all of the comments that were made, because we interpret them in a way that we do, and we can interpret them in another way. I invite Mr. Long from the State of South Dakota to set up a meeting with our judiciary committee chairperson. I invite anybody who has comments, recommendations, qualms with the Standing Rock Sioux Tribe to come to any of our committee meetings, any of our council meetings, to my office. We've never closed a door on anybody.

The matters are at home, the resolve to them are also at home. I invite them to come, respectfully, to our committees and our council.

Finally, the comment that was made by the previous panel members that it's imperative that we finish a job that was started, what job was started? Hopefully it's not the annihilation and eradication of indigenous peoples of North America. Because we're having a heck of a time, as you well know, and appreciate your efforts in that, Senator, with the NAPRA laws, trying to get the bones of our ancestors off shelves. We hope that's not the job that was referenced. I appreciate the comments that were made, when it was said that we must be allowed to have consent to things.

We humble ourselves to other peoples, to other cultures, to other men, other governments, in hopes that this is not mistaken for incompetence or fear. It's done out of respect.

We are here for two reasons yet as American Indians. First of all, the compassion and love of the Creator and our belief in that, that he loves all men, regardless of what history shows. The second reason we are here is because of treaties. In my opening comments, when I said [remarks given in native tongue], that means ordinary, common men with a simple view of life. And that's what we are understanding these treaties with.

So in the upcoming meeting this weekend, as we meet with the State Department of the United States in Fort Laramie, Wyoming on Saturday, we intend to build upon that government-to-government relationship. We intend to offer our interpretations of those treaties.

Last, it was offered to me one time, when we were having debates between the State government and our tribal government, the State government official asked me to lay an olive branch out there to the State legislators. My only response to him was that sir, that's all we have left. You have all the olive trees, you have all the olive groves, and all we have left is that olive branch. And I can't lay that out there.

[Remarks given in native tongue.]

Thank you very much, Senator Inouye.

[Prepared statement of Mr. Taken Alive appears in appendix.]

Senator INOUYE. I thank you very much, Chief Taken Alive. May I now call upon the Attorney General of the Navajo Nation, Herb Yazzie.

STATEMENT OF HERB YAZZIE, ATTORNEY GENERAL OF THE NAVAJO NATION

Mr. YAZZIE. Thank you, Mr. Chairman, members of the committee.

On behalf of President Albert Hale and the Navajo Nation, I would like to thank you for giving the Navajo Nation this opportunity to present testimony today.

My name is Herb Yazzie, and I'm the Attorney General of the Navajo Nation. Today I speak on behalf of 250,000 members of the Navajo Nation and on behalf of the several thousand non-member citizens of the Navajo Nation.

This amendment would subject Indian nations and Indian government officials to State and Federal jurisdiction for claims relating to actions or proposed actions of such governments, or government officials impacting or threatening to impact the ownership or use of private property. The Navajo Nation, quite frankly, is appalled by the language of section 329. The language would grossly, grossly impinge upon the sovereign status of the Navajo Nation, and would violate the inherent rights of self-government of the Navajo people, rights which are granted to the Navajo people in the 9th and 10th Amendments to the U.S. Constitution, and in the treaties that we have between us and the United States. Quite simply, section 329 would make a mockery of the Navajo Nation's sophisticated, professional court system, by subjecting the Navajo Nation to suits in traditionally hostile State forums, by Navajo Nation members and non-members.

Proven remedies currently exist in Navajo law and Navajo legal institutions to protect all persons, whether Navajo or not, from the risk of harm intended to be addressed by section 329. The written testimony that we have submitted goes into detail citing those laws and institutions. The legitimacy of the Navajo Nation government is beyond question. Nevertheless, the obvious underlying premise of section 329 is that all Indian nations are incapable of providing justice to non-members within the framework of their governments. This view is misinformed and is without factual foundation.

Speaking just for the Navajo Nation at the moment, you have heard from witnesses today citing Navajo Nation examples, such as our government allowing non-member participation in our system, such as participation on the Tax Commission, implementing the most basic function of any government. And also other examples, such as participation on the Navajo Labor Commission, which regulates labor problems within the Nation.

I would also say that our system allows—there has been so much talk about laws and lawyers today—the Navajo Nation has a system to allow people who wish to practice before the justice system of the Navajo Nation, if they would take the exam. I would say to those lawyers, as was mentioned earlier by another witness, that it behooves them to take that exam, because then it teaches them what laws provide the foundation for the government. Just as I would, if I were to venture to practice in Federal court or any State court, I would have to comply with those rules. There's a lot to be said to the point that was made that when one practices before another government, one ought to know those laws, the foundation and the policies of those governments. And then as a bar member

of that government, they have an obligation to not only educate but also to participate in the development and the improvement of the system, rather than attack the system.

The Navajo Nation has a civil and criminal court system which operates effectively at the tribal and appellate levels as a separate branch of the Navajo Nation government. The courts of the Navajo Nation have been in continuous operation since the early years of the 20th century. And a system of just dispute resolution has existed under the Navajo common law far longer.

The concept of justice runs deep within the culture of the Navajo people. In the Navajo way, individual rights and responsibilities, as well as the rights and responsibilities of the larger community, are considered in every dispute resolution. It is deeply offensive to the Navajo people to suggest that its government engages in conduct that deliberately and consistently violates the rights of persons within its jurisdiction.

Nearly 30 years ago, the Navajo Nation Council enacted the Navajo Nation Bill of Rights in order to ensure that individual liberties of all persons are secured within the nation. The nation guaranteed fundamental liberties against violation by the Navajo Nation government even before the United States Congress enacted the Indian Civil Rights Act of 1868 the following year. The Navajo Nation Bill of Rights is more expansive and protective of individual rights than either the Indian Civil Rights Act or the Bill of Rights within the U.S. Constitution. Most importantly, in the context of section 329, the Navajo Nation Bill of Rights protects private property. The Navajo Nation Bill of Rights expressly mandates that private property shall not be taken, nor its lawful private use be impaired for public or governmental purposes or use without just compensation.

These words were interpreted more than 20 years ago by our supreme court. These enumerated rights, as well as other unenumerated rights retained by the people, apply to all persons, irrespective of race, nation affiliation, gender or religion. As an example, non-member citizens of the Navajo Nation sit on civil juries in Navajo Nation courts, along with Navajo Nation members. Thus, in the Navajo Nation, all persons have every one of the rights enumerated in the United States Constitution and more. In the Navajo Nation, there is no need for section 329. On the contrary, section 329 would only destroy an effective Navajo Nation judicial systems already attuned to the individual rights of all persons, Navajo and non-Navajo alike.

Indian nation courts have been thoroughly studied and have been found to provide effective protection of individual civil rights. It is significant that the Honorable Sandra Day O'Connor of the U.S. Supreme Court most recently in 1966, in a speech before the annual sovereignty symposium sponsored by the Oklahoma supreme court and the Indian courts of Oklahoma, praised the third judicial sovereign for effectively guaranteeing the rights of all. Justice O'Connor singled out Navajo peace making as an effective alternative to litigation.

Legislation like 329 is completely unnecessary for another reason. There are already adequate remedies in Federal court for alleged interference with private property rights by Indian nation governments. Under controlling U.S. Supreme Court precedent, ac-

tions of an Indian government which are alleged to be in excess of its authority as defined by applicable Federal statutory and common law are redressable in Federal courts.

Thus, where an Indian nation government acts in excess of its authority, particularly where alleged interference with private property rights or other individual rights of a non-member are concerned, there already is a remedy in Federal court.

The nation urges this committee to consider other ramifications of 329. The language of the section would expose virtually all Indian nation property interests to suit in foreign jurisdictions, including disputes between Indian nation members and their own Indian nation governments over private property rights. The section does not limit itself to non-members of Indian nations, but reaches out to encompass any person with a private property interest which might be impacted by the actions of an Indian nation government.

This will have a chilling effect on the ability of all Indian nation governments to provide effective government within Indian nation territories, particularly the ability of Indian nation governments to effectively regulate for the health and safety of both Indian nation member and non-member citizens alike.

Fundamentally, that Congress might even consider imposing such legislation upon Indian nations reflects a lack of appreciation of the conceptual basis of Indian peoples' right to self-government. Governments only have such powers as the people delegate to them. The 10th amendment teaches us that the power is not delegated to the United States by the Constitution, nor prohibited by it to the States or reserved to the States respectively or to the people.

Indian people generally have never delegated any of their inherent political rights to the States. Rather, Indian people have expressed their constitutionally protected retained rights through delegations to their respective Indian nation governments.

Much of the conflict between Indian nations and non-Indian property owners is a direct result of the checkerboard land ownership patterns which exist within many Indian nations. These land ownership patterns are a direct result of actions by the United States during the allotment era, where the United States carved up and distributed Indian nation lands to Indian families and sold surplus lands to non-Indian settlers and speculators.

The United States imposed this policy in a deliberate attempt to destroy traditional Indian governments and institutions, and to force Indian people to abandon their culture and to assimilate into mainstream America. After two generations, the United States Congress found this policy to be a complete failure and abandoned it in 1934 in favor of reorganizing and promoting Indian self-government.

However, the damage had already been done. Non-Indian people came to own land within the boundaries of many Indian nations. And cultural and legal conflicts have arisen as Indian nation governments increasingly seek to fulfill their responsibilities as governments. Nevertheless, it would be both unfair and unwise to penalize Indian nations and Indian people further for the consequences of this failed Federal policy.

To the witnesses, and for the committee's information, to the witnesses that cited incidents involving the Navajo Nation government and the treatment of individuals, I would respond by saying that in addition to the comments I made earlier about learning what the law is and participating in that government system that you are practicing in, I would also say that they must realize that Navajo Nation, like other Indian governments, have a different system, have a different culture as to land. Their regard for land is different, basically different. In our nation, land is held in common ownership. And the laws and statutes that you will see and are cited regulate the use of the land, not title to the land. Only the Creator can say who has title.

So the people who cited those cases, if they would learn and educate themselves about Navajo law, I believe fruitful discussion can be held.

Now, it is the Navajo Nation position that section 329 really reveals the intent of the drafters, which is to destroy the judicial and political integrity of all Indian nations, in complete disregard of the covenant of trust and good faith, which binds the United States and those Indian nations. The Navajo Nation can say with certainty that it is not the only Indian nation to afford all persons within its jurisdiction such basic protections as I have described.

American Indian people taught the European immigrants to North America about democracy over 200 years ago. And those teachings found their way into the U.S. Constitution and the constitution of the States. To suggest now that Indian nations know or practice less justice, less protection of individual liberty or less democracy than do the States is based upon ignorance. It's probably rooted in racism, and is therefore immoral and contrary to the American ideals of government.

Accordingly, the Navajo Nation urges this committee to reject the concept of section 329. As we all engage in this great endeavor of building a more perfect Union, the Federalism, which includes Indian nations, must be protected from such concepts as that expressed in 329.

Mr. Chairman, I thank you for this opportunity to present these comments.

[Prepared statement of Mr. Yazzie appears in appendix.]

Senator INOUYE. Thank you very much, General Yazzie.

And may I now call upon Vice Chairman Hatch.

STATEMENT OF DONALD C. HATCH, JR., VICE CHAIRMAN, TULALIP TRIBES OF WASHINGTON

Mr. HATCH. Good afternoon, Mr. Chairman and members of the committee.

My Indian name is Spat-ub-kud. My English name is Donald Hatch, Vice Chairman of the Tulalip Tribes of Washington. I'd like to thank my Indian people that are here, who are behind me and on the panel, and what's happening here today. There's a lot of hurt in my heart to come here today. There's a lot of hurt for my people, my elders, my young children and my children's children and their children, and what might happen after this is over. We don't look at a lot of things in the long run at what could happen.

But I'd like to thank the committee for this opportunity to send testimony in an oversight hearing on this tribal sovereignty immunity.

I have a prepared statement which I'd like to submit for the record and summarize. First, Mr. Chairman, I'd like to raise here the strong opposition of the Tulalip Tribes to language such as proposed in section 329 of H.R. 3662, as reported by the Senate Subcommittee on Interior Appropriations. Such language would unjustly penalize Indian tribes who are asserting their legal rights in disputes with non-Indian reservation residents and neighbors.

And I'd like to paint another picture, a little different picture than the word that was stated in an earlier panel of gangs, Indians are like gangs in my tribe, my Tulalip Tribe and all the other tribes and nations. Under our treaties and other legal precedents the Tulalip Tribes have a government-to-government relationship with the United States. These treaties and precedents also created legal protected governmental resource rights into the tribes. We do not only have Constitutionally protected rights, but we also have adopted a process inclusive of non-Indians to manage our lands with good government.

The Tulalip Tribe has established a track record with the Federal, State and local government, as well as a positive record with our community, tribal and non-Indian. In my written testimony I detail several examples of how the Tulalip Tribes have entered into a friendly relationship with cooperative, accepting local governments and entities.

On the Federal and State level, I would like to cite two specific examples. First, on Interstate 5, we were successful in adding an interchange at 88th Street, where the Tribe assumed the lead role in the NEPA process. Second, under the Clean Air authorities, the Tribe has worked with the State of Washington and EPA to establish a tribal regulatory management.

Mr. Chairman, one of the things that was stated earlier was that the Tribe made *x* amount of dollars in our casino. I wish they could find that for me so I could carry it home in a suitcase to bring it back to my people. We have 1,300 employees of our tribe and 51 percent of them are non-tribal members. So we're feeding a lot of non-tribal, non-Indians, 51 percent.

Also, Mr. Chairman, the tribe has established a good working relationship with Snohomish County. For example, the tribe and Snohomish County entered into a comprehensive plan relating to reservation development. Under the plan, there was a clear division of permitting responsibilities, with the county regulating non-Indian property and the tribe regulating Indian property on the reservation. Tulalip has in this process a planning commission composed of Indian and non-Indian residents.

Also, to further enhance the law enforced coverage within the boundaries of the reservation, the tribes, Snohomish County Sheriff's office, has entered into agreement with the result of the establishment of a sheriff's substation on the reservation. The Sheriff's department is on our reservation, cooperative with our tribe.

Finally, Mr. Chairman, I want to show that the tribe has been able to work well with the local government within our boundaries. The Tulalip Boys and Girls Club is a prime example of the Tulalip Tribe's Marysville School District, the Boys Club of America, the

Department of Housing and Urban Development, the Indian and non-Indian individuals coming together to fulfill a dream which has been a positive influence on everyone in our community. That is going to be the first Boys and Girls Club in the State of Washington on Indian land, on a reservation, only the eighth in the United States, eighth, first in the State of Washington. And it's a cooperative between the Boys and Girls Club, all Snohomish County, and the Tulalip Tribes.

Mr. Chairman, I think the remarks and my written statement made it very clear that there are leaders of good will, mutual respect on both sides of these Indian and non-Indian disputes. They can be resolved without the need for ill consideration. Unjust constitutional actions, such as section 329, in many respects, the leaders and citizens of Snohomish County and cities of Marysville and Everett have accepted the governmental status of the Tulalip Tribes and have shown a great respect for our rights and our institution. And as a consequence, we have done the same and have been able to resolve many of our differences cooperatively.

This concludes my statement, and I would be happy to respond to any questions the committee may have.

And one thing, Mr. Chairman, I think it's just things that I feel and it really hurts me to come here for my people, it hurts me in the heart. Sometimes we look at, what can I do. And I come back here many times to fight a war that I think I could be home taking care of my people. But we as Indian people are back here, on that plane flying back here and trying to fight these wars day in and day out. And we talk about where the money's spent. That's where the money is spent. We need a cooperative agreement government-to-government to make things happen successfully for all our people, Indian and non-Indian.

Thank you.

[Prepared statement of Mr. Hatch appears in appendix.]

Senator INOUYE. I thank you very much, Vice Chairman Hatch.

And now may I call upon the distinguished President of the National Congress of American Indians, Ron Allen.

STATEMENT OF W. RON ALLEN, PRESIDENT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. ALLEN. Thank you, Mr. Chairman.

It's an honor, as always, to be able to be here before you to testify with regard to the matters before this committee and the Congress. I really do want to extend my appreciation to you as a champion and leader addressing Indian issues all over the map, everything from our Indian Child Welfare issues to housing, to health, etc., and now the gravest and one of the heaviest concerns to Indian country; tribal sovereignty. It is a pillar and foundation of our existence that you have been very clear about in terms of supporting us. And we do appreciate it.

I know the day is long and I know that you have sat through a great deal of testimony trying to capture the essence of this issue from all perspectives. I know that we at NCAI and I know that Indian country does appreciate that you want to make sure that the focus on this issue is clear, and it is well balanced, and it is in

proper perspective not only with the current conditions, but also historical conditions.

I think Chairman Jesse Taken Alive has captured a great deal of the spirit that has gone into this relationship historically. I don't think that a synopsis could be better captured on the legal and political history of the Federal tribal relations than was done by the attorneys Sue Williams and Doug Endreson. In my opinion, it was outstanding.

I was very encouraged to hear the administration officials say that they were going to unequivocally support and stand behind the tribes' sovereignty.

When issues are brought before this Congress regarding sovereign immunity or even just small components of sovereign immunity, and try to look at it from the perspective that all we're doing is refining the notion of how comprehensive should it be, we can look at it maybe as a great oak. And the foundation of that great oak is our sovereignty.

Well, if you keep chipping away at the foundation of that great oak, no matter how big it is, no matter how far it reaches out, no matter how old it is, it will fall. And that's the essence of our sovereignty. And we are very concerned about that.

We come here with heavy hearts, as you can hear in the testimony of the people on this panel, the testimony of lawyers who understand our issues, like Sue Williams and Doug Endreson. And the issues are conveyed to you by the many leaders and the many leaders who aren't even here. We're going to be conveying to you that our heart is heavy because the Congress has taken up a matter that we think is of great concern to us. Should we even be taking this issue up?

But we're here with also our warrior hearts. We're here because we're going to fight. We're here because we're standing side by side, 557 nations across this Nation. This Nation is great because of us, because of the conciliatory disposition of our people, from the Iroquois Confederacy to the California tribes. And I think that what you've been witnessing today is the fact that, for 500 years, we have moved over, we have adjusted. Every time you turn around in the course of our history, we've made adjustments. The fact that we have checkerboard reservations is not the fault of the Indian people. It is the fault of the Federal policies, the gyrations of the Federal policies in their attempt to take over Indian land, Indian resources, to dominate the Indian people, from the very beginning.

So we experience that today, again, in a new form. And the issue here is, as you have seen in witnesses here today, is that we are showing that our political systems do work. It does coexist very well with this system. And we've got a long way to go. We admit that. We don't have any problems admitting that we have a long way to go to refine our governmental system.

But the fact is, the Federal Government has an obligation to assist us in refining our judicial systems to meet the kind of standards that is expected in this Nation, within our political and judicial systems. Due process and remedies are available. The mere fact that you can find anecdotal examples, you can find those anywhere. We discovered that in Indian Child Welfare. But does that

mean we throw the law out? No. Does that mean we try to refine and diminish tribal sovereignty? The answer is no.

There are better answers, and there are great examples out there where you're seeing it working and being refined, if we're provided the opportunity. You see, these tribes here who have shown this committee countless examples, and we haven't even begun to add on to the list.

We see tribal State accords in Washington and New Mexico, and North Dakota, where tribes and States are working things out and getting onto a better track. You see tribal State Memoranda of Understanding [MOUs] with the tribes and the local counties.

So those kinds of arrangements and processes are being developed. They are there.

You see the Congress recognizing the need for improved court systems, like the American Indian Tribal Justice Act in 1994. Is Congress funding it? Is Congress providing the kind of quality that we need as court systems to elevate their capacity and capabilities to provide due process and improve those systems? No, it is not. The Federal Government has an obligation there, and it should assist us in that effort.

So what we're saying here, and what I think is being conveyed, is that the tribes, reflective of the theme of the NCAI convention in Tulsa, Oklahoma, is that we're standing our ground. We're not going to back off. And there is a better way.

You have said many times over that you can't legislative attitude. But we quite frankly will keep working with all of our counterparts out there. You see it in Lummi Nation, you see it with the Navajo Nation, Standing Rock and every other tribe out there. We are constantly working, no matter what the size of the tribe, or no matter what the condition, no matter what the issue. We're there. And we're doing it very, very well if we're given due credit for that. The Congress must understand that. Everybody who was affected by this must understand that.

We currently only own, still, 4 percent of the land in this Nation. Is the issue that they really want more than 4 percent, or should we be moving toward providing the tribes the opportunity to reacquire the fee patent lands within reservation boundaries to help resolve some of those problems?

So there are lots of solutions, and we have lots of solutions here for this Congress. But the abrogation or the diminishment of tribal sovereignty is clearly not one of them.

We have seen many treaties, we have seen many speeches throughout our history. And they all have said that we are distinct nations and we can and will and must live in peace and harmony. And I always like to reflect back on the treaty wampum belt that was a part of the Iroquois Confederacy, when I read a little clip about what it meant, and it has these two rows of purple beads. And what do they represent?

The chiefs back then said very clearly that they represent two nations, two different kinds of cultures, different sets of values, that have to co-exist. They represent our two vessels that will traverse these rivers side by side. And it means we will live together, but we will not try to steer each others' boat, each others' vessel.

That is reflective of our governments, and that's what we're trying to do here.

So we are here to help, we're here to make sure that the picture is clear, it's crisp and you understand the truth. The notion that our sovereignty, our governments are an anachronism is the reverse really of what the situation is. The anachronism is to go back to any notions of termination and assimilation. The true solution here is to strengthen the tribal governments, so we can co-exist in a very meaningful way, to the benefit of everybody, including our people.

With that, I thank you very much, Senator. And I look forward to being able to work with you, the committee and the Congress in resolving this very serious issue.

[Prepared statement of Mr. Allen appears in appendix.]

Senator INOUYE. Thank you very much, President Allen.

I had every intention of staying here as long as I could to carry on this discussion with you, to ask you questions. But I find that I will have to submit those questions, and further, to share with the Navajo Nation, the Lummi, and the Standing Rock Tribes, the transcripts of the testimony, because certain statements were made affecting your area. And I would hope that you will find it possible to respond to them.

The reason I have to leave is something that may be of concern to you. We will soon begin the debate on the continuing resolution for fiscal year 1997 appropriations. It involves, among other things, the appropriations for the Interior Department. And we have been advised that there may be attempts made to amend that portion, and such amendments may place in jeopardy, grave jeopardy, your gaming enterprises, among other things. There may be an attempt to revive section 329, one of the subjects that we have been discussing here, and include it in this resolution.

And so I must be there to make certain that these things do not happen. It is a big responsibility, but I am prepared to accept that.

As some of you are aware, as a U.S. Senator, and as a senior member of this committee, I have taken an oath to defend and uphold the Constitution of the United States. I have also taken a pledge to uphold and support the laws of this land, the treaties of this land and the decisions of our courts. And to me, it is very clear that these laws, provisions in the Constitution, and the decisions of our courts, clearly declare that Indian nations are sovereign, and that sovereignty is inherent.

It is further clear to me from these decisions and these provisions in Federal law that sovereign immunity can be waived, but it should be waived with the consent of the tribe involved.

I realize that these are difficult times, and for that matter, studying the history of Indian nations, it does not seem that there has ever been an easy time for you in the last 500 years. But notwithstanding the good reports that you have given of cooperation with your neighbors and working together, there is a perception, as other witnesses have testified, a perception that the legal process in Indian land, the judicial process is not fair, that it is somehow biased, that those providing such process are not quite competent. Whereas the realities do show that to the greatest extent, as the

Civil Rights Commission indicated, the courts are not biased, and the courts are competent.

I have over the years, ever since becoming chairman of this committee, tried my best to assure fininacial support for the judicial systems of Indian country. And as President Allen has indicated, though we do have a law on our books calling for such improvement and enhancement, we have failed miserably in providing the necessary funds.

Second, I have done my best to bring about better cooperation between States, the Federal Government, county governments and Indian nations. We have spent years on one measure, gaming, to bring about this cooperation. I have personally met with dozens upon dozens of Governors, spent hours and days, I think we have had over 81 meetings already. But now the *Seminole* decision of recent days has frustrated our efforts.

But I will not give up on that. I think we should continue to foster cooperation. We should continue to insist upon the Government of the United States carrying out its trust responsibility to see that the courts of Indian country are improved. I think it is a trust responsibility.

And so with that, I have to bid you good-bye, because I am certain you want me in the Senate Chambers instead of here. The work there is a bit more important at this point.

But finally, I would hope that upon receipt of the transcript of this hearing, those of you who have been mentioned in the testimony would respond to what has been said. Because if not, our record will not be complete.

So with that, to all of you, I thank you for your attendance, as well as your patience. Goodbye.

[Applause.]

[Whereupon, at 2:22 p.m., the committee was recessed, to reconvene at the call of the Chair.]

APPENDIX

Additional Material Submitted for the Record

Prepared Statement of Hon. Byron L. Dorgan, U.S. Senator from North Dakota

Civil Jurisdiction in Indian Country September 24, 1996 Mr. Chairman, I would like to thank you for scheduling this hearing and for inviting Jesse Taken Alive, Chairman of the Standing Rock Sioux Tribe of North and South Dakota, to testify today. Chairman Taken Alive brings an interesting perspective to the issue of civil jurisdiction and tribal sovereign immunity, as the Standing Rock Reservation is located in two states. Because of this, opening up tribal actions to suit in state court and eliminating tribal sovereign immunity as a defense to the court's jurisdiction would have an especially large impact for the Standing Rock Sioux Tribe.

I would like to say a few words about the subject of today's hearing. I have been a long-standing supporter of tribal sovereignty. The Supreme Court ruled in 1987 that "tribal authority over the activities of non-Indians on reservation lands is and important part of tribal sovereignty" and, as such, "civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or Federal statute." I support this Supreme Court ruling, and believe that Congress should exercise extreme caution when considering whether to infringe on Indian tribal sovereignty or the jurisdiction of Indian tribes over legal matters.

For this reason, I joined Vice Chairman Inouye, Senator Murray and others in opposing the so-called "Lummi" provision in the 1996 Omnibus Rescissions and Appropriations Act. This provision, contained in Section 115 of the Act, penalizes any Self-Governance tribe of Washington State involved in a dispute over water rights by cutting its Federal funding in half. This language, which was intended to address a dispute on the Lummi Indian Reservation, set a dangerous precedent by legislating fiscally punitive measures against any tribe in any state which attempts to exercise its legitimate governmental powers.

In a broad expansion of the Lummi provision, the fiscal year 1997 Interior appropriations bill approved by the Senate Appropriations Subcommittee on Interior would have provided that tribal actions or proposed actions which might impact private property would be subject to state and Federal court jurisdiction. It also would have waived tribal sovereign immunity as a defense in state and Federal courts. Thankfully, this onerous provision was deleted from the bill during full Committee consideration.

I realize that jurisdictional issues involving non-Indians who live or do business on Indian reservations is a complex matter that has serious repercussions for both sides. However, I also believe that it is fundamentally unwise to undue the basic notion of tribal sovereignty over civil legal matters without careful consideration of the long-standing legal precedents surrounding this issue. I look forward to hearing from all of the witnesses at today's hearing and to working with my colleagues to ensure that legal disputes can be resolved equitably without trampling on tribal sovereignty.

PREPARED STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

I would like to thank the Chairman for this opportunity to offer testimony on the issue before the Committee today. This is a matter of great importance to states with Indian reservations. The issue of non-tribal and tribal members with regard to tribal sovereignty and immunity dealing with private property rights is one that is extremely volatile in my state of Montana today. In reality the thought is one that is so very simple, it deals with the basic foundation upon which our country was established more than two centuries ago.

I join with Governor Racicot of Montana, in urging Congress to address and reconcile the competing visions of both tribal and non-tribal residents of reservations. Fortunately, I do not agree with the Governor's prognosis that Congress will not have the will to address and simply delineate the differences and seek a common answer to the concerns of all involved.

We can look back in our nation's history and see that conflicts result between states and tribes due to the undefined concept of what we call tribal sovereignty. The line between what can and should be done, is at many times as gray as gray can be, and leaves no understanding for the states to react to the needs of their citizens. This is neither the fault of the state nor the tribes. The fault lies within the halls of the buildings within which we work. At best Congress has done a complete job confusing and complicating the situation.

We started out more than a hundred years ago, with a policy which did nothing for the future of the Native Americans in this great land. We have turned now to the point of abandoning the private property rights of non-tribal members, whose families settled on tribal lands under the full protection of Federal law. I come here today to challenge the members of this Committee and Congress to address these concerns so that the future may be blessed with a sense of peace and understanding among all Americans.

Mr. Chairman, in the past 2 years I personally have seen conflict arise that could have been avoided if Congress had addressed the concerns of the people. The private property rights of the non-Indians are being subjugated to appease a few Members of Congress. Peace and understanding on tribal lands across the country are in confusion due to the indirect manner that Congress has taken to address the concerns of both the private citizen and the governments that represent them at the local level.

Although I do not always agree with what the senior Senator from Washington is seeking in the legislative process, I do tip my hat to him for coming to the table to start the debate on behalf of all the people. In Montana the problems that we see and hear from the people are not just from the non-tribal residents of the reservations, but also from tribal members who feel that their rights as citizens of this great country are being taken advantage of by some, not all, but some level of tribal authority.

Mr. Chairman, I have always commended you for your work on behalf of the Indian population in our country, and I have appreciated the way that you have come out to the states to get an understanding of the problems facing both the tribes and the non-tribal members living on reservations. However, the difference between your state's reservations, and my state of Montana are huge. The concept of the open reservation has created problems that you cannot really understand with a few trips through the area. Earlier this year I invited you to come to Montana and visit with both tribal and non-tribal members living on reservations, and I thank you for accepting that offer. Yet neither of our schedules have allowed us the opportunity to travel around Montana and listen to the people. Today, I renew that invitation, and I hope that in the coming year we can make this trip happen.

The basic problem which faces us today is not what is wrong, but how far we are willing to go to address the concerns of not just a select population, but of all the people. Before we go any further with any legislation, I hope that we will all go back to our homes during the upcoming time we have away from the confines of Washington and listen to the people. For it is in their wisdom and understanding, their courage and ability to face the problems and concerns on a daily basis that we can and will find the answers to the questions that this committee and Congress must ultimately address.

Mr. Chairman, I would also like to have included in the committee record statements from the Governor of Montana, a member of the Montana Legislature, the Montana Stock-growers and tribal and non-tribal residents of reservations in Montana. Thank you, Mr. Chairman for providing me with this opportunity to address the Committee on this very important issue to the state of Montana.

PREPARED STATEMENT OF SAM DAVIS, MAYOR, PARKER, AZ

My name is Sam Davis, and I am the Mayor of Parker, AZ, an incorporated town with approximately 2,500 residents, located just east of the Colorado River in western Arizona. . Thank you for the opportunity to briefly describe to you the present situation in Parker.

In 1908 Congress appropriated money to enable the Secretary of the Interior "to reserve and set apart lands for townsite purposes" in the Colorado River Indian Reservation. The Secretary subsequently created the townsite of Parker, AZ, and approximately two-thirds of the lots in town were purchased by non-Indians at public auctions. Ninety percent of the population of Parker is non-Indian.

Following 5 years of litigation in Federal District Court in Phoenix, AZ, last month Judge Strand issued a decision which concluded that the Parker lands are still part of the Colorado River Indian Reservation. He enjoined the Town from enforcing its building code on "tribal lots" in the townsite. Parker is appealing Judge Strand's order.

In the meantime, the court's decision leaves residents of Parker subject to a complicated and confusing combination of state, tribal and Federal jurisdiction. There are numerous unanswered questions regarding whether and how the tribes will assert jurisdiction in Parker in such areas as taxation, zoning, business licensing, liquor sales and health and safety regulation. The most serious and urgent problems relate to law enforcement. A particular law enforcement officer's authority in a given situation on an Indian reservation depends upon the identities of the suspect(s) and victim(s). The varying degrees of authority between Federal, state, county, town and tribal officers can lead to confusion, delay and even physical harm-to both citizens and police officers.

Last month, for example, a tribal member driving a pickup truck repeatedly rammed, at high speeds, a squad car occupied by the Town's chief of police. Because the suspect is an Indian, the police chief and other Parker police officers had no authority as police officers to take any law enforcement action in response to the suspect's unprovoked attack. They could only stand by as the suspect threatened the chief's life, damaged property and fled from the scene. This attack was only the latest in a series of recent incidents in which tribal members have assaulted Parker police officers.

The existing situation is very frustrating for town police officers. Our officers were trained to enforce the law fairly and uniformly for the benefit of the entire community, without regard to race or creed. Now they are being required to discriminate on the basis of race, refraining from enforcing the law in any situation involving an Indian. Not surprisingly, the town is finding it increasingly difficult to retain existing members of its police force and to recruit additional officers.

Federal, state, county, town, and tribal officials agree that cross-deputization of law enforcement officers would constitute an effective and efficient solution to the law enforcement problems stemming from Judge Strand's decision. The tribes, however, are refusing to cross-deputize Parker police officers. The town is attempting to secure deputy special officer commissions from the Bureau of Indian Affairs for all Parker police officers who do not presently have such commissions. The tribes have requested Federal funding for six additional tribal officers in order to provide increased law enforcement services in town. The town of Parker opposes that request but, as a compromise, it is willing to have extra BIA officers assigned to Parker on a temporary basis to supplement, as needed, the existing resources of the law enforcement agencies with jurisdiction in Parker.

Both the tribes and the town are interested in working out a comprehensive, permanent resolution regarding law enforcement and other jurisdictional issues relating to the townsite. Representatives of the two governments are engaging in discussions to achieve that objective, starting with the issue of law enforcement. We anticipate that any final agreement will be presented to Congress for approval.

Thank you again for this opportunity to discuss the difficulties in Parker. I would be happy to address any questions you may have.

PREPARED STATEMENT OF W. DEWEY CLOWER, PRESIDENT—NATSO, INC.

On behalf of NATSO, Inc., the professional and legislative representative of America's $28 billion travel plaza and truckstop industry, I am pleased to present testimony to the Senate Indian Affairs Committee on the issue of Native American sovereignty and its effect on business competition between Indian and non-Indian retailers. Our association has over 1,050 travel plaza and truckstop members employing nearly 200,000 individuals nationwide and more than 300 allied companies that provide products and services to the industry and its customers. As fuel sales con-

stitute the largest portion of our truckstops' retail sales, many of our members are increasingly concerned about retail fuel facilities located on Native American reservations that sell fuel state tax free to non-Indians.

Native American sovereignty provides Indians with significant tax benefits including exemption from state sales and excise taxes on items they purchase on reservation land. Though Federal law intends this tax exemption for Indians only, many tribal retailers extend the tax exemption to non-Indians who also purchase goods such as motor fuel on reservations. State excise taxes on motor fuel range from 7.5 cents to 32.5 cents per gallon. Since taxes make up such a large portion of the retail price, selling motor fuel state tax-free provides Indian retailers with an unfair competitive advantage over non-Indian retailers who must collect and remit the taxes.

For example, just outside of Buffalo, New York, along the New York State Thruway lies the Cattaraugus Indian Reservation. An Indian fuel retailer there currently sells diesel fuel for $1.15 per gallon. Meanwhile, non-Indian truckstops elsewhere along the thruway sell diesel fuel for $1.39 per gallon—a difference of 24 cents per gallon. The fuel is the same, the only difference is the price.

The Indian tax exemption unfairly allows this Indian retailer to offer fuel for sale at a price much lower than his non-Indian competition. By purchasing fuel on the reservation, a non-Indian trucker saves $26.40 on an average fill-up of 110 gallons and $72 if he fills up to his tank capacity of 300 gallons. This price difference provides a strong incentive for the non-Indian trucker to fill up on the reservation. And in the retail fuel industry where profit margins are measured in pennies, this price difference will force non-Indian retailers out of business. Additionally, the uncollected tax deprives the state of New York critical funding for infrastructure construction and maintenance.

The Supreme Court has ruled that states have a right to impose taxes on reservation sales to non-Indians. However, the Court has also held that if a tribe fails to collect state taxes from non-Indian purchasers, tribal sovereign immunity prevents a state from bringing suit against the tribe to recover the taxes. States, then have a right to taxes on sales to non-Indians but no remedy when tribes fail to collect them.

While several states such as Wisconsin, Minnesota and North Carolina have negotiated successful working agreements with tribes that provide for the collection of taxes on sales to non-Indians, other states such as New York, New Mexico, and Oklahoma have experienced great difficulty reaching this type of agreement. Native American sovereign immunity provides little incentive for tribes to work out an agreement with states over these taxes legally due the state.

Although state taxes are at stake in this debate, NATSO believes the Federal Government can and should play a role in this policy question. The Constitution vests the Federal Government with exclusive authority over relations with the tribes. NATSO strongly encourages Congress to add reservation fuel tax collection practices to the list of other Indian issues—like gaming and Bureau of Indian Affairs [BIA] reform—already under congressional scrutiny.

NATSO also strongly supports the Istook/Visclosky amendment included by the House of Representatives in the fiscal year 1997 Interior Appropriations. This amendment provides what we believe to be a fair incentive for tribes to work out an agreement over taxes rightfully due the state. The amendment simply requires that before any new lands can be transferred into tribal trust, the tribe must have a binding agreement with state and local governments providing for the collection and payment of state and local taxes on sales to non-Indians. Again, this amendment deals only with taxes on non-Indians.

Enactment of this legislation this year would be timely. Several tribes are actively seeking trust land along busy trucking corridors. For example, the Peoria Indians of Oklahoma are seeking to open a large truckstop in Wright City, MO, just outside of St. Louis along Interstate 70. The tribe plans to apply to the BIA to have the land placed in Federal trust. Once placed into trust, local and state laws will no longer be applicable on this land. To ensure collection of state taxes on any sales this truckstop will make to non-Indians, the Istook/Visclosky amendment would require the Peoria Tribe to enter into an agreement with the state of Missouri regarding collection of these taxes before the land is placed into trust. NATSO believes this amendment to be a reasonable means of addressing state-tribal tax problems before they have a chance to escalate.

Also on the Federal level, NATSO believes that limits should be placed on Federal grants that tribes receive for economic development absent an agreement between the tribe and state over state taxes. In 1995, the Choctaw Tribe of Oklahoma received $750,000 from the Housing and Urban Development Indian Community Development Program to help build a truckstop along a busy trucking route. Meanwhile the BIA is giving the Cherokee Nation of Oklahoma $150,000 to complete a

travel plaza on an Interstate highway. At the time these grants were awarded, no agreement was in place between the tribes and the state. In the interest of fairness, NATSO urges Congress to prohibit using Federal grants to help tribes construct retail fuel outlets on reservations that fail to collect and remit state taxes on fuel sales to non-Indians.

In conclusion, NATSO urges Congress to close the legal loopholes that allow tax-free sales by Native American retailers to non-Indians. Requiring Native American fuel retailers to collect state taxes due on sales to non-Indians will not jeopardize their economic viability; it will simply level the playing field for all retail fuel outlets—both Indian and non-Indian. Additionally, collection of state taxes will prevent states from losing revenues vital to meeting infrastructure needs.

Prepared Statement of the Oneida Indian Nation

The Oneida Indian Nation thanks the Senate Committee on Indian Affairs for this opportunity to offer public testimony on the critical issue of sovereign immunity.

Common law immunity from suit is an inherent and essential attribute of sovereignty. It protects one sovereign from unwarranted intrusions by other sovereigns and their citizens. It provides a sovereign with the power and freedom to express the will of its people in matters of culture, community and association.

There are only three sovereigns within the outer geographical boundaries of the United States: the Federal Government, the states, and Indian nations. These three sovereigns have each chosen to allow the other two sovereigns some intrusion into their sovereign domain. In the case of the states, they voluntarily gave up a great deal of their original sovereignty in choosing to join the union. In the case of the Indian nations, they gave up millions of acres of land and established unique relationships to the United States. The Federal Government's sovereignty has been waived in some respects to allow suits by states and Indian nations. This method of shared responsibility and sovereign authority is integral to the continued intergovernmental cooperation of these three governments.

Pursuant to the Constitution and principles of Federal Indian law, the Federal government claims the power to alter the balance of this shared responsibility and sovereign authority. However, any change to the balance has an effect on thousands of U.S. citizens, and should not be exercised without serious consideration of the potential consequences. In addition, the Federal Government owes a special treaty obligation and treaty responsibility to Indian nations above and beyond the typical responsibilities it owes to all U.S. citizens. It has made solemn vows, promises and covenants to the Indian nations through the numerous treaties it has entered into with them, and it has a special relationship with the Indian nations by virtue of its own laws and recognized international legal norms.

The Supreme Court has recently restated the importance of sovereign immunity in *Seminole Tribe of Florida* v. *Florida* [1996]. There the Court noted that sovereign immunity, as preserved by the 11th Amendment, is an inherent attribute of sovereignty, and is essential to a sovereign's continued vitality as the protector of its citizens' right to choose their culture and the character of their communities. In regard to Indian nations the Court has repeatedly emphasized the importance of sovereign immunity, as demonstrated in *California* v. *Cabazon Band of Mission Indians* [1987] [Indian nation is immune from state attempts to regulate high stakes bingo, in light of tribal interest in economic development and self-sufficiency] and in *Santa Clara Pueblo* v. *Martinez* [1978] [Indian nation is immune from suit because determination of citizenship is an inherent power of the sovereign].

The amendment recently proposed by the Senate Subcommittee on Interior and related Agencies to the fiscal year 1997 Interior Appropriations Bill [Section 329] would have permitted anyone who asserts that his or her private property interest might be affected by a proposed action of an Indian nation to sue the Indian nation and its officials in state or Federal court to stop the Indian nation from proceeding. It would allow the party bringing the suit to recover damages from the Indian nation for any harm the court might decide the action, or threat of action, has caused.

The amendment would have empowered state courts, many of which have long histories of hostility toward Indian nations, to bankrupt Indian governments for even considering actions that might adversely affect any private individual's interests. Congress has never before provided such a blanket authorization for state court jurisdiction over Indian nations and Indian officials.

Indian nations, like the state and Federal Governments, have long been recognized as possessing immunity from suit, unless that immunity was waived by the Indian nation or an Act of Congress. Congressional waivers of Indian sovereign immunity are both rare and limited. The blanket waiver of sovereign immunity in this

legislation would allow disgruntled opponents of Indian nations to flood both state and Federal courts with litigation that has historically been reserved to tribal courts out of respect for the government-to-government relationship between Indian nations and the United States. Indian nations would quickly be impoverished simply by the costs of defending this litigation.

In addition to litigation from their non-Indian neighbors, dissatisfied members of an Indian nation would also be able to force the Indian nation to litigate those disputes in state courts and give state courts the authority over the conduct of internal Indian government. Congress has considered and rejected proposed legislation to waive tribal immunity in favor of Federal court jurisdiction to hear internal Indian government disputes in the past. Instead, Congress has passed legislation to strengthen Indian justice systems so that challenges to Indian government actions can be heard in appropriate Indian forums. The proposed amendment would have reversed the significant gains and improvements made in Indian justice systems over recent years, since all would be free to bypass tribal courts.

As noted above, immunity from suit is an essential attribute of sovereignty and as such is the cornerstone of Indian governments. Any limitation on that sovereign right severely impairs the sovereignty of Indian nations. Without the ability to protect itself as a sovereign government, an Indian nation is no longer able to protect and preserve its citizens' right to exercise their culture, choose the character of their communities or determine with whom they wish to associate.

If the Federal Government restricts the sovereign immunity of Indian nations it breaks its own solemn promises, violates its trust responsibility, and leaves Indian people vulnerable to cultural extinction.

The Oneida Indian Nation strongly opposes any legislation which seeks to destroy the rights of Indian nations to exercise self-government. We sincerely hope that the Congress of the United States will take no action that might unhinge the balance of shared responsibility and sovereign authority among the Federal government, the states, and Indian nations, without thoughtful and careful consultation with Indian nations.

Prepared Statement of Lana E. Marcussen

The power of Congress to grant to a tribe "sovereign immunity" is in question because of recent U.S. Supreme Court decisions. The trend of these decisions is to create "accountability" in both the tribes and more importantly, in the Congress itself. Congress cannot delegate what it does not possess. The last decision of the U.S. Supreme Court this term, *U.S.* v. *Winstar*, which changes the sovereign immunity of Congress, is likely to have as much impact on tribes as the *Seminole* decision.

The Congress should end "sovereign immunity" before a tribe does something so inherently unfair or radical that there is no alternative. For example, the Mescalero Apache Tribe is refusing to obey a Federal district court order to close their casino. The U.S. Attorney of New Mexico has stated he is going to enforce the order. Why should Mescalero obey—they have sovereign immunity.

Tribal sovereign immunity has led to two intrinsic problems: arrogance and greed of tribal officials. If the point of federal Indian policy was to make the Indian people ready for citizenship, then Indian sovereign immunity must be abolished now before the arrogance and greed of corrupt tribal officials results in a backlash of public opinion against tribal interests. Indian gaming has pushed the question of sovereign immunity to the limit, as the Pojoaque Pueblo found out when it blocked the highway into Santa Fe. The public reaction which had been very sympathetic to the gaming tribes, changed in 2 hours.

Indian sovereign immunity was intended to give the tribes separate but equal rights to those enjoyed by states. This was the objective of the Indian Reorganization Act of 1934. But, the tribes with their sovereign immunity are no longer the victims of discrimination they are the victimizers. Here are some examples with which I am personally familiar:

Dennis Williams received the estate of his mother from the Navajo Probate Court. Two years later, the case was telephonically reopened and placed on appeal by the Navajo Court of Appeals. Mr. Williams was excluded from the hearing because he objected to the Court's jurisdiction. He discovered that the case was reopened by physically switching case numbers on the records. He appealed with his proof of the switch and was denied review by the Navajo Nation Supreme Court. He was then served with a new case alleging damages for his resistance to the injustice. He refused to pay the judgment and was thrown in jail for civil contempt. This case is still going on. It began in 1984 and is now in the Federal District Court awaiting review of the Navajo Court decisions.

Bruce Williams, a non-Indian used car salesman doing business just outside the Navajo Reservation was arrested by a Navajo police officer for refusing to sign a Navajo Nation speeding ticket. Mr. Williams expressly told the officers that he would sign a New Mexico ticket issued by them. He was arrested and transported to the San Juan County detention center under the Navajo citation. He is now suing the tribe for civil rights damages in state court. In addition, his business has been targeted by the DNA-the legal defense fund for the Navajo. There are now two substantial tribal court judgments against Bruce Williams containing more than $35,000 in punitive damages seeking to be enforced in the state courts under *Jim v. CIT*, the only full faith and credit case ever won by a tribe. The New Mexico Court of Appeals has accepted the first case for full briefing.

The Talleys were farmers on the CRIT reservation when a series of actions were taken by very corrupt tribal officials to revoke very valuable farming leases and give them to someone more popular with the tribe. They were forced into bankruptcy because every piece of ground they had farmed, some for 50 years, was refused to them. A civil rights/breach of contract complaint was served on CRIT 2 weeks ago.

There are countless individual horror stories of tribal abuse of sovereign immunity, inflicted on both Indian and non-Indian citizens. Now, the tribes are expanding their jurisdiction, especially in Montana, to include tribal taxation of non-Indian fee land businesses and awarding outlandish judgments of $250 million and more in tribal courts. Since they have sovereign immunity, there is currently no check on their authority if they are found to have jurisdiction.

The states are no longer a threat to the tribes. The Civil Rights movement of the 1950's forever changed the ability of the states to discriminate. This old justification for tribal sovereign immunity is not valid. The states' enemy is the Department of the Interior and the "reserved rights doctrine" it created. The states would all welcome the Indian people as full citizens and immediately grant full state services in exchange for a final determination of rights. Indian people are already represented in state government at all levels. There is no more state segregation of rights.

Ending tribal sovereign immunity right now would enable the Indian people and their leaders to start the transition from Federal ward status to citizenship while still enjoying some of the direct Federal protection. It would mean that tribal governments would be accountable. It would end widespread corruption, establish the enforceability of the Indian Civil Rights Act and possibly even allow Federal judicial review of tribal court decisions. Contracts would be enforceable allowing business development on the reservations. The U.S. Attorneys could probably even shut illegal casinos.

Tribal governments would restructure using their own customs and chose to either incorporate, become municipalities or counties, or seek enclave status. There would be no limitation on their social activities. These choices would undoubtedly increase representation of Indian citizens, end the militancy, define the jurisdiction, and allow final determinations of water rights. For the first time since conquest, it would allow the Indian citizens to make real decisions for themselves. The Indian people are ready for full citizenship, end tribal sovereign immunity.

PREPARED STATEMENT OF JESSE TAKEN ALIVE, CHAIRMAN, STANDING ROCK SIOUX TRIBE

Mr. Chairman and members of the committee. I am Jesse Taken Alive, Chairman of the Standing Rock Sioux Tribe. I am here to express in the strongest possible terms my tribe's opposition to any Congressional waiver of tribal sovereign immunity.

I would like to thank the committee for holding this hearing and providing me with an opportunity to testify. The trust responsibility and basic principles of fairness require that when Congress considers matters of Federal Indian policy, the tribes be entitled to express their views before Congress acts and to participate fully in the process. This hearing, like so many other actions taken before, demonstrates this committee's commitment to this principle.

At the same time, over the past few years, Congress has time and again considered legislation to take away the rights of the Tribes, in complete disregard for this principle. The tribes have faced—and continue to face today—a series of major initiatives in Congress that would harm tribal , interests and undermine longstanding commitments to the Tribes. These initiatives, which threaten tribal self-government interests, have been advanced in a manner that limits or excludes tribal participation in the process. Where there is a chance to respond to these proposals at all, tribes are forced to demonstrate at the last minute why they should be permitted to retain their sovereign rights.

As we understand from the committee, this hearing arose in response to section 329 of the Senate Interior Appropriations bill. That provision, which would waive tribal sovereign immunity, would have altered Federal Indian policy and subjected tribes to suit in Federal and state courts in an unprecedented manner. Yet, section 329 was offered as an appropriations bill rider without any consideration whatsoever of the views of the tribes.

Unfortunately, it appears that this has now become standard operating procedure for those who would like to undermine tribal rights. Over and over tribes find that Congress is considering fundamental changes in Federal Indian policy—and is intentionally preventing the tribes from being heard. The list of such initiatives is long—and I mention just a few examples.

Taxation of Tribes. Last year, the House Ways and Means Committee included a provision to tax tribal gaming proceeds in the Omnibus Budget Reconciliation Act. The provision would have reversed the long settled principle that tribes are not subject to Federal income tax. And, it would have imposed a tax on tribal gaming, while leaving state gaming revenue untaxed. No hearings were held on this major proposal, and tribes were not given an opportunity to address their concerns to the Ways and Means Committee. The language was released only 3 days before the Committee's markup of the bill.

Means testing. Also last year. the Senate Interior Appropriations Subcommittee included in the fiscal year 1996 Appropriations bill, a provision to require the Secretary to reduce Federal funding for tribes that have revenues from gaming—a gross sort of tribal means testing that has never been imposed before. This language was not the subject of any hearings, or offered to the tribes for meaningful comment.

Istook amendment. This is a provision in the current House passed version of the Interior Appropriations Committee. It would prohibit lands being taken into trust unless there was a tax agreement in place between the tribe and the state regarding sales to non-members of the tribe. The amendment would impair the rights of tribes to restore their land base and strengthen their communities. Although the measure was initially disapproved by the Appropriations Committee and stricken by the Rules Committee, it was adopted as a floor amendment in the House. We understand that there is now a danger that it may also be presented as a floor amendment to the Senate Interior Appropriations bill that is now under consideration. There have been no House or Senate hearings on the Istook amendment, no showing of need for it, and no consideration of its impact on broader Federal Indian policy.

Gaming amendments. We understand that amendments will be offered to the Senate Interior Appropriations bill to amend the Indian Gaming Regulatory Act. These may include amendments that would prohibit the Secretary of Interior from approving new gaming compacts, prevent the Secretary from establishing procedures for approving Class III gaming, and bar one tribe [the Narragansett Tribe of Rhode Island] from participating in the benefits of the Indian Gaming Regulatory Act. Although these amendments would fundamentally alter the core provision of IGRA—the compacting process—it has never been the subject of any hearings, and is being advanced in a manner designed to prevent tribal input and reasoned consideration.

The United States has a trust responsibility to aid the tribes in the exercise of our sovereign authority. The efforts in Congress to enact legislation that would fundamentally alter the rights of tribes, without hearing from the tribes themselves, is in violation of that trust responsibility. In the face of these efforts, the Chairman and Vice Chairman of this committee have repeatedly stood up for the rights of tribes to be heard and for Congress to act fairly in its dealings with the tribes.

We deeply appreciate the Chairman and Vice Chairman's support for the rights of tribes and your willingness to take action when others propose to undermine tribal rights. Through your efforts, this committee has maintained a key element of the trust responsibility—the responsibility to protect the tribes from unfair actions in Congress that would harm tribal interests.

I turn, then, to the issue of tribal sovereign immunity. The Standing Rock Sioux Tribe along with the other tribes that comprise the Great Sioux Nation—is a treaty tribe. The United States and the Sioux Nation entered the Treaty of Fort Laramie in 1868. To us, that treaty is an expression of our sovereignty, and a recognition of our sovereignty by the United States. The principle of tribal sovereign immunity is an important part of our sovereignty. It signifies that the tribe, like other governments, can decide the best manner for resolving disputes with others. In a practical senses it also means that tribal resources that are needed for core governmental services, are not too readily put at risk by lawyers and others seeking personal gain at tribal expense. Overall, we see sovereign immunity as a protected right that—

like other rights derived from our treaty must not be taken away without our consent. If Congress can take away our sovereign immunity without our consent, what protections exist for other tribal rights?

Section 329 of the Appropriations bill would have waived tribal sovereign immunity for suits by property owners. It would have allowed tribes to be sued in Federal court or state court, for money damages, or injunctions.

The operation of a tribal court goes to the heart of tribal self-government, by providing a modern mechanism for the tribe to exercise its longstanding authority to resolve disputes arising on the Reservation. It is vitally important for tribal courts to continue to mature and enhance their already significant capabilities. Section 329—or any other Congressional waiver of tribal sovereign immunity—would undermine the efforts to promote the development of tribal courts. Such a provision would suggest that tribal courts are not meaningful institutions of tribal self-government and that tribal courts do not properly dispense justice—propositions we strongly reject.

The premise of section 329 appears to be that non-Indians need to be treated differently that they need remedies to be made available to them by Congress outside of tribal courts. In our view, precisely the opposite is true. The Standing Rock Sioux Tribal Court provides equal access to litigants—whether they are Indian or non-Indian. If a dispute arises on the reservation, or involves at least one Indian party, the Tribal Court is available to resolve the matter.

According to the Chief Judge of the Standing Rock Sioux Tribal Court, many non-Indians avail themselves of access to the Tribal Court. The cases filed by non-Indians are in various categories. Many are non-Indian creditors or vendors who file actions in Tribal Court to collect on a debt or to repossess an automobile. There have been in excess of 200 such cases brought in the Tribal Court over the past year—with many reduced to judgment. Other cases brought by non-Indians against Indians include (1) landowner actions against an adjoining Indian landowners for livestock trespass, (2) child support actions, and 3) paternity actions. Even a subdivision of the State, Sioux County, which is located on the reservation, filed an action in Tribal Court against an Indian employee claiming misuse of county phones. As these examples reflect, the Tribal Court is open to claims by non-Indians, and is being used extensively in that regard. It is simply not the case that non-Indians need to be provided with access to state or Federal courts to address claims that arise on the reservation. The Tribal Court treats Indians and non-Indians alike in an evenhanded and fair manner.

With respect to claims against the tribe itself, we have taken a reasonable and balanced approach. Tribal employees who commit torts within the scope of their employment are typically covered one of two ways. In those programs that the tribe operates under a Self-Determination Contract. Such torts are covered by the Federal Tort Claims Act. In other cases, the tribe has liability insurance. In the insurance we purchase for the tribe, we require that the insurer include language in the policy stating that if a claim is asserted against the tribe, the insurance company will not assert immunity within the policy amount. This assures that an injured party who has a claim covered by our insurance can get his day in court, but that the tribe's general fund is not placed at risk.

With respect to commercial dealings, the tribe has taken different approaches, depending on the circumstances and the needs arising out of the particular transaction. In some instances, the tribe operates commercial ventures through Tribal Corporations, that have waived immunity in their corporate charters. In other cases. the tribe has agreed to arbitration as a remedy under a contract. In these commercial matters, the parties are able to work out the appropriate remedy by agreement—and no action by Congress is necessary.

Beyond this, the tribe is not aware of any claim being asserted in Court against it by non-Indians. If such a claim arose. we would consider it on a case by case basis. But nothing in our experience suggests that there is a need for a broad remedy that encroaches so deeply on tribal sovereignty, as section 329 does.

To be sure, we are aware that there are a small number of non-Indians who are hostile to the notion that tribes are governments, and that tribal governmental action can impact non-Indians on the Reservation. We also know that there may be some individuals who feel aggrieved by the actions of particular tribal officials—just as there are individuals who feel aggrieved by actions taken by Federal or state officials. But that is not a reason for taking away the sovereign rights of tribes.

Tribal self-government and self-determination are among the keys to our survival as a tribe. Congressional waivers of tribal sovereign immunity would serve to undermine tribal self-government to an unprecedented degree. To the extent that the committee has concerns about tribal justice systems, we urge the committee to refocus its attention on providing the resources needed to enhance tribal courts. That was

the promise of the Indian Tribal Justice Act. But while that Act suggested that funding for tribal courts would be afforded a higher priority by Congress, in fact the opposite has been true. Our Tribal Court received only $302,000 in appropriated funds for fiscal year 1996—a reduction of $46,000 from the previous year. We urge the Committee to continue its efforts to see that tribal court funding is returned in future years to adequate levels.

In conclusion, we strongly oppose any measure designed to waive tribal sovereign immunity. Such a provision is not needed, and would be contrary to the longstanding Federal policy of promoting tribal self-determination. Again, I appreciate the Committee's invitation to testify, and your strong support for tribal governments.

STATEMENT OF ROBERT T. ANDERSON
ASSOCIATE SOLICITOR, DIVISION OF INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR
BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
CONCERNING TRIBAL SOVEREIGN IMMUNITY AND SECTION 329
1997 INTERIOR APPROPRIATIONS BILL

September 24, 1996

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on the principle of tribal sovereign immunity and on the integral function which sovereign immunity serves in empowering Indian tribal governments and in advancing self-determination.

From the first days of our Republic, the United States has recognized Indian tribes as governments. There are presently over 500 federally acknowledged tribes within the borders of the United States. These tribes range from very small to very large, both in membership and in the scope of tribal territory. Despite this variety, one thing they all have in common is the sovereignty that is inherent to government, regardless of size or type of organization. Congress recently expressly affirmed the sovereign status of tribes in the 1994 "Federally Recognized Indian Tribe List Act," stating, "the United States has a trust responsibility to recognized Indian tribes . . . and recognizes the sovereignty of those tribes." In this Act, Congress validated the authority of the Secretary of the Interior to maintain a list of acknowledged tribes. In publishing this list, the Secretary has consistently indicated that listed tribes possess "the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States, as well as the responsibilities, powers, limitations and obligations of such tribes." 60 Fed. Reg. 9250, 9251 (1995); 25 C.F.R. § 83.2 (1996).

Article I, Section 8, of the United States Constitution vests the federal government with the power to regulate commerce with Indian tribes. In 1831, Chief Justice John Marshall examined the status of tribes in relation to the United States and determined that tribes were neither states nor foreign nations. He characterized them as "domestic, dependent nations," possessing attributes of sovereignty and yet dependent upon the protection of the United States. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). One year later, Chief Justice Marshall noted that this dependent status does not strip tribal governments of their inherent sovereignty and that states generally lack

jurisdiction in Indian country. The Supreme Court's holding in Cherokee Nation must, of course, be read against the background of the United States' solemn pledge to protect Indian tribes, which was frequently set forth in early Indian treaties. Art. III, Treaty with the Cherokee, 1785, 7 Stat. 18. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

Thus, tribes are sovereign nations and possess all powers of government, except those which have been expressly extinguished by Congress or, as the Supreme Court has ruled, are inconsistent with overriding national interests. Tribes can adopt and operate under their chosen form of government; levy taxes; license and regulate activities; define conditions of tribal membership; exclude persons from tribal territories; exercise zoning authority; make and enforce laws, both civil and criminal; and establish tribal courts of law. In addition, Congress has delegated federal powers and authority to tribes in a number of statutes.

The final two attributes of sovereignty are related to our discussion today, and I would like to present a brief summary of tribal criminal and civil jurisdiction before examining the doctrine of sovereign immunity. The scope of tribal criminal jurisdiction is fairly straightforward and is governed largely by federal statutes. With the exclusion of enumerated "major crimes," a tribe has jurisdiction over Indians within Indian country. A state has no criminal jurisdiction over tribal members in Indian country except in states subject to the provisions of Public Law 280.

However, the contours of tribal civil jurisdiction are considerably more complex, as they are not established by federal statutes. Since tribal civil jurisdiction concerns those matters which are linked most intimately with tribal identity, the exercise of broad tribal civil jurisdiction is essential to the maintenance of a vigorous tribal government. The Supreme Court has indicated that tribes may regulate activities of non-Indians on fee lands who enter consensual relationships with the tribe or tribal members or whose activities otherwise directly affect the political integrity, economic security, or health or welfare of the tribe. Montana v. United States, 450 U.S. 544, 565-66 (1981).

The retention of significant tribal powers in the regulatory arena is matched by expansive tribal court jurisdiction over civil matters, as evidenced in subsequent Supreme Court rulings. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16, 18 (1987) (tribal courts best qualified to interpret and apply tribal law; tribal authority over activities of non-Indians on reservation land an important part of tribal sovereignty); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985) (requiring plaintiffs to exhaust tribal court remedies; exercise of

jurisdiction over non-Indians presents federal question, reviewable by federal court). The reservation of jurisdiction to tribal courts over civil matters arising within Indian country springs from the pre-existing government authority of Indian tribes and is maintained by the United States' respect for the government-to-government relationship between tribes and the United States.

The United States recognizes that states should not have judicial authority over Indian tribes. Rather, tribal justice systems remain the most appropriate forums for the adjudication of disputes affecting tribes, as well as those affecting personal and property rights. Congress recognized the importance of tribal courts in passing the 1992 Indian Tribal Justice Support Act, 25 U.S.C. § 3601(6), although no funds have been appropriated for its implementation.

Despite limited funding, tribes have developed systems to meet the growing demands of tribal communities and changing tribal economies. The vast majority of tribes do not have the resources or revenues to develop the justice systems they envision. The President's Fiscal Year 1995 and 1996 budget requests included funds to implement the Indian Tribal Justice Support Act. Proposed regulations establishing funding levels to be awarded to eligible Indian tribes for use in establishing or enhancing traditional or contemporary justice systems were published on July 30, 1996.

In September 1995, mandated by the Indian Tribal Justice Support Act, the Bureau of Indian Affairs competitively awarded a contract to a non-federal entity to conduct a survey of conditions of tribal justice systems and Courts of Indian Offenses. This study will determine resources and funding, including base support funding, needed to provide for expeditious and effective administration of justice. Compilation of the results of the survey will begin in the next fiscal year.

A corollary to these sovereign powers of regulatory and judicial authority is the common law doctrine of sovereign immunity. Since a sovereign can mandate laws and create courts to interpret and apply these laws, it follows that a sovereign cannot be sued absent its consent. The roots of this doctrine are in English and continental law, and American courts have subsequently adopted and modified it. Consent to be sued is best given in clear terms, although courts have occasionally found implicit waivers. American governments explicitly have consented to suit to such an extent in, for example, the Federal Tort Claims Act, that sovereign immunity may serve more as the exception than as the rule. Indeed, where Indian tribes contract to perform federal functions under the Indian Self-Determination Act, the Federal Tort Claims Act system is available in certain circumstances to redress alleged grievances by individuals

affected by those operations. it is important to note, however, that Congress established this system without waiving tribal sovereign immunity.

It is well established that the doctrine of sovereign immunity applies to Indian tribes, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (citations omitted), as it does to state and federal governments. See also Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 172-73 (1977). Most recently, the Supreme Court in Oklahoma Tax Comm'n v. Potawatomi Tribe, 498 U.S. 505 (1991), stated:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. . . . Congress has consistently reiterated its approval of the immunity doctrine [in Acts which] reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."

498 U.S. at 510 (citations omitted). The Supreme Court concluded that, "Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity." Id. Thus, Indian tribal sovereign immunity retains its full vitality.

However, tribes have the ability to waive, and have in fact partially waived, their sovereign immunity when it was necessary for practical reasons for them to do so, as in water rights agreements, mineral leases, and other commercial enterprises. There are limitations on the types of activities for which tribes will waive sovereign immunity, as is true with state and federal waivers.

Tribes, like state and federal government, are cautious about waiving their sovereign immunity, as this would undermine the goals of Indian self-government and tribal self-sufficiency and economic development. A blanket waiver would allow anyone, Indian or non-Indian, who believes that a proposed tribal action might affect his or her property interests to sue the tribe and tribal officials in state or federal court to halt the tribe's action and to recover damages for any harm the court finds that the tribal action produced. This would flood state and federal courts with litigation over matters that historically have been reserved to tribal courts, or that have been resolved through the political process or through actions for injunctive relief in the federal courts. Non-Indians who choose to live in Indian country could scorn tribal government and seek to have the courts of the historically hostile non-Indian neighbors of the tribes empowered to take control of the affairs of the tribe. Such a sweeping

curtailment of tribal sovereignty would equal that of the Termination Era.

Current tribal sovereign immunity prevents disgruntled tribal members from forcing the tribe to litigate disputes in other courts. Were tribal members permitted to sue tribes in state courts, this effectively gives state courts the authority to interfere in the conduct of internal tribal government. This also would distort the development of tribal court jurisprudence and increase the chances of generating inconsistent decisions.

Such lawsuits would place a tremendous financial burden on tribes due simply to the costs of defending litigation in non-tribal fora. In addition, the threat of suit would have a chilling effect on tribal activities in general and could paralyze economic development for tribes.

There must be no link of a waiver of sovereign immunity by those tribes which accept federally appropriated funds to the receipt of those funds. Such an approach creates a situation in which a tribe would have to waive its sovereign immunity in order to accept judgment funds and even the interest on judgment funds, as tribal council use of these is typically authorized by the general language in the BIA portion of Interior's appropriations statute. Judgment funds are the tribes' money. When the United States pays what it owes a tribe for a wrong committed against the tribe, it should not attach burdensome and sovereignty-impairing conditions to the payment of what is rightfully the tribe's money, free and clear.

Tribes are one of three sovereigns recognized as such under the United States Constitution and possess inherent powers of self-governance. This governmental status has been recognized in an unbroken line of Supreme Court cases dating to the earliest days of the Republic. Any erosion of tribal sovereign immunity would undermine one of the most fundamental principles of government.

I am pleased to have the opportunity to present the views of the Department of the Interior on this subject to the authorizing committee of jurisdiction.

TESTIMONY OF LAWRENCE LONG
CHIEF DEPUTY ATTORNEY GENERAL
STATE OF SOUTH DAKOTA

Sovereign immunity is a doctrine developed by the courts, and sometimes embodied in constitution or statute, which allows a government immunity from lawsuits. The doctrine has its origin in the feudal structure of England in which the king, the highest feudal lord, was not subject to suit in his own courts. See Muskopf v. Corning Hospital District, 359 P.2d 457, 458-459 n.1 (Cal. 1961). As a North Dakota court has pointed out, however, "even under the earliest common law of England, sovereign immunity did not produce the harsh results it does today and only rarely did it completely deny relief." Bulman v. Holstrand, 521 N.W.2d 632, 638 (N.D. 1994). This was so because the Court of Exchequer was available for "equitable relief against the crown" even though "jurisdiction in the king's courts" was not available. See Muskopf, 359 P.2d at 458-459 n.1.

As the courts have stated, "[f]ew principles of modern law have been so uniformly and soundly criticized." Bulman, 521 N.W.2d. at 638. As long ago as 1943, the New Mexico Supreme Court stated that it was "'incredible . . . that the entire burden of damage resulting from the wrongful acts of the government should be imposed upon the single individual. . . .'" Barker v. City of Santa Fe, 136 P.2d 480, 482 (N.M. 1943)(quoting an earlier ALR annotation). Because sovereign immunity relieves the government from the consequences of its actions, the courts have concluded that the doctrine is "counterintuitive to any ordinary person's sense of justice." Bulman, 521 N.W.2d at 638.

As a result of the harshness of the doctrine, the sovereign immunity of all levels of government in the United States, except tribes, has been significantly abrogated. Thus, the United States itself, states, municipalities, counties, cities, and even foreign governments, have been found to have surrendered or lost significant aspects of their sovereign immunity. Only the court-created sovereign immunity of the tribes remains in near intact condition with regard to most matters for most tribes.

Sovereign Immunity of the United States.

Congress has abrogated a significant portion of the federal government's sovereign immunity. Congress has allowed suits for torts in District Court against the United States under the Federal Tort Claims Act. 28 U.S.C. §§ 2671-2680.[1] Congress has subjected the federal government to suit in the Court of Claims with regard to an express or implied contract, and with regard to claims founded on the Constitution, on an act of Congress, or on a regulation of an executive department. 28 U.S.C. § 1491. 28 U.S.C. § 1505 specifically allows certain

[1] Pursuant to federal law, Indian tribes, contractors, and employees are deemed to be agents of the federal government for the purpose of the Federal Tort Claims Act when they are carrying out contracts under the Indian Self-Determination and Education Assistance Act and certain other acts. Pub. L. No. 101-512, Title III, 104 Stat. 1959 (codified at 25 U.S.C. § 450 notes).

Indian claims against the United States. Further, in 1976 Congress enacted 5 U.S.C. § 702 by which Congress waived sovereign immunity in certain suits for relief other than money damages. 28 U.S.C. § 2410 allows certain quiet title acts against the United States. The doctrine of Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971) allows a federal cause of action for damages against a federal agent who has violated constitutional rights.

In addition, the courts have consistently held that a federal corporation created by the United States Government does not enjoy sovereign immunity unless Congress clearly grants that immunity. See, e.g., Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939).

> As summarized by Kenneth Culp Davis
> [t]he broad result is that the sovereign that was once generally immune is now generally responsible for wrongs committed.

Davis, 4 Administrative Law Treatise § 23:19 (2d ed. 1983).

Sovereign Immunity of States.

Sovereign immunity, although originally a part of the jurisprudence of all states, has been drastically limited. Although precise statistics are not available, it can be reliably said that "[a]t least twenty-nine state courts have abolished large portions of the doctrine." Note, Tribal Sovereign Immunity: Searching for Sensible Limits, 88 Colum. L. Rev. 173, 174 (1988). Even in states where sovereign immunity has not been abolished, "most courts" have limited sovereign immunity to governmental acts as opposed to proprietary acts. Id. at 175. These courts thus indicate that when the government acts in a proprietary manner, as by entering the commercial arena, they are not covered by sovereign immunity. Other courts have abrogated sovereign immunity for "ministerial" acts of state officers. See, e.g., Kyllo v. Panzer, 535 N.W.2d 896 (S.D. 1995). These courts allow suits against governmental officers and employees performing a "ministerial" act, such as driving a car.

Furthermore, Congress has effectively limited the sovereign immunity of the states in civil rights matters. While a state is not technically a proper defendant for damages under 42 U.S.C. § 1983, state officers, when sued in their personal capacity, are proper defendants in damage claims. Further, state officials are subject to prospective injunctive relief to enforce civil rights guarantees even if such relief requires the expenditure of substantial state funds; attorney fees may likewise be awarded. See Hutto v. Finney, 437 U.S. 678 (1978). Finally, the Supreme Court has held that a state officer engaged in official activity in another state may be made subject to the sister state's courts. See Nevada v. Hall, 440 U.S. 410 (1979).

Sovereign Immunity of Local Governments and Municipalities.

Local governments and municipalities generally have even less immunity than state governments. At least forty-eight states have enacted legislation which defines the extent to which local governmental units will be liable for or immune from tort liability. See Antieau, 1A Local Corporation Law § 11A.00, et seq. While the statutes vary, the states have commonly abolished immunity and left certain exceptions in place. Id. at § 11A.00. One writer has said that "[p]olitical subdivisions of states, such as municipalities and counties, are almost always liable for proprietary acts." Note, supra at 175 n.18. Likewise, the employees of local units of government will ordinarily be liable for their "ministerial" acts, such as driving a car.

Furthermore, local units of government qualify as "persons" under 42 U.S.C. § 1983 and, therefore, such local units of government are directly subject to suit under § 1983. Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978).

It is notable that these local and municipal governments have not retained their sovereign immunity either as a matter of state or federal law merely because of their limited population base or their limited financial assets. In the state of South Dakota, for example, the following towns, which are all incorporated municipalities, according to the South Dakota Secretary of State, would presumably be subject to suit, both as a matter of state and federal law:

Selected South Dakota Incorporated Municipalities

Agar, population 82
Batesland, population 124
Belvidere, population 63
Dante, population 98
Florence, population 192
Hitchcock, population 95
Java, population 161
Kranzburg, population 132
LaBolt, population 91
Mellette, population 184
Olivet, population 74
Stockholm, population 89

Sovereign Immunity of Foreign Nations in United States Courts.

The United States Supreme Court, apparently on the basis of comity, long ago found that a sovereign state was not subject to suit in the courts of the United States. See The Schooner Exchange v. M'Faddon, 11 U.S. 117 (1812). Congress has, however, limited the immunity of foreign states in the Foreign Sovereign Immunities Act (FSIA). 28 U.S.C. § 1602-1611. Pursuant to that act, a foreign nation is not immune from the jurisdiction of a court of the United States or of a state when

the action at issue is based upon a commercial activity of the foreign nation in the United States or upon a commercial activity of the foreign nation elsewhere which causes a "direct effect" in the United States. 28 U.S.C. § 1605(a)(2). Federal and state courts also have jurisdiction with regard to certain property rights of foreign sovereigns and for money damages caused by certain tortious acts or omissions of the foreign nation. 28 U.S.C. § 1605(a)(5). Claims based on the performance of "discretionary functions" are excluded, as are certain other matters. 28 U.S.C. § 1605(a)(5)(A) and (B). It is notable that the FSIA specifically allows for implied waivers of sovereign immunity by the foreign sovereign. 28 U.S.C. § 1605(a)(1).

Sovereign Immunity of Indian Tribes.

The Supreme Court has generally equated the sovereign immunity of Indian tribes to that of the United States, see United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940); it has not, however, revised the scope of tribal sovereign immunity as Congress has limited federal government's own sovereign immunity. There is, therefore, no general congressional waiver of sovereign immunity for torts of tribes similar to that of the Federal Tort Claims Act,[2] nor is there a general waiver of sovereign immunity with regard to breach of implicit or explicit contracts or violation of federal laws by tribes. Similarly, there is no general waiver of sovereign immunity with regard to the proprietary acts of the tribal government. Indeed, the Ninth Circuit Court of Appeals has held that tribal sovereign immunity barred an action even with regard to an off-reservation commercial activity of a tribe. In re Greene, 980 F.2d 590, 594 (9th Cir. 1992) (rejecting New Mexico cases to the contrary). Further, the Court has explicitly found that enactment of the Indian Civil Rights Act of 1968 did not create a remedy against tribes or officers for civil rights violations, except with regard to habeas corpus relief. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Nevertheless, Congress has waived tribal sovereign immunity with regard to certain federal laws, and has also waived such immunity with regard to certain tribes for narrowly specified purposes. See generally Strickland, Felix S. Cohen's Handbook of Federal Indian Law, (1982 ed.), p. 324, notes 355-357.

Furthermore, despite the lack of definitive congressional action, there has been limited, albeit unsatisfactory, progress in limiting tribal sovereign immunity in the courts. The attached case summaries from the federal, state and tribal courts indicate in more detail the approaches the courts have taken and the inroads made by some of the courts on tribal sovereign immunity to date.

[2] See n.1, supra.

Rationale for Preservation of Very Broad Tribal Sovereign Immunity.

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) suggests two rationales for the very broad sovereign immunity extended to Indian tribes. Neither of these appear to have validity in modern day government.

1. Rationale that tribes should enjoy full sovereign immunity because they are recognized as sovereign or semi-sovereign. The flaw in recognizing absolute or near absolute sovereign immunity for Indian tribes merely because they have sovereign or quasi-sovereign status is that the same rationale applies to the United States, the states, and foreign governments. None of these entities today enjoys the broad sovereign immunity applied to tribes, yet the sovereignty of these entities remains intact. As recognized by Cheyenne River Sioux Tribal Court of Appeals in grudgingly accepting a claim of tribal sovereign immunity, "many sovereigns have waived sovereign immunity in a variety of contexts like the present one without in any way diminishing their sovereignty." Clement v. LeCompte, 22 ILR 6111, 6117 (Cheyenne River Sioux Ct. App. Jan. 12, 1994). Furthermore, the sovereignty of the tribes, in any event, is limited. See, e.g., South Dakota v. Bourland, 508 U.S. 679 (1993); Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).

2. Protection of tribal resources. The second rationale for extending broad sovereign immunity to Indian tribes has been the protection of tribal resources. However, the small communities listed above do not enjoy broad sovereign immunity and the financial resources of these communities are typically more limited than that of a tribe, especially a tribe which has the benefit of a casino operation. Furthermore, to the degree that a tribe does fail to meet its commercial responsibilities, or to the degree that it acts beyond its legal authority, it should be subjected to appropriate litigation just like any other entity regardless of its size. Lawsuits have encouraged the adoption of better governmental practices by the United States, the states, and local units of government and can have the same effect on tribes. Finally, a tribe can purchase appropriate insurance, and should, to cover activities likely to engender lawsuits.

immune.jpg(dh)

SUMMARY OF SELECTED TRIBAL SOVEREIGN IMMUNITY CASES

I thought it would be useful to this Committee to have a sense of the volume and types of court cases at all levels which have addressed tribal sovereign immunity. Consequently, I have made an attempt, admittedly incomplete, to compile that information. The following process was used. I gathered the monthly case headnotes from Indian Law Report (ILR) from 7 ILR (1980), when ILR began that useful practice. I read the summaries and noted cases from the U.S. Court of Appeals, U.S. district courts, state courts and tribal courts which appeared in some fashion to have turned on tribal sovereign immunity. Many times (but not in each instance) I reviewed the text of the opinion to understand the facts, identify the litigants as non-Indian or Indian, and determine how tribal sovereign immunity affected disposition of the case.

Although I borrowed heavily from ILR headnotes, the summaries attached to this testimony are mine. The decision to include or exclude a case was mine. The interpretations are mine. Having said all of that, I believe the collection attached hereto is representative of the cases litigated nationwide on tribal sovereign immunity in the last fifteen years.

Cases asserting violations of the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, have been included. This is because the ICRA was, until Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) utilized widely by Indians and non-Indians in Indian country to seek redress in federal court for a variety (civil and criminal) of constitutional rights violations. Martinez severely limited that avenue by holding that the only constitutional violations actionable in federal court under the ICRA are those where habeas corpus would otherwise be available (when the applicant is in tribal custody). Martinez also held that suits against the tribe in federal court for ICRA violations were barred by common law sovereign immunity. Consequently, all ICRA cases ultimately turn on a tribal sovereign immunity analysis whether stated or not.

42 U.S.C. § 1983 and similar cases have also been included. These cases would ordinarily be heard in federal or state courts for violations of civil rights and would largely not be susceptible to a state sovereign immunity attack. In other words, if tribal and state officials had engaged in identical conduct, the state officials would ordinarily be subject to a 1983 claim, tribal officials would not.

Fifty-six U.S. Court of Appeals' cases are included touching tribal sovereign immunity (TSI). In the following general categories, the results are:

Civil Rights violations (including ICRA, 42 U.S.C. § 1983 and similar theories): 3 of 4 dismissed on TSI.

Intratribal disputes (election and membership disputes): 6 of 6 dismissed on TSI.

Commercial dealings (construction, financial and gaming contracts): 9 of 14 dismissed on TSI.

Real property disputes: 5 of 6 dismissed on TSI.

Regulation of non-Indians: 2 of 3 dismissed on TSI.

State tax litigation: 5 of 5 dismissed on TSI.

Exclusion from reservation: 1 of 2 dismissed on TSI.

Disputes between tribes: 5 of 5 dismissed on TSI.

Disputes with the United States: 0 of 3 dismissed on TSI.

Personal injury: 2 of 2 dismissed on TSI.

Bankruptcy: 3 of 3 dismissed on TSI.

Employment claims: 2 of 2 dismissed on TSI.

Miscellaneous: 1 of 1 dismissed on TSI.

I have attempted to group cases in similar categories, but there is considerable overlap. Civil rights, employment, and intratribal cases almost always contain multiple theories of liability. I have simply grouped them together in a fashion which makes the most sense to me.

In the United States district courts, at least sixty-four cases have addressed tribal sovereign immunity. In general categories, the results are:

Civil Rights: 11 of 12 dismissed on TSI.

Intratribal disputes: 11 of 14 dismissed on TSI.

Commercial dealings: 13 of 17 dismissed on TSI.

Real estate: 0 of 1 dismissed on TSI.

Regulation of non-Indians: 3 of 4 dismissed on TSI.

State tax litigation: None.

Exclusion from reservation: None.

Intertribal disputes: 3 of 3 dismissed on TSI.

U.S. preemption: 1 of 2 dismissed on TSI.

Personal injury: 2 of 2 dismissed on TSI.

Bankruptcy: 1 of 1 dismissed on TSI.

Wrongful termination of employment: 4 of 5 dismissed on TSI.

Collective bargaining: 1 of 2 dismissed on TSI.

Other: 2 of 2 dismissed on TSI.

In the various state courts, thirty-three cases have been included which touched on tribal sovereign immunity. It should be kept in mind that Public Law 280 and specific Indian claims settlement acts in several states vests the civil adjudicatory jurisdiction over actions between Indians in the state courts. In most states, however, the state courts have not been vested with such jurisdiction.

Commercial dealings: 5 of 17 dismissed on TSI.

Real estate: 1 of 1 dismissed on TSI.

Personal injury: 8 of 11 dismissed on TSI.

Employment disputes: 4 of 4 dismissed on TSI.

In the general categories of civil rights, intratribal disputes, regulation of non-Indians, state taxes, exclusion from reservations, intertribal disputes, U.S. preemption, bankruptcy and collective bargaining: I did not observe any cases in the ILR headnotes which appeared to turn on sovereign immunity.

Sixty-one tribal court decisions are included which turn on tribal sovereign immunity. They show the following results:

Civil Rights claims: 2 of 6 dismissed on TSI.

Intratribal disputes: 8 of 15 dismissed on TSI.

Commercial dealings: 6 of 6 dismissed on TSI.

Real estate: 0 of 2 dismissed on TSI.

Regulation of non-Indians: 0 of 1 dismissed on TSI.

Personal injury: 3 of 6 dismissed on TSI.

Employment claims: 9 of 13 dismissed on TSI.

Collective bargaining: 1 of 1 dismissed on TSI.

Separation of powers: 2 of 11 dismissed on TSI.

The Committee should keep in mind that the summary is incomplete. Many other cases have applied tribal sovereign immunity, particularly in the state and tribal courts, and not been reported in ILR. For example, Lisa Hanson v. Yankton Sioux Tribe. In April 1992, Hanson contracted with the Fort Randall Casino to provide subsidized transportation from eastern Nebraska to the casino. Hanson was to be paid $15 per person delivered and returned. When her contract was terminated in January of 1993, the casino owed her $41,566. She brought suit in state court in Charles Mix County, South Dakota. Her case was dismissed upon the Yankton Sioux Tribe's assertion of tribal sovereign immunity.

Craig Katt received the same result from the same court on the same day. He contracted with the Fort Randall Casino to book live entertainment. From January 13, 1993, through December 4, 1993, he booked in various artists who were paid by the casino over $504,250. Katt's fee was to be 10% or $50,425. Mr. Katt also sued. The Yankton Sioux Tribe also defended by asserting sovereign immunity. Mr. Katt's claim was also dismissed on January 7, 1994.

In addition, that for every case which reaches court, dozens of meritorious claims are never filed. Attorneys practicing in and near Indian country advise clients regularly that litigation against tribes is a waste of time. An attorney colleague was contacted by custom wheat harvesters, who every year travel north from Texas and combine wheat for local farmers. On each occasion, a custom harvester had contracted with a local tribal farm corporation to cut the tribe's wheat crop.

Typically, the harvester would negotiate a price in the range of $15,000. When the job was completed and he went for payment, he was told by the tribe "Here's $5,000. Take it or leave it. You can't sue us."

Next, the summaries suggest that some tribal courts have taken an activist view toward enforcement of Indian Civil Rights Act violations. Judges who act on such views may do so at their peril. For example, the Sisseton Wahpeton Sioux Tribal Court issued several decisions asserting the court's power to enforce the Indian Civil Rights Act in tribal court against tribal officials. However, in the late 1980s, the Sisseton Wahpeton Tribe dissolved their tribal court and reorganized the court system as a CFR Court of Indian Offenses. This eliminated the judiciary who had made such decisions because none were qualified to be CFR judges. Tribal Judge Matthews, who wrote a strong opinion in 1983 enforcing the Indian Civil Rights Act against the Oglala Sioux Tribe, is no longer a member of the Oglala Sioux Tribe judiciary. Rosebud Sioux Tribal Judge Trudell Guerue, who attempted to enjoin a tribal election the day before it was to commence, was fired by the tribal judiciary committee during the early hours of election day. He was replaced and the TRO was lifted so that the election could proceed. The more realistic and pragmatic status of tribal judiciary is that stated in the tribal court cases of Lac du Flambeau Band v. One Small Mesh Gilnet, Lac du Flambeau Tribal Court 1988 16 ILR 6095, and Lane-Oreiro v. Lummi Indian Business Council, Lummi Tribal Court 1994, 21 ILR 6143. Reality is that tribal government generally is not a government defined by constitutional separation of powers. Tribal judges and tribal courts exist only at the pleasure of the tribal council. Attempts by tribal judiciary, absent assistance of the federal courts or Congress, to enforce the Indian Civil Rights Act and similar claims are simply unrealistic.

Finally, at the state government level, the widespread acceptance of tribal sovereign immunity by the federal and state courts is an inhibiting factor in negotiations of agreements of all types between states and tribes. Any agreement being negotiated, whether for tax collections, hunting and fishing, collection of child support, extradition, cross deputization or other issues is from the mind set that the agreement must be framed in such a fashion that it can only be enforced by the state by withdrawing from it. If a dispute develops about any agreement, and the State wishes to seek declaratory or other relief, the first response from the tribe will likely be a motion for 1) dismissal on sovereign immunity grounds and/or 2) a motion to remand to tribal court for exhaustion of tribal remedies. The reverse is, of course, not true. The tribe is free to sue a state in state court and, in most circumstances, also free to sue the state in federal court.

The Committee will undoubtedly hear testimony suggesting that waiver of tribal sovereign immunity will have a detrimental effect on tribes by increasing costs of litigation and reducing tribal resources. The waiver of sovereign immunity, however, will have at least one beneficial effect. When agreements are made between states and tribes, there may be a court within which the agreement may be interpreted, enforced or resolved. Thank you for your time.

United States Courts of Appeals Decisions

Civil rights violations:

Dry Creek Lodge v. Arapaho and Shohone Tribes, (10th Cir.) 7 ILR 14. The decision in Santa Clara Pueblo v. Martinez does not preclude federal court jurisdiction where plaintiff is a non-Indian and in the absence of federal jurisdiction, plaintiff would be without a remedy. This is a much criticized decision, and has been severely limited.

White v. Pueblo of San Juan, 10th Cir. 1984, 11 ILR 7, 2063. Tribal sovereign immunity bars ICRA suit against the Pueblo by non-Indian alleging tribal interference with sale of his land.

Evans v. McKay, 9th Cir. 1989, 16 ILR 2122. Court dismisses claim by non-Indian against tribe under 42 U.S.C. § 1983 because of sovereign immunity but allows similar claim against city of Browning, Montana, to stand.

In Re Prairie Island Dakota Sioux, 8th Cir. 1994, 21 ILR 2096. Civl Rights complaints under state law. Plaintiff tribe sued to prevent federal court from remanding a lawsuit to state court. Court held that the tribe's assertion of sovereign immunity did not vest the federal court with subject matter jurisdiction.

Intratribal disputes:

Boe v. Ft. Belknap Indian Community, 9th Cir. 1981, 8 ILR 9, 2069. Tribal election contest. Tribal members sue alleging deprivation of tribal office. Federal courts lack jurisdiction under ICRA (which does not waive tribal sovereign immunity) or IRA to review actions of tribal officials alleged to have deprived plaintiffs of office in violation of tribal laws.

Wheeler v. Swimmer, 10th Cir. 1987, 15 ILR 2004. Tribal election dispute. Plaintiff's claims under ICRA and 42 U.S.C. § 1985(3) dismissed relying on Santa Clara Pueblo v. Martinez.

Fluent v. Salamanca Indian Lease Authority, 2d Cir. 1991, 18 ILR 2044. Lessees of Seneca Nation trust land sued Nation and tribal officials to compel renewal of leases and challenged constitutionality of Seneca Nation Settlement Act of 1990. The court dismissed Nation on sovereign immunity and dismissed remaining claims because Nation is an indispensable party.

Lycero v. Lujan, 10th Cir. 1992, 19 ILR 2096. Former Isleta Pueblo officials sue to void secretarial election to amend tribal constitution. Action dismissed for failure to join Pueblo as an indispensable party. Pueblo cannot be joined under tribal sovereign immunity.

Pembina Treaty Committee v. Lujan, 8th Cir. 1992, 20 ILR 2039. Tribal members challenged U.S. distribution of treaty settlement funds to Turtle Mountain Band of Chippewa Indians under PL 97-403. Dismissal affirmed for failure to join tribe, an indispensable party, because of sovereign immunity.

Shermoen v. U.S., 9th Cir. 1992, 20 ILR 2040. Tribal members challenge constitutionality of Hoopa-Yurok Settlement Act. Case dismissed for failure to join Hoopa and Yurok tribes as indispensable parties because of sovereign immunity.

Commercial:

Inecon Agri-Corp v. Tribal Farms, 9th Cir. 1981, 8 ILR 21, 2163. Contracts by tribal farming corporation formed under state law are enforceable even without approval under 25 U.S.C. § 81-84.

Ramey Construction v. Apache Tribe, 10th Cir. 1982, 9 ILR 9, 2053. Tribal sovereign immunity is a jurisdictional issue and may be raised at any time. The "consent to suit" clause in the corporate charter of the Mescalero Apache Tribe, Inc. does not waive sovereign immunity of the tribe as a constitutional entity. The "Inn of the Mountain Gods" is therefore protected by sovereign immunity. Non-Indian contractor's suit to recover $427,000 in retainage dismissed.

Navajo Tribe v. Bank of New Mexico, 10th Cir. 1983, 10 ILR 7, 2064. Non-Indian bank loaned Navajo Housing Development Enterprise (NHDE), a tribal corporation, $300,000. NHDE defaulted. Bank withheld funds from tribe's deposits. Court held that the tribe and the NHDE are legally separate entities and the tribe cannot be held liable for NDHE's debts.

Tenneco Oil Company v. Sac and Fox Tribe, 10th Cir. 1984, 11 ILR 5, 2043. Oil company challenge to tribal authority to cancel certain oil and gas leases. Tribal officials acting outside of authority are not protected by sovereign immunity.

American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe. 8th Cir. 1985, 13 ILR 3, 2017. Tribe defaulted on $80,000 loan. Tribe was allowed to defend suit on sovereign immunity grounds.

Weeks Construction v. Oglala Sioux Housing Authority, 8th Cir. 1986, 13 ILR 2153. Breach of contract action against OST Housing Authority, U.S. and HUD dismissed. Sovereign immunity waiver through "sue and be sued" clause in Housing Authority charter not sufficient to create federal jurisdiction.

Enterprise Management Consultants v. Hodell, 10th Cir. 1989, 16 ILR 2199. Suit to enforce two bingo management contracts. Case

is dismissed on sovereign immunity of the Citizen Band Potawatomi Tribe.

Pan American Inc. v. Sycuan Band of Mission Indians, 9th Cir. 1989, 16 ILR 2203. Plaintiff sued to enforce federally approved bingo management agreement. Arbitration claim in agreement not sufficient to waive tribal sovereign immunity. Case dismissed.

Bank of Oklahoma v. Muscogee (Creek) Nation, 10th Cir. 1992, 19 ILR 2155. After tribal court issued a TRO to Bank enjoining release of funds to tribal bingo hall management contractor, Bank instituted an interpleader action. The contractor cross-claimed against the tribe. Court dismissed the interpleader action and cross-claims based on sovereign immunity. Contractual sovereign immunity waiver held valid only in tribal court.

Altheimer and Gray v. Sioux Manufacturing Corp. (SMC), 7th Cir. 1993, 20 ILR 2053. Consolidated actions for breach of contract. Court holds that SMC waived immunity from suit in contract and cannot assert tribal sovereign immunity. Tribal court exhaustion is not required because SMC explicitly agreed to submit to venue and jurisdiction of federal and state courts in Illinois.

U.S. ex rel. Hall v. Indian Country Leasing, 7th Cir. 1994, 21 ILR 2252. Action challenging gaming contracts dismissed for failure to join the tribes as indispensable parties.

Rosebud Sioux Tribe v. Val-U Construction Company. 8th Cir. 1995, 22 ILR 2094. Arbitration clause in housing construction contract waived tribal sovereign immunity as to the contract but the "sue and be sued" provision of tribal corporate charter does not waive sovereign immunity for tort claims.

Tamiami Partners v. Miccousukee Tribe, 11th Cir. 1995, 22 ILR 2177. Gaming management contractor's claims against tribe, tribal business council, tribal gaming agency and tribal court are dismissed on tribal sovereign immunity grounds. However, contractors allowed to proceed against individual defendants.

Sokaogon Gaming v. Tueschie Montgomery Associates, 7th Cir. 1996, 23 ILR 2125. The tribe waived sovereign immunity by agreeing to an arbitration clause in a contract for architectural services.

Real estate:

Rodriquez v. Pipa, 9th Cir. 1982, 9 ILR 7, 2045. Trespass action. Federally recognized tribes are protected by sovereign immunity from suits by tribal members. Absent federal claim, the U.S. district court lacks subject matter jurisdiction over tribal member suits against other members for violations occurring on the reservation.

Big Spring v. United States, 9th Cir. 1985, 12 ILR 17, 2133. Suit by tribal members against Blackfeet tribe to recover mineral rights alleged to have been illegally transferred to tribe dismissed on sovereign immunity.

Imperial Granite Company v. Pala Band of Mission Indian, 9th Cir. 1991, 18 ILR 2137. Imperial used a reservation road across fee land and tribal land as sole access to its pit since 1933. The tribe closed the road. Imperial sued to regain access and an easement. Case dismissed on tribal sovereign immunity.

Maynard v. Narrangansett indian Tribe, 1st Cir. 1993, 20 ILR 2062. Boundary dispute between Tribe and non-Indians. Trespass action against tribe dismissed. Rhode Island Indian Claim Settlement Act contains no waiver of tribal sovereign immunity.

Pit River Home and Agricultural Co-op v. United States, 9th Cir. 1994, 21 ILR 2159. Intratribal dispute over land ownership. Pit River Co-op is a group of tribal members. Co-op's claim under 28 U.S.C. 1362 dismissed because Co-op is not an Indian tribe and because the Pit River tribal council is an indispensable party that has not waived sovereign immunity.

Rupp v. Omaha Indian Tribe, 8th Cir. 1995, 22 ILR 2068. Boundary dispute along Missouri River. Court holds that tribe waived its sovereign immunity to counterclaims by clearly and unequivocally consenting to suit. Tribal charter contains "sue and be sued" clause, and tribe agreed to litigate counterclaim in open court.

Regulation of non-Indians:

California v. Harvier, 9th Cir. 1983, 10 ILR 9, 2088. Declaratory action regarding game and fish regulation. California suit against Quechen tribal officials dismissed on tribal sovereign immunity.

Burlington Northern Railroad v. Blackfeet Tribe, 9th Cir. 1981, 18 ILR 2005. BN challenge to tribal right to tax railroad rights-of-way dismissed against tribe on sovereign immunity grounds. Railroad claim against tribal officials allegedly acting in violation of federal law for prospective relief is allowed to stand.

Arizona Public Service v. Aspaas, 9th Cir. 1995, 23 ILR 2003. Navajo Nation enjoined from regulating ASP's non-Indian employment practices at plant on Navajo reservation because Navajo Nation waived whatever authority it may have had to regulate ASP's employment practices by the terms of the lease documents between the tribe and ASP.

State taxes:

Chemehuevi Tribe v. California State Board of Equalization, 9th Cir. 1985, 12 ILR 9, 2057. Tribal sovereign immunity bars state's counterclaim for cigarette taxes.

Squaxin Island Tribe v. Washington, 9th Cir. 1986, 13 ILR 2053. Although Washington may tax and regulate tribal liquor sales, state's counterclaim for past due taxes is barred by tribal sovereign immunity.

Oklahoma Tax Commission v. Graham, 10th Cir. 1987, 14 ILR 2117. Oklahoma's state court action against Chickasaw Nation for tax collection removed to federal court and then dismissed on tribal sovereign immunity.

Oklahoma Tax Commission v. Graham, 10th Cir. 1988, 15 ILR 2073. On remand from United States Supreme Court. State court action to collect taxes from tribe was properly removed to federal court because the state failed to plead either tribal consent to suit or tribal waiver of sovereign immunity.

Oklahoma Tax Commission v. Wyandotte Tribe, 10th Cir. 1990, 18 ILR 2001. Oklahoma's tax claim against tribe remanded to state court. Defense of tribal sovereign immunity does not constitute a substantial question of federal law sufficient to vest jurisdiction in the federal court.

Exclusion from reservation:

Hardin v. White Mountain Apache Tribe, 9th Cir. 1985, 13 ILR 3, 2020. Sovereign immunity shields tribe and tribal officials from suit challenging tribal exclusion of a nonmember from the reservation.

Poodry v. Tonawanda Seneca Indians, 2nd Cir. 1996, 23 ILR 2108. ICRA held to allow petitioner to test the legality of exclusion from tribe's reservation. The court also held that habeas corpus is properly directed to tribal officials acting in violation of federal law and therefore beyond lawful tribal authority. Further, the ICRA does not authorize habeas actions against the tribe itself.

Intertribal:

Wichita and Affiliated Tribes of Oklahoma v. Hodel, D.C. Cir. 1986, 13 ILR 13. The D.C. Cir. approves the BIA distribution plan for land income to three separate tribes, but dismisses the Caddo Tribe claim for retroactive relief because the two other tribes had not waived sovereign immunity.

Nero v. Cherokee Nation of Oklahoma, 10th Cir. 1989, 17 ILR 2020. Non-Cherokee descendants of slaves owned by Cherokee Nation sued Nation, its officials, and U.S. to enforce rights under 1866 treaty, and assert various civil rights claims. Case dismissed on tribal sovereign immunity grounds.

Confederated Tribes of the Chehalis Reservation v. Lujan, 9th Cir. 1991, 18 ILR 2062. Plaintiff Tribe sues U.S. to enjoin recognition of the Quinalt Indian Nation as the sole governing authority for the Quinalt reservation. Case dismissed for failure to join Quinalt Nation as an indispensable party. Tribal sovereign immunity prevented joinder.

Keweenaw Bay Indian Community v. Michigan, 6th Cir. 1993, 21 ILR 2007. Plaintiff tribe suit to enforce treaty rights dismissed for failure to join the Bad River and Red Cliff Bands of Lake Superior Chippewa Indians who are indispensable parties and cannot be joined because of sovereignty immunity.

Quileute Indian Tribe v. Babbitt, 9th Cir. 1994, 21 ILR 2068. Plaintiff tribe challenged escheat of land to Quinault tribe under Indian Land Consolidation Act through the probate of Makah Indian who held trust land interests on the Quileute, Quinault and Makah reservations. Court dismissed for failure to join Quinault tribe as an indispensable party. Quinault tribe could not be joined because of sovereign immunity.

United States preemption:

U.S. v. Red Lake Band of Chippewa, 8th Cir. 1987, 14 ILR 2144. Tribal sovereign immunity may not be asserted against the U.S.

Blue Legs v. BIA, 8th Cir. 1989, 16 ILR 2051. The Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. waives tribal sovereign immunity for violations of the act. Court orders Tribe, BIA and Indian Health Service to jointly clean up reservation dump sites.

Public Service Co. of Colorado v. Shoshone Banneck Tribes, 9th Cir. 1994, 21 ILR 2167. Tribe tried to stop nuclear fuel shipments across reservation. Court holds that Congress waived tribal sovereign immunity in the Hazardous Mineral Transportation Act.

Personal injury:

Medina v. San Juan Pueblo, 10th Cir. 1989, 17 ILR 2020. Non-Indian sues to enforce a settlement agreement obtained after injury he sustained working for tribe's sand and gravel

operation. Tribal, U.S. District, and 10th Circuit Courts all dismissed because tribe failed to waive sovereign immunity.

Gaines v. Ski Apache, 10th Cir. 1993, 20 ILR 2169. Texas citizen sued for injuries when struck in head by a chair lift at Mescalaro Apache Ski Resort. Case dismissed for lack of diversity jurisdiction.

Bankruptcy:

Richardson v. Mount Adams Furniture, 9th Cir. 1992, 20 ILR 2008. Bankruptcy trustee obtains $8,779 judgment for preferential transfer against Mount Adams Furniture, a wholly owned Yakima Nation business. Ninth Circuit reverses judgment and dismisses trustee claim on the grounds of tribal sovereign immunity.

Hoopa Valley Tribe v. Hong Kong and Shanghai Banking Corp., 9th Cir. 1994, 21 ILR 2157. Tribe had a timber contract with Bank. Bank had possession of substantial amounts of tribal timber when bank declared bankruptcy. The court held that federal law preempts the application of state commercial law to the extent that state law would vest the right to the proceeds from timber sales in bank's other creditors. Since the timber was a trust asset of the tribe, the tribe retained ownership.

Seymour v. Confederated Tribes of Coville Reservation, 9th Cir. Bankruptcy Appellate Panel 1995, 22 ILR 2175. Bankruptcy court lacks jurisdiction to discharge debts to tribal credit agency in the absence of an express waiver of tribal sovereign immunity or a limitation of tribal sovereign immunity in the 1994 Bankruptcy Reform Act.

Employment:

Sulcer v. Davis, 10 Cir. 1993, 20 ILR 2081. Plaintiff challenges termination of her employment by tribe business committee. Case dismissed in tribal and federal court on tribal sovereign immunity.

Sac and Fox Nation v. Hanson, 10th Cir. 1995, 22 ILR 2090. Employees of off reservation tribal enterprise sued and recovered judgment against tribal enterprise for back pay. Court enjoins state court from proceeding on third party indemnification claims against the tribe on grounds of sovereign immunity.

Other:

U.S. ex rel. Hall v. Creative Games Technology, 8th Cir. 1994, 21 ILR 2145. Court dismisses private citizen challenge under 25 USC § 81 that service contracts for a tribal gaming operation failed to comply with the Indian Gaming Regulatory Act. Case was dismissed because of tribal sovereign immunity, the tribe being an indispensable party.

U.S. District Court decisions

Civil Rights violations:

ShortBull v. Horse, D.S.D. 1980, 7 ILR 6. Challenge by candidate denied right to seek office in Oglala Sioux Tribal election dismissed because 42 U.S.C. 1983 and 1985(3) are available only where defendants act under color of state rather than tribal law.

Wells v. Philbrick, D.S.D. 1980, 7 ILR 8. Tribal child custody dispute. Suit under 42 U.S.C. § 1983 ruled unavailable because action complained of is under color of tribal law rather than state law. Further, claim for tribal council's failure to appoint judges is barred by tribe's sovereign immunity.

Rodriquez v. LaJolla Band of Mission Indians, S.D.Cal. 1980, 7 ILR 13. Action against tribe for civil rights deprivation and ICRA violations dismissed on tribal sovereign immunity.

Barnes v. White, N.D.N.Y. 1980, 7 ILR 16. Members of St. Regis Mohawk Tribe cannot sue under ICRA or 42 U.S.C. § 1983 tribal officials who refuse to vacate office after being voted out in recall elections.

Toineeta v. Andrus, W.D.N.C. 1980, 7 ILR 17. Tribal member suit alleging due process deprivation of tribal land rights dismissed. Court held that the enforcement limitations of the ICRA cannot be circumvented by bringing suit under 42 U.S.C. 1983 or 1985(3) against tribal members or tribal officials.

Bruette v. Knope, E.D.Wis. 1982, 10 ILR 5. Tribal members bring 42 U.S.C. § 1983 action against county and tribal police officers who were jointly involved in a high-speed chase in part on Menominee reservation. Civil rights complaint against tribal defendants dismissed on basis of sovereign immunity. Claim against county defendants allowed to stand.

Stroud v. Seminole Tribe, D.Fla. 1983, 11 ILR 1, 3001. Non-Indian plaintiff's reverse employment discrimination claim against tribe under ICRA is barred by sovereign immunity.

Charley v. Washington, E.D.Wash. 1984, 11 I.L.R. 12, 3043. Discrimination suit based on 42 U.S.C. §§ 1981 and 1983 barred by tribal sovereign immunity.

Stroud v. Seminole Tribe, S.D.Fla. 1985, 12 ILR 12, 3052. Summary judgment for tribe granted in employment discrimination suit by non-Indian under 42 U.S.C. § 1981, based on tribal sovereign immunity.

Sandman v. Dakota, W.D.Mich. 1992, 20 ILR 3055. Action against a tribal court judge accused of violating plaintiff's right to due

process in a child custody action under the Indian Civil Rights Act dismissed on tribal sovereign immunity.

Baugus v. Brunson, E.D.Calif. 1995 22 ILR 3231. Plaintiff sues security officer at an Indian gaming operation for false arrest under 42 U.S.C. 1983 and 1985. Motion to dismiss denied. Court finds that the security officer is not a tribal official who may assert tribal sovereign immunity.

Intratribal:

Sahmaunt v. Horse, W.D.Okla. 1984, 11 ILR 19. Tribal election dispute dismissed for lack of subject matter jurisdiction.

Learned v. Cheyenne Arapaho Tribe, W.D.Okla. 1984, 11 ILR 23. Tribal election dispute dismissed for lack of jurisdiction.

Runs After v. U.S., D.S.D. 1984, 12 ILR 1, 3001. District court finds no jurisdiction in tribal election dispute.

Nero v. Cherokee Nation, N.D.Okla. 1986, 13 ILR 6, 3045. Non-Cherokee Plaintiff asserts that tribal officials deprived him of right to vote in tribal election and deprived him of benefit of federally funded tribal programs. Court held that complaint fails to state a claim against the Cherokee Nation because of sovereign immunity of the tribe.

U.S. ex rel. Shakopee Sioux Community v. Pan American Management and Little Six Enterprises v. Shakopee Sioux Community. D.Minn. 1986 14 ILR 3015. Breach of contract and tortious interference with contractual relations claims by bingo management companies against tribe dismissed on grounds that management agreements are null and void. Court refuses dismissal of remaining claims on sovereign immunity grounds, holding that because these claims arise out of same transactions as tribe's suit, tribe has waived sovereign immunity.

Johnson v. Eastern Band Cherokee Nation, N.D.N.Y. 1989, 16 ILR 3127. Court lacks subject matter jurisdiction to compel tribe to grant membership in tribe.

Shermoen v. United States, N.D.Calif. 1991, 18 ILR 3095. Individual Indians and the Coast Indian Community of Yurok Indians file constitutional challenge to the Hoopa-Yurok Settlement Act. Court dismisses. Hoopa Valley and Yurok tribes are necessary parties and cannot be joined because of sovereign immunity.

Ross v. Flandreau Santee Sioux Tribe, D.S.D. 1992, 20 ILR 3041. Nonresident members of the tribe challenged per capita distribution of gaming revenues to resident tribal members only

as violative of ICRA. Court held that while it lacks jurisdiction under ICRA, it has jurisdiction to assure tribe's compliance with the Indian Gaming Regulatory Act and enjoined per capita payments pending final resolution of the litigation.

United Keetoowah Band of Cherokee Indians v. Mankiller, N.D.Okla. 1993, 20 ILR 3198. Tribal plaintiffs challenge authority of Cherokee Nation to impose sales tax on tobacco products. Case dismissed for failure to join Cherokee Nation as an indispensable party. Tribal sovereign immunity presents joinder.

Cruz v. Ysleta Del Sur Tribal Council, W.D.Tex. 1993, 21 ILR 3127. Court holds that 29 U.S.C. § 794(a) waives sovereign immunity for actions under the Rehabilitation Act (which protects handicapped persons in dealing with entities receiving federal funds), but Voting Rights Act of 1965 does not apply to tribal elections.

Davids v. Coyhis, E.D.Wis. 1994, 22 ILR 3061. Tribal members sued tribal council alleging misconduct in tribal gaming operation. Court dismissed. Indian Gaming Regulatory Act does not waive tribal sovereign immunity nor create a private cause of action against tribal officials.

GNS Inc. v. Winnebago Tribe, N.D.Iowa 1994, 22 ILR 3068. Casino manager sues tribe for breach of contract and refusal to arbitrate. Court dismissed after finding no waiver of sovereign immunity.

Smith v. Babbitt, D.Minn. 1995, 22 ILR 3148. Tribal members sued Shakopee Mdewakanton Sioux Community and its business council for violations of IGRA, ICRA, Indian Reorganization Act, RICO and violations of tribal constitution and bylaws, alleging unlawful distribution of gaming revenues and unlawful withholding of revenues and benefits from tribal members. The court dismissed because a determination of tribal membership would be required and because the tribe had not waived its sovereign immunity from suit.

Montgomery v. Flandreau Santee Sioux Tribe, D.S.D. 1995, 22 ILR 3354. Plaintiff challenges denial of tribal membership and misapplication by defendants of gaming revenues. Court finds that neither the IGRA or the ICRA authorize private rights of action. Court lacks subject matter jurisdiction to consider gaming revenue allocation or if plaintiffs were wrongfully denied enrollment.

Commercial:

Murray Insulation v. Rosebud Housing Authority, S.D.Iowa 1980, 7 ILR 20. Non-Indian sued for breach of contract. Tribal ordinance codified at 24 CFR § 805.110 waives tribal immunity to suit against Rosebud Housing Authority.

R.J. Williams Co. v. Ft. Belknap Housing Authority, D.C.Mont. 1981, 8 ILR 11, 3059. Construction contract dispute. Tribe Housing Authority attached plaintiff's property through tribal court without due process. Plaintiff sued to enjoin tribal court and Housing Authority and for damages. Court denied relief. Federal court does not have jurisdiction under ICRA to review civil tribal court actions which are allege to exceed court's jurisdictional powers and violate federal due process rights of a non-Indian.

Red Lake Band of Chippewa v. American Arbitration Association, D.Minn. 1981, 8 ILR 18, 3114. Court enjoins Defendant from arbitrating a contract dispute for construction of buildings between tribe and a general contractor. Contracts made with Indian tribes for money are invalid without approval by Secretary of Interior and Commissioner of Indian Affairs. 25 USC § 81. Indian tribes are protected from suit by sovereign immunity which cannot be waived by their tribal officers.

Gearhart Ind. v. Cerco Corp., W.D.Okla. 1984, 12 ILR 3, 3005. Non-Indian Texas Corp. and tribe contract dispute. Plaintiff sues Comanche tribal enterprise. Dismissed on basis of tribal sovereign immunity.

Federal Land Bank v. Reeves, D.S.D. 1987, 14 ILR 3071. Collection action by Federal Land Bank against tribal member and the United States stayed pending exhaustion of remedies in tribal court.

Palmer v. Yankton Sioux Tribe, D.S.D. 1987, 15 ILR 3001. Plaintiff's action dismissed without prejudice so that tribal court may determine whether tribe waived sovereign immunity when it signed promissory note in acknowledgement of its debt for purchase of oil and gas products.

C&R Wyoming Corp. v. Northern Arapaho Tribe, D.Wyo. 1989, 16 ILR 3133. The tribe owed plaintiff $200,000 on a note for the purchase of 1/3 of plaintiff's stock. Plaintiff declared bankruptcy and trustee attempted to collect on the note for the benefit of other creditors. District court reverses bankruptcy court's denial of defendant's motion to dismiss holding that the bankruptcy code does not contain an express waiver of tribal sovereign immunity.

Stock West Corp. v. Taylor, D.Ore. 1990, 17 ILR 3033. Non-Indian corporate plaintiff sues for legal malpractice and misrepresentation against tribal attorney. Court holds that Colville Tribe sovereign immunity extends to the defendant, an officer of the tribe.

G.L. Bingo v. Lujan, S.D.Ala. 1990, 17 ILR 5119. Plaintiff's action dismissed for failure to join the tribe as an indispensable party and failure to exhaust tribal remedies.

Leigh v. Black Feet Tribe, D.Mass. 1990, 17 ILR 3129. Plaintiff sold 100% stock ownership in going business to tribe for $400,000 in cash and a $200,000 note. Tribe defaulted on note. Plaintiff sued tribe in its corporate capacity. Court holds that tribe waived sovereign immunity with a "sue or be sued" clause in its corporate charter.

Tamiami Partners v. Miccosukee Tribe, S.D. Fla. 1992, 19 ILR 3181. Plaintiff tribal gaming management contractor's injunction request denied because tribe's narrow waiver of sovereign immunity does not extend to the licensing process.
46.

Tohono Nation v. Schwartz, D.Ariz. 1993, 20 ILR 3213.
Court enjoins state court proceeding by non-Indian contractor against tribal housing authority for breach of contract, enforcement of a settlement agreement, and seeking writ of execution against an off-reservation bank account. Even though the Housing Authority has waived sovereign immunity, the court finds it lacks subject matter jurisdiction and action should have been brought in tribal court.

CCI Inc. v. Hartman, D.Conn. 1994, 21 ILR 3109. Plaintiff sues two non-Indian employees of tribal gaming enterprise for off-reservation activity. Even though plaintiff joined the tribe in the action and anticipated the defense of sovereign immunity, the case must be dismissed because the state law claims have not thereby been converted into a federal claim. The issue of tribal sovereign immunity alone is not sufficient to give the federal courts subject matter jurisdiction.

Niagara Mohawk Power v. Tonawanda Band of Seneca Indians, W.D.NY 1994, 22 ILR 3040. Plaintiff sought declaratory judgment of rights with regard to franchise agreement between tribe and plaintiff. District court dismissed for lack of subject matter jurisdiction based upon tribe's sovereign immunity and failure to join tribe as an indispensable party.

Federico v. Capitol Gaming International, D.R.I. 1995, 22 ILR 3233. Plaintiff sued for payment $8,333.34 and costs for legislative lobbying services provided to Narragansett Tribe. Court dismissed suit on tribal sovereign immunity grounds.

Calvello v. Yankton Sioux Tribe, D.S.D. 1995, 22 ILR 3295. Plaintiff sues under Federal Arbitration Act to enforce arbitrator's decision awarding him $55,317 in net profits and $83,760 in lost compensation on gaming employment contract. Court grants tribe's motion to dismiss on grounds of sovereign immunity.

Whiteco Industries v. Yankton Sioux Tribe, D.S.D. 1995, 22 ILR 3368. Plaintiff sues tribe for payment for placement of billboards along public highways to advertise tribe's casino. Tribe asserts sovereign immunity and nonapproval by tribe of the contracts. Court grants tribe motion to dismiss.

Real estate:

Connecticut v. Babbitt, D.Conn. 1995, 22 ILR 3345. Connecticut attorney general sought to enjoin Secretary of Interior from accepting 245.25 acres of land into trust on behalf of Mashantuelet Pequot Tribe. Court finds the tribe is not an indispensable party. Court has jurisdiction over the action which may proceed without joinder of the tribe.

Non-Indians:

Amoco Production Co. v. MacDonald, D.M.N. 1980, 8 ILR 3. Suit challenged whether Indian tribal tax violates federal law. Court held tribal officers not immune from suit where actions are alleged to be unconstitutional or beyond their statutory powers.

Lummi Tribe v. Hallauer, W.D.Wash. 1982, 9 ILR 5, 3025. Lummi tribe has authority to operate and maintain sewer system for all residents of reservation (including non-Indians) to the exclusion of state sewer districts, both as a proper exercise of tribal government powers and to protect the economic security, health and welfare of the tribe.

Colorado River Indian Tribes v. Town of Parker, D.Ariz. 1986, 14 ILR 3009. Tribe sought to enjoin town from enforcing its building code on unallotted trust land within city limits. Town counterclaimed 1) that town was disestablished; 2) to enjoin enforcement of tribal ordinances against non-Indians because ordinances violated federal common law and non-Indians had no voting franchise; and 3) tribal licensing and taxing ordinances could not be imposed on non-Indians because they had not been approved by the BIA. Town of Parker counterclaims against plaintiff tribe dismissed on grounds of tribal sovereign immunity.

Thon v. Ferry County, E.D.Wash. 1994, 21 ILR 3182. Suit by non-Indian landowners challenging application of state-tribal intergovernmental land use planning agreement to fee lands within the Colville Indian Reservation dismissed because tribe is an indispensable party that has not waived sovereign immunity.

Intratribal:

Navajo Nation v. Confederated Tribes of Warm Springs Reservation, D.Ore. 15 ILR 3058. Navajo Nation sued Warm Springs Tribe to declare which tribal court had jurisdiction over custody of two orphaned Indian children of mixed Navajo and Warm Springs ancestry. Maternal grandmother kidnapped children from Navajo reservation and took them to Warm Springs. Navajo tribal court asked for full faith and credit from Warm Springs tribal court and to enjoin Warm Springs tribal court from exercising jurisdiction over children under ICRA and Indian Child Welfare Act. Court dismissed because Warm Springs tribe is immune from suit on basis of sovereign immunity. See also Navajo Nation v. Warm Springs Tribe, D.Ore, 1988, 15 ILR 3060.

Confederated Tribes of Chehalis Reservation v. Lujan, W.D.Wash. 1990, 17 ILR 3025. Treaty dispute. Plaintiff tribe sought to enjoin U.S. from dealing with Quinault Indians as sole governing body of Quinault reservation. Action dismissed. Quinault Nation is an indispensable party and cannot be joined because of sovereign immunity.

Kickapoo Tribe of Oklahoma v. Lujan, D.D.C. 1990, 17 ILR 3027. Court dismisses plaintiff tribe's claim holding that plaintiff tribe lacks standing to challenge secretary's certification of constitutional election by Texas Band of Kickapoo Indians. Court also holds that Texas Band is an indispensable party and sovereign immunity presents joinder.

United States preemption:

U.S. v. Boggs, D.Mont. 1980, 8 ILR 1. Tribe not immune from federal grand jury subpoena investigating theft from Indian tribal organization.

U.S. v. Morris, D.M.N. 1991, 18 ILR 3020. Garnishment of wages by U.S. against employee of Navajo tribe denied. Court holds that Congress has not authorized the U.S. to garnish wages located within reservation of the sovereign Navajo Nation by waiving tribal sovereign immunity or otherwise. The Navajo Nation has not authorized garnishment either.

Personal injury:

Suarez v. Confederated Tribes of Yakima Indian Nation, E.D.Wash. 1991, 18 ILR 3120. Wrongful death action and similar claims against tribe and tribal police officer dismissed on grounds of sovereign immunity. Decedent was male of Mexican ancestry. He was struck and killed while crossing a street by an on-duty tribal police officer.

Elliott v. Capitol International Bank, E.D. Tex. 1994, 22 ILR 3067. Plaintiff sues tribally owned bank for fraud. Court dismisses action against tribe because of tribal sovereign immunity.

Bankruptcy:

Confederated Tribes of Colville Reservation v. Seymour, Bankruptcy E.D.Wash. 1993, 20 ILR 3158. Tribal creditor challenges bankruptcy plan of tribal member debtor. Court holds that Bankruptcy Act does not waive tribe's sovereign immunity and orders removal and dismissal of tribe from plan on grounds the court lacks jurisdiction over it.

Employment:

Sulcer v. Citizen Band Potowatami Tribe, W.D. Okla. 1992, 19 ILR 3071. Employment discrimination suit against the tribe dismissed for lack of subject matter jurisdiction based upon tribal sovereign immunity.

Long v. United Tribes of Kansas and S.E. Nebraska Inc., D.Kan. 1993, 20 ILR 3142. In employment discrimination action court rules that defendant is not an Indian tribe for purposes of asserting tribal sovereign immunity and therefore cannot assert immunity in a 42 U.S.C. § 1983 action.

Cameron v. Bay Mills Indian Community, W.D. Mich. 1994, 21 ILR 3053. Tribal member sues tribe and tribal council for wrongful termination from tribal police department. Court dismisses action finding that "consent to be sued" clause in tribal charter does not confer jurisdiction on the federal court.

Miller v. Coyhis, E.D.Wis. 1995, 22 ILR 3137. Plaintiff sued tribal council for wrongful termination, assault and battery, and first amendment free speech deprivation in violation of 42 U.S.C. § 1983. Court held claims barred by doctrine of tribal sovereign immunity.

Barker v. Menominee Nation Casino, E.D. Wis. 1995, 22 ILR 3278. Suit for wrongful termination from employment against tribal casino, tribal gaming commission and tribal legislature. Dismissed on grounds of sovereign immunity.

Collective bargaining:

Roberson v. Confederated Tribes of the Warm Springs Reservation. D.Oreg. 1980, 7 ILR 5. Employees suit for employer's breach of collective bargaining agreement is dismissed against tribal employer based on tribe sovereign immunity but allowed against Warm Springs Forest Products (tribally owned company).

Local IV-302 International Woodworkers Union of America v. Menominee Tribal Enterprises, E.D.Wis. 1984, 11 ILR 21, 3100. Plaintiff union had for several years operated under a collective bargaining Agreement with the defendant which required mandatory union membership and dues withholding. Two tribal member employees sought relief in the tribal court from union membership. The tribal court granted the relief. Plaintiff asked the federal court to enforce the agreement. Court refused to enjoin tribal enterprise from failing to honor a collective bargaining agreement, based on tribal sovereign immunity.

Others:

In re U.S.A. ex rel. Hall, D.Minn. 1993, 20 ILR 3164. Non-Indians sued on behalf of U.S. to void various tribal gaming contracts. Court ruled that plaintiffs lack standing, the tribes are indispensable parties and cannot be joined because of sovereign immunity.

U.S. ex rel. Hall v. Tribal Development Corp. E.D. Wis. 1996, 23 ILR 3132. Plaintiff brings qui tam action against tribal corporation engaged in supplying tribe's gaming operation. District court grants motion to dismiss for failure to join the tribe as an indispensable party. Sovereign immunity prevents joinder.

State Court decisions

Commercial:

Halverson v. Roubal, Wash. 1983, 10 ILR 6, 5026. Neither HUD regulations which establish Indian housing authorities nor the Quinault tribal code have the effect of waiving tribal sovereign immunity. Facts not stated in opinion.

Native village of Eyak v. G.C. Contractors, Alaska 1983, 10 ILR 6, 5027. Builder of Village Community Center sued to collect $13,745.98 awarded by arbitrator. Village refused to pay, citing tribal sovereign immunity. Court held native village waived sovereign immunity when it entered into a contract containing an arbitration clause.

S. Unique Limited v. Gila River Pima Maricopa Indian Community, Ariz. 1983, 11 ILR 4, 5002. Plaintiff supplied Tribal Farm Corp. $177,000 worth of herbicide. Tribe refused to pay. Court found waiver of tribal immunity from suit in "sue and be sued" clause of corporate charter, but also found that tribal immunity was a defense to service of process. Suit dismissed for lack of proper service of process.

Southwest Forest Industries v. Hoopa Timber Corporation, Calif. 1984, 11 ILR 6, 5009. Tribal sovereign immunity does not bar state court adjudication of this contract dispute. Court found sovereign immunity waiver in contract language.

Val/Del Inc. v. Arizona Superior Court, Ariz. 1984, 12 ILR 4, 5015. A contract arbitration clause in a bingo management agreement with a tribe is an express waiver of tribal sovereign immunity.

Hydro Thermol Energy Corp. v. Ft. Bidwell Indian Community, Calif. 1985, 12 ILR 23, 5103. Plaintiff and tribal chairman signed contract containing arbitration clause. Tribal council had not approved contract. Lower court arbitration award against tribe reversed because tribal council had not waived its immunity from suit.

Padilla v. Pueblo of Acoma d/b/a Sky City Contractors, N.M. 1988, 15 ILR 5045. Plaintiff contracted to supervise roof installation off reservation for a tribal construction company. Defendant refused to pay and asserted sovereign immunity. Held: state court may exercise jurisdiction over tribe when engaged in off-reservation activity as an unincorporated association registered and authorized to do business in New Mexico and sued in that capacity for breach of a contract in connection with off-reservation activity.

Native Village of Stevens v. Alaska Management and Planning, Alaska 1988, 15 ILR 5049. Village hired Defendant for

engineering services. Village formulated contract and Plaintiff sued. Jury awarded $38,891. Village appealed asserting tribal sovereign immunity. Court held Village not a tribe and therefore may not plead sovereign immunity to bar a breach of contract action.

Doyle v. Native Village of Mekoryuk, Alaska 1990, 17 ILR 5075. Plaintiff provided air-taxi services to tribal enterprises for several years. A dispute ended the contract and Plaintiff sued for breach. Court held that because the native village is a tribal government under Section 16 of IRA, the tribal government and its enterprise, Bering Sea Reindeer Products, are immune from suit.

Hydaburg Co-op v. Hydaburg Fisheries, Alaska 1992, 19 ILR 5046. Plaintiff and Defendant tribal corporation entered into a joint venture for commercial fish processing. The partnership broke down and Plaintiff invoked the arbitration clause. Plaintiff was awarded $218,433.28. Defendant Co-op asserted sovereign immunity to avoid execution of a judgment against its assets. The court held that the Defendant Co-op was not chartered under the IRA and has not been recognized by the U.S. as a tribe and has not established tribal status for sovereign immunity purposes.

Nenana Fuel Company v. Native Village of Venetie, Alaska 1992, 19 ILR 5160. A "remedies on default clause" in a contract between the native village and a fuel company constitutes a waiver of sovereign immunity for purposes of enforcing the provisions of a contract in state court.

McCarthy and Associates v. Jackpot Junction Bingo Hall, Minn. 1992, 19 ILR 5216. Contract dispute. Appeals court denies tribe's motion to dismiss holding that tribe had waived its sovereign immunity under a "sue and be sued" clause in its tribal corporate charter.

Wippert v. Black Feet Tribe, Mont. 1993, 20 ILR 5123. Tribe loaned Plaintiff money and was secured by livestock and real estate. During foreclosure and related litigation, Plaintiffs claimed fraud by tribe. Court held that the Black Feet Tribe did not waive sovereign immunity by loaning money or by defending a declaratory judgment action. Court affirms dismissal of suit against the tribe on sovereign immunity grounds.

Mashantucket Pequot Gaming Enterprise v. CCI Inc., Conn. 1994, 21 ILR 5124. Contract dispute between tribal enterprise and Defendant, who supplied computer services. In resulting litigation, CCI files counterclaim. Tribe's motion to dismiss counterclaim on sovereign immunity ground is granted.

Dacotah Properties v. Prairie Island Indian Community, Minn. 1994, 21 ILR 5137. Tribe contracted with Plaintiff for bus tours

to casino. Contract contained waiver of immunity to enforce contract. Tribe terminated Johnson's contract after two months. Later, tribe is sued on lease for property used by Johnson and Tribe under former contract. Johnson is pled in as a third party and counterclaimed for breach of his agreement. Tribe defended on sovereign immunity. Held: tribe waived sovereign immunity through the "sue and be sued" clause in its corporate charter. Tribe did not waive its immunity to suit by bringing a third party claim. By reason of sovereign immunity waiver as to economic affairs, the tribe is subject to state statutory laws for its off-reservation activities.

Hoover v. Kiowa Tribe, Okla. 1995, 23 ILR 5023. Tribe borrows from Hoover $142,500 and gives shares of stock as security. Tribe defaults. Hoover sells stock, applies proceeds on debt and sues tribe for the balance. Tribe defends on sovereign immunity. Court rejects the defense, holding a contract between a tribe and non-Indian is enforceable in state court when the contract is executed outside Indian country.

First National Bank v. Kiowa, Comanche and Apache Intertribal Land Use Committee, Okla. 1996, 23 ILR 5075. Trial court dismissal of action based on tribal sovereign immunity is reversed. Appellate court holds that contract executed outside Indian country between the Intratribal Land Use Committee and the plaintiff bank is enforceable in state court.

Real estate:

C & B Investments v. Wisconsin Winnebago Health Department, Wis. 1995 23 ILR 5005. Tribal Health Board leased office space from landlord. Board vacated property in disrepair. Landlord brought action for breach of lease and damages to premises. Board defended on sovereign immunity. Landlord argued waiver in lease agreement. Court held against landlord, finding that terms of lease agreement do not expressly waive sovereign immunity of the tribal health board.

Personal injury:

Long v. Chiemehuevi Indian Reservation, Calif. 1981, 8 ILR 10, 4022. Plaintiff sued for wrongful death of son, killed in a boating accident at a marina operated and owned by the tribe. Court held that Public Law 280 does not waive tribal sovereign immunity. Consequently plaintiff's claim against tribe is dismissed.

White Mountain Apache Tribe v. Industrial Commission, Ariz, 1985, 12 ILR 8, 5034. Tribal member claimant crushed left hand while at work for tribal timber company. Issue is whether 40 U.S.C. §

290 which applies state workman's compensation law to "federal enclaves" applies and waives tribal sovereign immunity. Held: the Arizona Industrial Commission lacks jurisdiction over workers compensation claims against the tribal employer. Claim dismissed.

Couturier v. Penobscot Indians, Maine 1988, 15 ILR 5081. Lower court dismissed plaintiff's tort action for bodily injury against tribal police officer. Court held that the Maine Indian Claims Settlement Act (25 U.S.C. § 1725) waived tribal immunity and therefore the Maine Tort Claims Act applies if officer was acting in governmental capacity.

Dickson v. Picopa Construction Company, Ariz. 1989, 16 ILR 5021. Plaintiff non-Indian injured when struck by tribal construction company gravel truck off reservation. Suit for damages and collection action defended on tribal sovereign immunity. Court finds that defendant is not a "subordinate economic organization" of the Salt River Pima Maricopa Indian community and thus cannot assert the tribe's sovereign immunity from suit in an action involving a company truck in an automobile accident off the tribe's reservation.

Houghtaling v. Seminole Tribe, Fla. 1993, 20 ILR 5011. Action for personal injuries sustained in tribal bingo hall. Court holds that tribe is immune from suit unless tribe has consented in its section 16 IRA charter or bingo hall is a Section 17 IRA corporate entity whose charter waives sovereign immunity. Court further holds that Public Law 280 does not waive tribe's sovereign immunity.

Gudgeon v. Jones, Wis. 1993, 21 ILR 5004. Chairman of Wisconsin Winnebago Tribe is immune from suit for assault and battery upon tribal employee in tribal bingo hall because chairman was acting in her official capacity.

Diver v. Peterson, Minn. 1994, 22 ILR 5028. Action by tribal members against tribal attorney for defamatory statements about them is dismissed on the grounds that the complaint arises out of an intratribal matter in which the tribe's sovereign immunity extends to the attorney.

Hegner v. Dietze, Minn. 1994, 22 ILR 5035. Tribe's sovereign immunity bars defamation action against the tribe. However, tribe's human resources manager is not entitled to dismissal unless he can show he is immune from suit or had an absolute privilege.

DeFeo v. Ski Apache Resort, N.M. 1995, 22 ILR 5185. Non-Indian suit for personal injuries occurring in Indian country at tribal ski resort. Court held that tribe is immune from suit in state

court and that tribal courts have exclusive jurisdiction over the action. Suit dismissed with prejudice.

Cohen v. Little Six Inc., Minn. 1996, 23 ILR 5049. Action against tribal corporation for personal injuries sustained in casino when chair at slot machine collapsed. Defendant asserts tribal sovereign immunity. Court agreed. Because tribal corporation was created under tribal law and is owned and operated by the tribe for governmental purposes, tribal sovereign immunity applies.

Otterson v. House, Minn. 1996, 23 ILR 5096. Because a tribal security guard is not a tribal officer, tribal sovereign immunity does not bar a tort claim against him arising from an off-reservation automobile accident.

Employment:

Colliflower v. Ft. Belknap Community Council, Mont. 1981, 8 ALR 15, 4035. Tribal council is immune from suit by tribal member for wrongful termination of employment absent a waiver of sovereign immunity.

Meier v. Sac & Fox Tribe, Iowa 1991, 19 ILR 5017. Non-Indian sues for past due wages and damages for breach of an employment contract with the tribe. The appellate court dismissed holding that it lacks jurisdiction when the tribe asserts sovereign immunity.

Ransom v. St. Regis. Mohawk Education and Community Fund, N.Y. 1994, 21 ILR 5103. Plaintiff sought reinstatement and back pay from tribal college. Lower court rejected sovereign immunity defense. Appellate court reversed and held that a not-for-profit tribal corporation is an arm of tribal government and has not waived its immunity from suit.

Ransom v. St. Regis Mohawk Education and Community Fund Inc., N.Y. 1995, 22 ILR 5201. Reference in a corporate charter to statutory authority to "sue and be sued" language standing alone neither constitutes an express and unequivocal waiver of sovereign immunity nor subjects the tribal community college to the jurisdiction of state court.

Tribal Court Decisions

Civil Rights violations:

Miller v. Adams, Intertribal Court of Appeals 1982, 10 ILR 12, 6034. Plaintiff borrowed money from the tribe and defaulted on the loan. Tribe offset the debt from a per capita settlement of funds. Plaintiff sued alleging deprivation of property without due process. Tribe defended with sovereign immunity. Court held sovereign immunity does not bar the Sisseton-Wahpeton Sioux Tribal court from hearing suits brought against the tribe.

Colville Tribes Business Council v. George, Colville Tribal Court 1984, 11 ILR 24, 6049. Civil rights action in nature of "one man, one vote" (redistricting) against tribal council dismissed for tribal sovereign immunity.

Oglala Sioux Personnel Board v. Red Shirt, Oglala Sioux Tribal Appellate Court 1983, 16 ILR 6052. The tribal personnel board cannot rely on sovereign immunity as a defense to an action against it by a member alleging violations of ICRA.

Dupree v. Cheyenne River Housing Authority, Cheyenne River Appellate Court 1988, 16 ILR 6106. Plaintiff's suit for wrongful discharge and ICRA violations remanded to trial court to determine whether housing authority has waived it sovereign immunity from suit through a "sue and be sued" clause or under ICRA.

Hicks v. Harold, Fallon Tribal Court 1993, 20 ILR 6091. A tribal judge and tribal police officers were acting in their official capacities in issuing and executing a search warrant and are thus entitled to protection of the tribe's sovereign immunity.

Rave v. Reynolds, Winnebago Tribal Court 1995, 22 ILR 6137. Candidate challenges his removal from tribal election ballot without a hearing as a denial of due process under the ICRA. He alleges that tribal council has exceeded their scope of authority and thus waived any defenses of sovereign immunity as tribal officers. Court denies motions to dismiss and summary judgment motions and sets matter for trial on the merits.

Intratribal:

Holy Rock v. Tribal Election Board, Oglala Sioux Tribal Court 1982, 10 ILR 4, 6009. Election dispute. Sovereign immunity extends to administrative officials performing their duties according to law. However, administrative actions may be reviewed in order to determine propriety.

Satiacum v. Sterud, Puyallup Tribal Court 1982, 10 ILR 4, 6013. Election dispute. The court has general jurisdiction and may hear suits against the tribal council. However, in this case, council members are immune from suit because they are acting within their authority.

Garman v. Fort Belknap Community Council, Fort Belknap Tribal Court 1984, 11 ILR 10, 6017. The tribal court is without jurisdiction to hear an election dispute. Tribal council has delegated that responsibility to the election board and the tribe has not waived sovereign immunity.

Committee for a Clean Government v. Cheyenne River Sioux Tribal Council, Cheyenne River Sioux Tribal Court of Appeals 1984, 11 ILR 22, 6043. Plaintiff sued alleging improper use of federal funds. Court held committee lacked standing, but tribal members on the committee did not. Tribal council is protected by sovereign immunity. Council members can be individually liable for ultra vires acts. Appellate court remands suit against tribal council members in their individual capacities.

LeCompte v. Jewett, Cheyenne River Sioux Tribe Court of Appeals 1985, 12 ILR 6025. Election dispute. Sovereign immunity does not bar suits against the tribe for injunctive and declaratory relief. Court holds for the election board on the merits.

Chapoose v. Ute Indian Tribe, Ute Tribal Court 1986, 13 ILR 20, 6023. Enrollment dispute. The tribal court has jurisdiction to determine whether the tribal business committee has complied with the tribal constitution and the Indian Civil Rights Act in enacting an ordinance revoking jurisdiction of the tribal court to enforce tribal enrollment ordinances and transferring that jurisdiction to the tribal business committee.

Day v. Hopi Election Board, Hopi Tribal Court 1988, 16 ILR 6057. Tribal court denies request for injunction to prevent election and sustains election board's finding that plaintiff is not qualified for tribal office because he cannot speak the Hopi language fluently as required by the Hopi Constitution. All money damage claims against tribe and officers are dismissed on sovereign immunity.

Committee for Better Tribal Government v. Southern Ute Election Board, Southern Ute Tribal Court 1990, 17 ILR 6095. Tribal court dismisses action against election board for lack of subject matter jurisdiction over an election dispute. Tribal court further dismisses claims against tribal council and council members on grounds of sovereign immunity. Court retains jurisdiction over allegations of due process violations against election board for alleged actions beyond their authority.

Bennett v. Navajo Board of Election Supervisors, Navajo Supreme Court 1990, 17 ILR 6099. Tribal Court denies motion to enjoin Navajo primary elections holding that the request does not fall within the jurisdiction of the tribal court. The board of election supervisor is vested with all authority regarding elections.

Committee for Better Tribal Government v. Southern Ute Election Board, Southern Ute Tribal Court 1990, 17 ILR 6145. Tribal court holds that recall election should be declared void and remands to tribal election board.

Bennett v. Navajo Board of Election Supervisors, Navajo Supreme Court 1990, 18 ILR 6009. Tribal court overturns disqualification of candidate for tribal office, finding no rational basis for limiting elective public office to previously elected officials. Tribal statute violates equal protection.

Apache Election Board v. Wildes, Court of Indian Appeals 1990, 18 ILR 6033. Tribal election for secretary/treasurer declared invalid because election regulations which excluded petitioner's name from election ballot imposed eligibility requirements exceeding those in the tribal constitution.

Young v. Tribal Election Board, Northern Plains Intertribal Court of Appeals 1990, 18 ILR 6092. Appellate court finds that the Devil's Lake Sioux Tribal Court has no authority to overrule the decision of the tribal election board because tribal law vests authority over tribal elections in the election board.

Kowalski v. Elofson, Lower Elwha Tribal Court 1993, 22 ILR 6007. Officers of tribal business committee bring action alleging wrongful removal from their positions. Trial court dismissed the action citing lack of jurisdiction over decisions of tribal council. Tribal court of appeals remands to determine disputed facts on whether council action was taken as required by the tribal constitution.

Clement v. LaCompte, Cheyenne River Sioux Court of Appeals 1994, 22 ILR 6111. Tribal members dispute over grazing rights. Tribal court of appeals reluctantly reversed lower court injunction and remands with directions to dismiss action because tribe is an indispensable party and cannot be joined because of sovereign immunity.

> Waiving sovereign immunity therefore is not seen by most other western sovereigns as synonymous with a waiver of sovereignty. Rather, reflecting the notion advanced by Chief Justice Marshall in Marbury that there can be no legal right without an effective judicial remedy, the trend in the United

> States is for most sovereigns to waive their sovereign immunity to provide such an effective remedy. Indeed, even in Marbury, Chief Justice Marshall noted that English practice permitted the sovereign to be "sued in the respectful form of a petition, and [the crown] never fails to comply with the judgment of his court." The very essence of the sovereignty which the people of this reservation vested in the tribal council under the tribal constitution means that the tribal council, not this court, must decide whether, when, and how the tribe can be sued in its own forums. Until it does so, the plaintiff is without any effective remedy in tribal courts.

Commercial:

TBI Contractors v. Navajo Tribe, Navajo Supreme Court 1988, 16 ILR 6017. Contract dispute. Payment for change orders issued to adjust for topographical errors in plans for shopping center. Breach of contract action against the tribe dismissed with prejudice based on sovereign immunity of the tribe.

Pawnee Tribe v. Franseen, Court of Indian Appeals 1991, 19 ILR 6006. Action by a Bingo management company seeking restitution of its investment is dismissed on grounds of sovereign immunity. Court rejects all theories of implied waiver including ICRA. Company claims it provided bingo, lavatory, concession, advertising supplies, and air conditioning equipment.

Econo Lumber Yard v. Fort Peck Housing Authority, Fort Peck Court of Appeals 1993, 20 ILR 6060. Action to enforce a mechanic's lien against real property and improvements on a tribal housing authority project and to recover for materials furnished to Authority of $270,223 plus costs. Court holds that the U.S. and the tribe are indispensable parties. The housing authority has not waived its sovereign immunity. Neither a mechanics lien or a personal money judgment is enforceable so long as the U.S. and the tribe are indispensable parties and have not been joined in the action.

Colville Confederated Tribes v. Stock West, Colville Tribal Court 1994, 21 ILR 6075. Request that trial court find a waiver of tribal sovereign immunity denied. This case moved extensively through the federal courts before reaching tribal court. Stock West entered into several contracts with the tribe to assist in development and promotion of tribal economic enterprises. The federal court attempts were successfully defended by the tribe on sovereign immunity grounds.

GNS Inc. v. Winnebago Tribe of Nebraska, Winnebago Tribal Court 1994, 21 ILR 6104. Plaintiff seeks injunctive relief to be kept on as casino manager and for 40% of profits under management agreement. Tribe defended on sovereign immunity and other grounds. Tribal casino manager's request denied and tribe's motion to dismiss granted. Sovereign immunity defense was allowed despite "sue and be sued" clause in charter and arbitration clause in management contract.

Watts v. Sloan, Navajo Supreme Court 1995, 23 ILR 6033. Tribal court lacks jurisdiction over legal malpractice action against tribal attorneys because of failure to comply with procedural requirements of Navajo Sovereign Immunity Act.

Real estate:

Davis v. Turtle Mountain Housing Authority, Turtle Mountain Tribal Court 1990, 17 ILR 6035. Dispute over damage to leased property. Tribal court denies motion to dismiss by housing authority on sovereign immunity grounds as to declaratory relief, but reverses lower court and dismisses damages claim on sovereign immunity.

Rowland v. Hoopa Valley Tribe, Hoopa Court of Appeals 1992, 21 ILR 6087. Plaintiff operates a Redi-Mix concrete plant and for many years has stockpiled material on reservation trust land with permission of the Indian occupant. Tribe refused Plaintiff access to his materials. Plaintiff sued in tribal court. Lower court denied injunction to Plaintiff on sovereign immunity. Tribal appellate court reverses lower court and enters preliminary injunction allowing gravel company to remove gravel from tribal land stock pile. Case remanded for a determination of jurisdiction and sovereign immunity.

Non-Indians:

Allen v. Myers, Nez Perce Court of Appeals 1993, 20 ILR 6105. Nez Perce Court of Appeals affirms trial court's ruling in a 42 U.S.C. § 1983 suit against Lewis County Idaho and its law enforcement officers for false imprisonment. Court finds that Lewis County and its officers have no sovereign immunity in tribal court. This case is included because of the question whether a county may be sued in tribal court. That is a federal question, which is difficult to litigate in federal court because of tribal sovereign immunity and exhaustion requirements.

Personal injury:

Johnson v. Navajo Nation, Navajo Supreme Court 1987, 14 ILR 6037. Action for personal injuries against tribal police officers and tribe. Sovereign immunity asserted as a defense. Court held that under tribal ordinance, tribal court has jurisdiction if the tribe was insured at the time suit was filed and if the insurance policy covers the claims presented by the plaintiffs. However, the Indian Civil Rights Act does not authorize suit against the tribe in tribal court under the 1980 Navajo Sovereign Immunity Act.

Bauer v. Mashantucket Pequot Gaming Enterprise, Mashantucket Pequot Appellate Court 1994, 22 ILR 6145. Tribal court finds limited waiver of sovereign immunity through tribal ordinances authorizing actions for injuries sustained as a result of negligence at the tribal gaming enterprise.

Tajildeen v. Mashantucket Pequot Gaming Enterprise, Mashantucket Pequot Tribal Court 1994, 23 ILR 6043. Judgment entered for plaintiff in personal injury action under tribal sovereign immunity waiver ordinance.

Maddelena v. Foxwood Casino, Mashantucket Pequot Tribal Court 1994, 23 ILR 6093. Damage action for personal injuries sustained within the Foxwood Casino. Tribal court holds that action was not timely filed and is therefore barred by sovereign immunity.

Macaruso v. Mashantucket Gaming Enterprise, Mashantucket Pequot Tribal Court 1994, 23 ILR 6117. Tribal court holds that plaintiff failed to timely file her claim for personal injuries, and is barred by sovereign immunity.

Middleton v. Mashantucket Pequot Gaming Enterprise, Mashantucket Pequot Tribal Court 1994, 23 ILR 6118. Tribal court holds that plaintiff fails to timely file her claim for personal injuries and is barred by sovereign immunity.

Employment:

O'Brien v. Fort Mojave Tribal Council, Fort Mojave Tribal Court 1983, 11 ILR 2, 6001. Tribal sovereign immunity is not a bar to this breach of contract action brought by former tribal employee for back wages.

DuBray v. Rosebud Housing Authority, Rosebud Sioux Tribal Court 1985, 12 ILR 6, 6015. Employment dispute dismissed based on sovereign immunity despite explicit waiver language in tribal ordinance creating Housing Authority.

Smith v. Confederated Tribes of Warm Springs Reservation, Warm Springs Tribal Court 1990, 17 ILR 6055. Tribal game warden was

fired after being accused of cattle theft. He was later cleared of the theft charge. He sued. Breach of employment contract claim is barred because of the tribe's sovereign immunity and by the statute of limitations.

Gonzales v. Alan, Shoshone-Bannock Tribal Court 1990, 17 ILR 6121. Tribal police officer seeks reinstatement and back wages for wrongful termination. Tribal court holds that sovereign immunity prevents awarding monetary damages for past wages against the tribe, although plaintiff would be entitled to such payment if the court had authority to order back wages.

Sulcer v. Barrett, Citizen Band Potawatomi Supreme Court 1990, 17 ILR 6138. Action against tribal business committee for wrongful termination and sex discrimination. Tribal Court holds that tribe is exempt from suit under the doctrine of sovereign immunity. The tribe has not waived its sovereign immunity and the tribe is also immune from indirect attempts to sue it by naming its officers as defendants.

Sisseton-Wahpeton Community College v. Wynde, Northern Plains Intertribal Court of Appeals 1990, 18 ILR 6033. Appellate court holds that sovereign immunity bars damage claim against tribal college for breach of employment contract. Court reverses a jury award of $57,000 to tribal member.

Executive Committee of the Wichita Tribe v. Bell, Court of Indian Appeals 1990, 18 ILR 6041. Damage claim against tribal executive committee for wrongful termination of employment dismissed on sovereign immunity grounds.

Pinnecoose v. Southern Ute Housing Authority, Southwest Intertribal Court of Appeals 1992, 19 ILR 6072. Action for wrongful termination dismissed because tribe and its housing authority are immune from suit because of tribal sovereign immunity.

Francis v. Wilkinson, Northern Plains Intertribal Court of Appeals 1993, 20 ILR 6015. Employment dispute. Court finds that the Constitution of the Three Affiliated Tribes expressly waives immunity of the tribal council from suits under the ICRA.

Hudson v. Hoh Indian Tribe, Hoh Court of Appeals 1992, 21 ILR 6045. Wrongful termination of employment claim. Tribe defends on sovereign immunity grounds. Court holds that the tribal constitutional right to petition the government for redress of grievances allows plaintiff to file tribal court action.

Kakwitch v. Menominee Tribal Enterprises, Menominee Supreme Court 1994, 21 ILR 6112. Tribal member sues for wrongful termination. On appeal, Tribal Enterprise motion to dismiss is denied. Court holds that Tribal Enterprise cannot rely upon a broader scope of

derivative tribal sovereignty than that enjoyed by the tribe itself.

Thompson v. Cheyenne River Tribe Board of Police Commissioners, Cheyenne River Sioux Court of Appeals 1996, 23 ILR 6045. Tribal court review of administrative action to terminate appellee as a tribal officer. Appellate court finds sovereign immunity prevents back pay award. Balance of claim reversed on the merits. Judgment entered in favor of commission.

Lovermi v. Miccosukee Tribe, Miccosukee Tribal Court 1996, 23 ILR 6090. Tribal court dismisses plaintiff's wrongful termination of employment claim against the tribe, the tribal chairman, and the tribal corporation on the grounds of tribal sovereign immunity.

Labor unions:

Mitchell v. Warm Springs Forest Products Industries, Warm Springs Tribal Court 1989, 16 ILR 6162. Plaintiff employee at tribal industry was laid off because he supported a union strike. The NLRB ruled that the Labor Relations Act does not apply to tribal business. Plaintiff sued for breach of employment contract. Court grants with prejudice tribal industry's motion to dismiss on grounds of sovereign immunity.

Separation of powers:

In re Certified Question Navajo Nation v. MacDonald, Navajo Supreme Court 1989, 16 ILR 6086. Tribal court finds the tribal chairman is not empowered to terminate a probationary tribal judge or suspend him. Such power rests with the judiciary committee. On March 22, 1989, action filed against tribal chairman resulted in issuance of TRO against chairman by newly appointed judge within his probation period. On March 23, 1989, chairman asked for writ of prohibition to lift TRO based on tribal sovereign immunity. That was apparently unsuccessful. Later the same day, a letter from the chairman was delivered to the chief judge, dated March 16, 1989, declining the trial judge's appointment and holding that he had not been a judge since March 16, 1989.

In re Certified Question: Navajo Nation v. MacDonald, Navajo Supreme Court 1989, 16 ILR 6098. Tribal court holds that the power to screen applicants to the Navajo bench rests exclusively with the judiciary committee of the Navajo tribal council. The chairman must appoint a judge from among applicants recommended by the committee. Confirmation of judges rests exclusively with the tribal council. The council has the power to deny judgeship to any of the chairman's appointees.

Lac du Flambeau Band v. One Small Mesh Gillnet, Lac du Flambeau Tribal Court 1988, 16 ILR 6095. The tribal court was requested to review portions of the tribal code for validity. The tribal court holds that it does not possess the power to review any legislative actions by the tribe's governing body. A portion of the opinion is included:

> The issue facing the appellate court is whether the Lac du Flambeau Tribal Court has been empowered to review legislation action of the tribal governing body which has resulted in the creation and implementation of the 1985 Conservation Code that is intended to regulate the hunting and fishing activities of the Lac du Flambeau tribal members using reservation natural resources.
>
> To determine the issue, it was necessary for the appellate court to examine the evidence provided to find out: 1) if there is a declaration stating the fact that the Lac du Flambeau Tribal Court is empowered to review the legislative actions of the tribal governing body, or 2) [if] there exists an inference that the Lac du Flambeau Tribal Court has the power of review.
>
> After examining the evidence, the following facts were presented:
>
> 1. A declaration granting the Lac du Flambeau Tribal Court the power to review legislative actions of the tribal governing body does not exist in the tribal constitution or in the tribal court code nor is it mentioned in the duly adopted legislation creating the 1985 Conservation Code.
>
> 2. The passages that the respondent uses to support his position as written in the 1975 court code are not applicable to this issue because the 1985 Conservation Code deleted chapter IV of the court code and replaced it with chapter IX.
>
> Based on these facts, it becomes apparent that the power to review by the Lac du Flambeau Tribal Court must come from an alternate source if it exists within the tribal judicial system.

> The most common source mentioned is said to be inherent powers that are present whenever a judicial system is created; the most common example used to support this position is the United States system, where the lack of any declaratory statements in the constructionary [sic] documents was interpreted to infer the power of review upon the Supreme Court.
>
> But unlike the Anglo system, the Lac du Flambeau Tribe lacks the environment to support an undeclared power of review grant.
>
> The court based this opinion on the following points:
>
> 1. There doesn't exist any separation of powers which exists by a creation of the (3) distinct branches of government that is needed to make the power of review by the judicial system viable in a governmental setting.
>
> 2. As stated in the Lac du Flambeau Tribal Constitution the tribal council has the authority to establish a tribal court* and define its powers and duties. Given this authority, the tribal council would have to grant the tribal court the power to review if it wanted the court to have it.
>
> In summary, it is our opinion that the tribal court does not possess the power to review any legislative actions by the governing body of the tribe and must limit its activities to whatever the tribal council defines them to be.
>
> * See tribal constitution.

MacDonald v. Yazzie, Navajo Supreme Court 1989, 16 ILR 6099. Writ of prohibition action referred to previously. The applicability of the Navajo Sovereign Immunity Act to the defendant tribal chairman and other defendants requires a determination by the court of the capacity in which the defendants are acting. Application was denied.

Plummer v. Brown, Navajo Supreme Court 1989, 16 ILR 6101. Navajo Supreme Court enters permanent writ of prohibition precluding district tribal judge from exercising jurisdiction, lifts previous orders entered by same tribal judge and holds that

Chairman MacDonald is barred by the Navajo Sovereign Immunity Act from seeking relief against the tribe by suing the tribal council. Background: Tribal council passed an ordinance placing tribal chairman on administrative leave with pay and removing all his legislative and executive authority. This was in response to a lawsuit filed by the chairman against the council. The lawsuit was filed in a tribal court where the tribal judge was the chairman's brother-in-law. The tribal judge fixed a hearing to enjoin the suspension of the chairman, and refused to recuse himself. The appellate court observed that the family ties between the chairman and the judge should have caused the judge to immediately recuse himself.

McDonald v. Navajo Nation, Navajo Supreme Court 1990, 18 ILR 6003. Former tribal chairman Peter MacDonald cannot invoke testimonial privilege to avoid production of records under the Navajo Sovereign Immunity Act and because of the legislative intent expressed in the Special Prosecutor Act.

McKinney v. Business Council of the Shoshone Paiute Tribe, Duck Valley Tribal Court 1993, 20 ILR 6020. The tribal business council failed to comply with tribal law and the ICRA in expelling the chief judge of the tribal court. Reinstatement of the judge ordered.

Combrink v. Alan, Court of Indian Appeals 1993, 20 ILR 6029. Tonkawa tribal law requires the tribal president to call a special meeting of the council upon written request of ten members. Sovereign immunity does not bar the court's authority to issue a writ of mandamus to compel the calling of such a meeting.

McKinney v. Business Council of Shoshone Piaute, Shoshone Piaute court 1993, 20 ILR 6064. Tribal council fired judge for supposed ill health. Tribal court holds that the business council did not comply with the tribal law attempting to remove the tribal court judge. Court ordered reinstatement.

Bordeaux v. Wilkinson, Ft. Berthold Tribal Court 1993, 21 ILR 6131. In tribal court challenge to tribal council officers awarding themselves bonus pay, the court holds that sovereign immunity does not bar the action because the tribal constitution authorizes actions against tribal council members for injunctive relief.

Lane-Oreiro v. Lummi Indian Business Council, Lummi Tribal Court 1994, 21 ILR 6143. Court action to review tribal council recall election procedures. Court finds that neither the tribe nor the business council has given the tribal court the power to review the legality or constitutionality of business council actions.

Neither the Lummi Nation nor the Lummi Business Council has given the court the power to review the legality or constitutionality of the business council's actions and separated the court from the council so that the court would be protected if it were to do so. Unlike the United States Supreme Court which was specifically created and had its power defined in the United States Constitution, the Lummi Tribal Court was not created and its powers were not defined within the Constitution of the Lummi Nation.

Finally, the business council did not give the court a directive to review the constitutionality or legality of the council's actions, although the court proposed this as a possible way to resolve the dispute.

Until such time as the authority to review the legality or constitutionality of the tribal council's actions is legally given to this court by the business council or the general council, this court must decline to hear the case and leaves the petitioners to whatever remedies the political arena of the tribe may provide.

TESTIMONY OF SUSAN M. WILLIAMS, ESQ.
GOVER, STETSON & WILLIAMS, P.C., ALBUQUERQUE, NEW MEXICO
BEFORE THE COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
SEPTEMBER 24, 1996

Mr. Chairman and members of the Committee, name is Susan M. Williams. I am a partner in the law firm of Gover, Stetson & Williams. We represent Indian tribal governments throughout the country and have broad experience with issues relating to tribal sovereign immunity and the regulation and adjudication of interests affecting non-Indians and non-members within reservation territories.

At your request, I appear before you today to discuss the issue of tribal sovereign immunity against the backdrop of a broad waiver of tribal immunity from suit proposed in Section 329 of the Senate's Fiscal Year 1997 Interior Appropriations bill. The waiver appears to protect the interests of non-Indians and non-members owning or using property within reservation boundaries. I understand that the waiver provision was removed from the bill in the full Senate Appropriations Committee, and we strongly support its omission. I am grateful for the opportunity to testify before you on this very important issue.

My testimony, in sum, is that it is essential that Congress not legislate a sweeping waiver of tribal sovereign immunity specially to protect non-Indians and non-members owing or using land within Indian reservations. Both law and public policy suggest this conclusion. First, several dangers exist in legislating a broad waiver of tribal sovereign immunity. A broad waiver of this nature may result in serious, unintended impacts. It would undermine the historic common-law right and federal policy granting Indian tribes autonomy and self-determination as sovereigns, and it would expose the limited financial and economic resources of modern-day tribal governments to unfettered litigation and ultimate depletion. Second, a broad waiver of tribal immunity from suit simply is not necessary to protect non-Indians and non-members. The federal government and tribal governments already afford substantial legal protections to the interests of non-tribal entities and individuals on reservation lands. Tribal governments are dealing with non-tribal entities and individuals with increased frequency in the civil regulatory, commercial, and environmental contexts. As proactive measures and of their own volition, tribes have initiated programs and policies designed to solicit input and participation of non-tribal members. This has resulted in more effective administration, enforcement, and adjudication of tribal laws and regulations. For these reasons, it is essential that Congress refrain from legislating a broad waiver of tribal sovereign immunity.

I. The Doctrine of Tribal Sovereign Immunity from Suit Must be Preserved.

It has long been recognized that Indian nations possess "the common-law immunity from suit traditionally enjoyed by sovereign powers."[1] The basis of this immunity has been expressed as an inherent aspect of tribal sovereign powers predating the United States Constitution and as

[1] Santa Clara Pueblo v. Martinez, 936 U.S. 49, 58 (1978) (citing United States v. United States v. United States Fidelity & Guaranty, 309 U.S. 506, 512-13 (1940)).

consistent with federal policy in preserving the existence of tribal autonomy.[2] The United States thus must tread lightly in this area as the important federal interest in tribal self determination is at stake.[3] Indian tribes, however, are not cloaked with an absolute, unqualified immunity from suit. Like other sovereign powers of Indian tribes, tribal immunity may be waived by congressional act.[4] Courts also have recognized exceptions to tribal immunity from suit. In fact, tribal sovereign immunity is similar, but not identical, to that enjoyed by the federal government, state governments, or other foreign sovereigns.

A. Origin and Limited Scope of the Doctrine.

As a general matter, the doctrine of sovereign immunity has been supported on the theory that official actions of government must be protected from undue interference.[5] As a practical and policy matter, the doctrine has been deemed necessary to protect public treasuries from depletion by unfettered litigation.[6] Thus, the common law doctrine of immunity from suit remains viable, not only for tribal governments but also the state and federal governments.

The Supreme Court applied the common law immunity doctrine to Indian tribes for the first time in 1940.[7] The Court has viewed the common law sovereign immunity possessed by

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[2]Id.; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); Turner v. United States, 248 U.S. 354, 357-58 (1919).

[3]See e.g., Santa Clara Pueblo, 936 U.S. at 66-67 (Congress' provision in the Indian Civil Rights Act of 1968 "for *habeas corpus* relief, and nothing more, reflected a considerable accommodation of the competing goals of 'preventing injustices perpetrated by tribal governments, on the one hand, and, on the other, avoiding undue or precipitous interference in the affairs of the Indian people.'").

[4]Santa Clara Pueblo, 436 U.S. at 58.

[5]See Note, *Tribal Sovereign Immunity: Searching For Sensible Limits*, 88 Columbia L. Rev. 173 (1988); see also The Federalist No. 81 at 548 (J. Cook E. 1961); See also Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 Geo. L.J. 81 (1968); 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 3654 (1985)(litigation must not be allowed to stop or slow down official activities that are essential to governing a nation); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949)(the government represents the community as a whole and cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right)

[6]See Ziontz, *In Defense of Tribal Sovereignty: An Analysis of Judicial Error in Construction of the Indian Civil Rights Act*, 20 S.D.L. Rev. 1 (1975).

[7]United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512 (1940)(Indian nations are exempt from suit; "[i]t is as though the immunity which was theirs as sovereigns passed to the United States for their benefit . . . .").

tribes as "a necessary corollary to Indian sovereignty and self-governance."[8] Courts have recognized that tribal immunity from suit is essential to preserve tribes' autonomous political existence and tribal assets, as well as to promote the federal policies of tribal self determination, economic development, and cultural autonomy.[9] From a policy standpoint, tribal immunity from suit advances the federal policy of assuring that Indian nations remain viable cultural and political entities.[10]

Current-day jurisprudence does not regard the scope of tribal sovereign immunity from suit, however, as identical to that of other sovereigns. Indian nations are subject to broad federal control and definition. Consequently, tribes are characterized as "quasi-sovereigns,"[11] and as such, tribal immunity from suit "is not congruent with that which the Federal Government, or the states, enjoy."[12] Thus, the scope of tribal sovereign immunity from suit is not unlimited and is subject to a number of exceptions or waivers by the United States and tribes themselves.

B. Exceptions to and Waivers of Tribal Sovereign Immunity.

Tribes and tribal agencies and officials are subject to suit under various exceptions to tribal sovereign immunity recognized in the courts. For example, courts have applied the age-old doctrine established by Ex parte Young[13] in the tribal context.[14] This doctrine works as an

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[8]Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Engineering, P.C., 476 U.S. 877, 890 (1986), citing Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[9]Native Village of Tyonek v. Puckett, 890 F.2d 1054 (9th Cir. 1989).

[10]See Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 201 (1985).

[11]Santa Clara Pueblo, 436 U.S. at 71, 55, and 58 (1978).

[12]Three Affiliated Tribes of Ft. Berthold Reservation, 476 U.S. at 890-91 (1986)(because of the peculiar "quasi-sovereign" status of Indian tribes, the Tribe's immunity cannot be coextensive with that of the federal government, or even the states.), citing United States Fidelity & Guaranty Co., 309 U.S. 506, 513 (1940).

[13]209 U.S. 123, 159-160 (1908)(where a state official attempted to enforce an unconstitutional state law, he was "stripped of his official or representative character;" his immunity from suit in federal court under the Eleventh Amendment did not protect him from the consequences of his individual conduct). This doctrine remains vital as a mechanism to force compliance with the commands of the federal Constitution although it is based, in part, on the legal fiction that "unauthorized" or "illegal" actions of governments officers are not actions of the sovereign itself.

[14]See Wisconsin v. Baker, 698 F.2d 1323, 1332 (7th Cir. 1983), cert. denied 463 U.S. 1207 (1983)("an official of an Indian tribe should be stripped of his authority, and corresponding immunity, to act on behalf of his tribe whenever he exercises a power that his tribe was powerless to convey to him"); Puyallup Tribe, Inc. v. Department of Game, 433 U.S. 165, 171 (1977)(a suit to enjoin violations of state law by individual tribal members is permissible).

exception to the general rule of sovereign immunity from suit and is applied to federal and state governments. At its core, the Ex parte Young doctrine permits suits for prospective injunctive or declarative relief to require governmental officials to comply with the law. It is based on the notion that an action against individual government officials engaging in unauthorized or illegal conduct is not an action against the sovereign government itself. Thus, in the tribal context, a litigant may seek injunctive or declaratory relief[15] against individual tribal officials who allegedly have acted outside the scope of their authority.[16] This exception to tribal sovereign immunity has been broadly construed, permitting, for example, developers or individuals to obtain adjudications of the validity of various tribal laws and actions.[17] Thus, although the Ex parte Young doctrine was intended to waive state immunity to vindicate violations of federal law by state officials, the doctrine has been extended to act by tribal officials in derogation of tribal or federal law.

Tribal sovereign immunity has been limited by various court decisions establishing other exceptions to tribal immunity from suit. For instance, where particularly egregious allegations of personal restraint and deprivation of personal rights were raised, the Tenth Circuit distinguished the Santa Clara Pueblo case and permitted a claim for damages for constitutional violations of personal and property rights against a tribe.[18] In addition, an exception based upon the equitable

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[15]As with suits against state or federal officials, an action against tribal officials can only seek injunctive or declaratory relief; suits for monetary relief are barred under the notion that suits affecting the treasury are suits against the sovereign itself. See Edelman v. Jordan, 415 U.S. 651 (1974)(action for retroactive relief barred); but see Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 515 F.2d 926 (10th Cir. 1975) and 623 F.2d 682 (10th Cir. 1980), cert. denied 449 U.S. 1118 (1981)(no tribal remedy, thus non-Indians' claim for damages against tribe permitted).

[16]Burlington N. R. Co. v. Blackfeet Tribe of the Blackfeet Indian Reservation,. 924 F.2d 899, 901 (9th Cir. 1991), amended and cert. denied 505 U.S. 1212 (1992). In this regard, some tribal governments insure or indemnify employees against lawsuits in a manner similar to some state and federal governments. Since the court must make a threshold determination of whether the tribal employee was acting within his or her authority before deciding if jurisdiction exists, there will be costs associated even with a successful defense of an officer suit. See e.g. Hardin v. White Mountain. Apache Tribe, 761 F.2d 1285 (9th Cir. 1985), amended 779 F.2d 476 (10th Cir. 1985); see also Santa Clara Pueblo v. Martinez, supra (the Governor of the Pueblo was required to litigate the extent of the protection the Pueblo's immunity afforded him).

[17]See Kerr-McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195 (1985)(Supreme Court decided case involving a non-Indian challenge to tribal taxes without discussing sovereign immunity); Tenneco Oil Co. v. Sac & Fox Tribe of Indians, 725 F.2d 572 (10th Cir. 1984)(oil company permitted to maintain action against individual tribal officials and challenge certain tribal licensing and taxing ordinances).

[18]Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes, 515 F.2d 926 (10th Cir. 1975) and 623 F.2d 682 (10th Cir. 1980), cert. denied 449 U.S. 1118 (1981)(wrongful denial of access to a non-Indian guest ranch located on the reservation).

recoupment doctrine has been recognized in the Tenth Circuit.[19] These trends are disturbing as the power of the United States to waive tribal sovereignty rests in Congress, not the courts, and that power must be exercised judiciously.

Tribal sovereign immunity may be waived by either acts of Congress or acts of the tribes. Although Congress has power to waive a tribe's common law immunity from suit,[20] Congress appropriately, only sparingly has exercised this power. Only a few instances can be cited where Congress has waived tribal immunity from suit.[21]

In addition, tribes may waive sovereign immunity from suit voluntarily.[22] Tribal waivers of sovereign immunity must be "unequivocally expressed."[23] Courts have found tribal waivers of immunity from suit in a variety of circumstances. For instance, courts have held that an Indian tribe's contract providing for resolution of disputes by arbitration and making the arbitration agreement enforceable in any court having jurisdiction creates a right to sue, and thus constitutes

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[19]Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982)(doctrine of equitable recoupment applies to tribes as it applies to federal and state governments) When a sovereign sues, it waives immunity to: (1) claims of the defendant which assert matters in recoupment (matters arising out of the same transaction or occurrence), or (2) claims of equal or less monetary value that are of the same form or nature as those sought by the sovereign plaintiff, see Frederick v. United States, 386 F.2d 481, 487-88 (5th Cir. 1967).

[20]Three Affiliated Tribes of Fort Berthold, 476 U.S. at 891.

[21]See e.g. Santa Clara Pueblo, supra (in the Indian Civil Rights Act, Congress waived sovereign immunity for habeas corpus proceedings to review decisions of tribal courts); Metropolitan Water Dist. of Southern California v. U. S., 830 F.2d 139 (9th Cir. 1987), cert. granted 485 U. S. 1020 (1987), aff'd 490 U.S. 920 (1987)(in the McCarran Amendment, 43 U.S.C. § 666, Congress waived the United States' sovereign immunity as a party defendant in suits to adjudicate all water rights in a stream system, which included Indian water rights); Blue Legs v. U.S. Bureau of Indian Affairs, 867 F.2d 1094, 1097 (8th Cir. 1989)(tribal sovereign immunity from suit is abrogated under the Resource Conservation and Recovery Act, thus permitting "citizen suits" against tribes).

[22]Wichita and Affiliated Tribes v. Hodel, 788 F.2d 765 (D.C. Cir. 1986); Chemehuevi Indian Tribe v. California State Bd. of Equalization, 757 F.2d 1047 (9th Cir. 1985), rev'd on other grounds 474 U.S. 9 (1985); Merrion v. Jicarilla Apache Tribe, 617 F.2d 537 (10th Cir. 1980), aff'd on other grounds 455 U.S. 130 (1982); United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981); Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (8th Cir. 1970); Maryland Casualty Co. v. Citizens Nat'l Bank, 361 F.2d 517 (5th Cir. 1966), cert. denied 385 U.S. 918 (1966).

[23]Santa Clara Pueblo, supra.

a waiver of the tribe's sovereign immunity.[24] Most courts also have held as a general rule that the presence of "sue and be sued" clauses in corporate charters established under the Indian Reorganization Act ("IRA")[25] constitute a waiver of sovereign immunity.[26]

In the commercial context, increased economic development involving non-tribal entities has resulted in tribal governments voluntarily waiving tribal immunity and providing protections to non-Indians' and non-members' interests as necessary. For example, in its gaming compact with the State of Arizona, the Yavapai-Apache Nation agreed to a establish procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming establishment. See, Exhibit 1, attached hereto. Under the gaming compact, it was agreed that the procedures may be analogous to the remedial system available for similar claims arising against the State. Pursuant thereto, the Yavapai-Apache Nation adopted comprehensive tort remedies procedures, wherein the Nation waives the sovereign immunity of the gaming establishment and/or the Nation for the express purpose of allowing patrons to bring tort claims against the Nation and/or the gaming establishment in the Nation's tribal court. See, Exhibit 2, attached hereto.

These are but some examples of circumstances in which tribal immunity from suit has been limited. Given this discussion, it is clear that tribes are not cloaked by an impermeable shield of sovereign immunity from suit. The courts appear to be finding exceptions and waivers by tribes of tribal sovereign immunity with increasing frequency. Thus, a sweeping waiver of tribal sovereign immunity is unnecessary and will undermine tribes' entitlement as sovereigns to common law immunity from suit afforded other sovereigns. As with any sovereign, tribal governments must retain their autonomy and ability to protect their treasuries from attack and to subject themselves to government on a case-by-case basis.

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[24]Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., 86 F.3d 656 (7th Cir. 1996); Rosebud Sioux Tribe v. Val-U Construction Co. of South Dakota Inc., 50 F.3d 560 (8th Cir. 1995); see Aubertin v. Colville Confederated Tribes, 446 F.Supp. 430, 435 (E.D. Wash. 1978); see also In re Colegrove, 9 B.R. 337 (Bankr. N.D. Cal. 1981)(where "sue and be sued" language is omitted from tribal corporate charter).

[25]12 U.S.C. §§ 461, 462, 464-479 (1983); 25 U.S.C. § 463 (Supp. 1986).

[26]See, e.g., Merrion v. Jicarilla Apache Tribe, 617 F.2d 537, 540 (10th Cir. 1980), aff'd on other grounds, 455 U.S. 130 (1982); Boe v. Ft. Belknap Indian Community of Ft. Belknap Reservation, 455 F.Supp. 462, 463 (D. Mont. 1978), aff'd 642 F.2d 276 (9th Cir. 1981)(corporate waiver of immunity, however, should not waive tribal immunities); Maryland Casualty Co. v. Citizens National Bank, 361 F.2d 517 (5th Cir. 1966), cert. denied sub nom., Maryland Casualty Co. v. Seminole Tribe of Florida, Inc., 385 U.S. 918 (1966)(Seminole Tribe adopted a § 17 corporate charter with a "sue and to be sued" provision, and the court found this a waiver of immunity, which was expressly qualified, and the tribe's assets were beyond the reach of the garnishment action in issue); see Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143, 147 (8th Cir. 1970)(tribe subjected to action to quiet title to lands); Parker Drilling Co. v. Metlakatla Indian Community., 451 F.Supp. 1127 (D. Ark. 1978)(tribe exposed to tort suit).

II. The Federal Government and Tribes are Protecting Significant Interests of Non-Indians and Non-Members on Reservations Now.

A broad waiver of tribal sovereign immunity from suit is unnecessary because the federal government and tribal governments already are providing protections to non-Indians and non-members within the boundaries of reservations. Existing federal oversight protects the interests of reservation residents without destroying tribal autonomy.

A. Tribal Regulatory Undertakings Affecting Non-Indians and Non-Members.

Congress ensures the protection of non-Indians and non-members by requiring federal approval of certain tribal laws and ordinances governing a variety of civil regulatory areas. While it is arguable that Congress oversteps the "guardian" role of the United States over tribes and effectively usurps tribal governments through this type of legislation, it is certainly less harmful than legislating broad waivers of tribal immunity from suit in these areas. Thus, where tribes exercise regulatory jurisdiction in these areas, the involvement and oversight of the federal government already protects the interests of non-Indians and non-members.

For instance, tribes are allowed to enact their own liquor laws within the limitations set by a federal jurisdiction statute.[27] While Congress has set forth the requirements of the tribal ordinances and maintained a federal certification and oversight role,[28] actual regulation of the liquor sales remains vested in the tribes within their jurisdictional boundaries. Several tribes have enacted liquor ordinances under these procedures.[29] Significantly, a recent federal court decision upheld a tribal ordinance that authorized the Cheyenne River Sioux Tribe to regulate liquor sales in non-Indian communities, on lands held in fee by non-Indians within the reservation.[30] Other examples include federal agency involvement in forestry[31] and agriculture.[32]

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[27]18 U.S.C. § 1161.

[28]The statute requires that tribal ordinances be consistent with federal and state law and that the Secretary certify and publish the ordinance in the *Federal Register*. 18 U.S.C. § 1161.

[29]See 59 Fe. Reg. 31496 (June 17, 1994)(St. Regis Mohawk Tribal Alcohol Beverages Control Act passed 11/19/93); 59 Fe. Reg. 55316 (November 11, 1994)(Coushatta Tribe of Louisiana Liquor Control Ordinance passed 8/30/94); 59 Fed. Reg 26346 (May 19, 1994)(Jamestown S'Klallam Tribe Liquor Control Ordinance enacted 2/22/94).

[30]City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993).

[31]Under the National Indian Forest Resources Management Act (the "Forest Act"), the Secretary must comply with tribal laws and ordinances, including laws regulating the environment and historic or cultural preservation, and laws or ordinances adopted by the tribal government to regulate land use or other activities under tribal jurisdiction. 25 U.S.C. § 3101 et seq., P.L. 1010-630. Under the Forest Act, the Secretary is authorized to provide assistance in the enforcement of related tribal laws, notify others of such laws, and if the tribe so requests, require federal officers to appear in tribal court. Tribes must, however, adopt an ordinance identical to

In addition, Congress has authorized federal agencies to assist tribes in developing tribal ordinances and regulations related to the particular agency's areas of concern. For example, the Indian Energy Resources Act authorized the Secretaries of Interior and Energy to provide assistance to Indian tribes in the development, administration, implementation, and enforcement of tribal laws and regulations governing the development of energy resources on Indian reservations.[33] The Indian Gaming Regulatory Act authorizes the Chairman of the National Indian Gaming Commission, a federal agency, to approve tribal gaming ordinances and resolutions.[34] The interests of all reservation citizens is taken into account by the federal agency's evaluating tribal undertakings in these areas.

B. Tribal Environmental Regulations.

In the area of environmental protection, Congress has acknowledged that tribal governments, like state governments, have the authority to regulate environmental matters. This authority, however, is subject to federal agency oversight. The Environmental Protection Agency ("EPA") is authorized to approve certain tribal environmental codes as part of federal government programs. Specific EPA authority is found in the Clean Water Act[35] and the Safe Drinking Water Act.[36]

Under the "primacy" provision of the Safe Drinking Water Act, tribes are provided the opportunity to assume principal responsibility for the enforcement of drinking water supply regulations within the jurisdictional boundaries of the tribe. To attain primacy status, a tribe must have drinking water regulations at least as strict as EPA's and establish an independent agency within the tribal government that has the power to enforce tribal regulations. Increasing numbers

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the Department of the Interior forest trespass regulations to obtain concurrent civil jurisdiction to enforce the trespass regulations.

[32]The American Indian Agriculture Resource Management Act, 25 U.S.C. §§ 3701-3745 (1993), contains provisions expressly requiring the Secretary to comply with tribal laws and ordinances, similar to the Forestry Act. For agricultural resources, the law requires that a 10-year plan be developed and implemented either directly by the tribe or by the Secretary. Id. § 3711(b)(1)(C). A requirement for federal approval of the plan is implied in the statute. See 25 U.S.C. § 3711(b)(2).

[33]25 U.S.C. § 3504.

[34]25 U.S.C. § 2710(b)(1)B), (d)(1)(A)(iii), and (b)(2).

[35]33 U.S.C. § 1377(e).

[36]42 U.S.C. § 300j-11(a).

of tribes are undertaking principal responsibility, with the assistance of the EPA,[37] for protecting sources used for drinking water under the federal enabling legislation.

Tribes also are undertaking environmental regulation under the Clean Water Act. Congress has permitted tribes to be "treated as states" for purposes of this legislation. As such, tribes can obtain funds necessary to pursue the planning required for protecting water resources vital to the tribes. Section 106 of the Clean Water Act allows for development of a surface water management program, and section 104 provides for water quality management. Once a tribe's water quality standards have been approved by the EPA,[38] the tribe also is treated as a state for purposes of the certification process under section 401 of the CWA. The section 401 certification process requires the technical review of pending permit applications to determine their impacts on water quality standards, and most tribal law-making bodies avoid becoming directly involved in carrying out this kind of technical review process. Another statutory requirement is that tribes, like states, adopting their own water quality standards must conduct a public review of their standards at least every three years. These burdensome administrative procedures ensure the input and protection of the interests affected non-Indians and non-members.

Despite the strict statutory burdens of undertaking tribal environmental regulation, many tribes are establishing the necessary administrative and adjudicatory procedures and expertise in order to protect the resources that are vital to the welfare and future of their tribe. For example, tribal governments have developed extensive solid and hazardous waste regulations, particularly in response to the Eighth Circuit's 1989 decision in Blue Legs v. U.S. Bureau of Indian Affairs,[39] which held that tribal governments are responsible for managing solid waste disposal on reservations and may be held liable for failing to meet this responsibility. The Campo Band of Mission Indians, for example, has established comprehensive tribal regulatory and enforcement mechanisms for regulating solid waste on the Reservation. See Exhibit 3, attached hereto. In many of these tribal ordinances, tribes provide a waiver of their sovereign immunity from suit for purposes of appeal of administrative decisions by tribal agencies. The Lummi Water and Sewer Ordinance is an example.

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[37]The EPA provides grants and technical assistance to tribes for drafting environmental codes under the Indian Environmental General Assistance Program Act of 1992. 24 U.S.C. § 436b. The Clean Air Act requires the EPA to treat tribes as states for the purposes of funding planning grants and program operational costs under those statutes. 42 U.S.C. § 7601(d). The EPA also revised its internal regulations to make it easier for tribes to obtain EPA approval to assume environmental regulatory authority. 59 Fed. Reg. 64339 (December 14, 1994). The revision shifted the emphasis from treating tribes the same as states to treating tribes as sovereigns in their own right. Under the new regulation, a tribe must meet the applicable statutory requirements, rather than undergo a separate "treatment as state" approval process.

[38]We note for the record that any affected person may seek judicial review of the EPA's approval of tribal water quality standards. City of Albuquerque v. Browner, No. 93-82-M Civil (D.C.D. N.M., Oct. 22, 1993)(federal court jurisdiction is based on the Administrative Procedure Act and Declaratory Judgment Act).

[39]867 F.2d 1094, 1097 (8th Cir. 1989)

C. Tribal Economic Development and Commercial Dealings.

The interests of non-Indians and non-members are protected to the extent required by federal law or the terms of commercial transactions. The federal government, for instance, is inextricably involved in tribal housing development. The Department of Housing and Urban Development ("HUD") has requirements for tribal housing authorities receiving HUD funds. For example, the Indian Housing Loan Guaranty Program[40] allows HUD to guarantee loans for the purchase, construction, or rehabilitation of family dwellings on restricted lands and in Indian areas. In order for an individual Indian borrower or an Indian Housing Authority to participate in the program, the tribal government must enact both eviction and foreclosure procedures to protect borrowers, lenders, and HUD, in the event of a default. Here, too, tribal housing ordinances often contain a waiver of tribal sovereign immunity from suit to enforce individual rights under these ordinances.

In the commercial context, tribes have a built-in incentive to waive their immunity from suit or otherwise protect non-Indians. Interested parties will not be interested in conducting business on Indian reservations without an ability to seek redress for grievances. Tribes, thus, will choose to waive immunity or take other similar steps to consummate a business deal. Clearly, no intervention is necessary in this context.

III. Regulatory Issues and Participation of Non-Indians and Non-Members in Tribal Government.

A. Regulatory Issues Involving Modern-Day Tribal Governments Authority Over Non-Indians.

The authority of tribal governments to exercise tribal jurisdiction over non-Indians has been one of the most disputed issues in Indian affairs during the modern era. In 1978, the Supreme Court held in Oliphant v. Suquamish Indian Tribe[41] that tribes could not prosecute and convict non-Indians, unless authorized to do so by Congress. In 1990, the Supreme Court extended the Oliphant ruling to non-member Indians,[42] Congress later reinstated tribal authority over non-member Indians. Today, controversies relating to tribal authority to exercise civil jurisdiction and regulatory authority over non-Indians and non-members residing within reservation boundaries persist. In certain civil contexts, particularly taxation and land use, tribal authority over non-Indians and non-members has been upheld.[43]

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[40]42 U.S.C. § 1437a (amended 1992).

[41]435 U.S. 191 (1978).

[42]Duro v. Reina, 495 U.S. 676 (1990).

[43]Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980)(tribal cigarette tax for sales to non-Indians on tribal lands has been upheld by the Supreme Court); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)(tribal tax levied on mineral extraction from tribal lands upheld, even though the tribes were receiving revenues from the

Tribal authority to regulate non-Indians on non-tribal trust land within reservation boundaries is subject to certain rules under federal law. In Montana v. United States, 450 U.S. 544 (1981), the Supreme Court enumerated the rule for establishing tribal jurisdiction over non-Indians in this context. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[44] Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[45] Under the "tribal welfare" test, lower courts have upheld broad tribal civil powers over non-Indians on non-Indian land in a tribal zoning ordinance,[46] a tribal health and safety ordinance,[47] and tribal regulation of non-Indian lands bordering tribal trust property.[48] With regard to water use, the courts have upheld federal and tribal control to the exclusion of state control over water use by non-Indians on an Indian reservation.[49]

B. **Tribal Programs and Policies Involving Participation of Non-Indians and Non-Members in Tribal Governments.**

Many tribes have responded to the civil regulatory concerns involving non-Indians as well as tribal members by adopting extensive legal codes and restructuring tribal government capable of adjudicating Indian and non-Indian civil disputes in their own courts and administering their increased regulatory responsibilities. This makes tribal governments more accessible and "user-friendly" to tribal members and non-tribal members alike.

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mining companies under the mineral leases; the Court compared the tribe to states and cities, which can receive contract payments as landowners and levy taxes in their governmental capacities as sovereigns); Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985)(non-IRA tribal governments may tax on-reservation business activities without first obtaining approval by the Secretary of Interior where the tribal constitution does not require such advance approval).

[44]Montana v. United States, 450 U.S. 544, 565 (1981).

[45]Id., 450 U.S. at 566.

[46]Knight v. Shoshone and Arapahoe Indian Tribes, etc., 670 F.2d 900 (10th Cir. 1982).

[47]Cardin v. De La Cruz, 671 F.2d 363 (9th Cir. 1982).

[48]Confederated Salish and Kootenai Tribes of Flathead Reservation v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, 459 U.S. 977 (1982).

[49]Colville Confederated Tribes v. Walton, 647 F.2d 42 (9th Cir. 1981), cert. denied 454 U.S. 1092 (1981).

For example, the Zuni Pueblo has adopted extensive legal codes, including the Zuni Business Code which controls and regulates the activities of non-Zunis and non-residents of the Reservation in their commercial dealing with the Zuni Reservation and the people living thereon. See, Exhibit 4, attached hereto. The Zuni Business Code establishes procedures and requirements consistent with federal laws and regulations governing the conduct of business on the Zuni Reservation.

In addition, because tribes have civil regulatory authority and jurisdiction over non-Indians and non-members, tribal governments are developing initiatives to increase the participation of non-tribal members in the government. For example, the Navajo Nation has established a five-member Navajo Tax Commission, two of whom may be non-Indians and non-members. See, Exhibit 5, attached hereto. Particularly important to note here, also, is that Navajo law permits an adjudication of a refund action in tribal court in specific instances for certain taxes.[50] Thus, reservation citizens have direct access to both regulatory and judicial relief.

Another example of tribal initiatives to involve non-Indians include the six-member Board of Commissioners of the Wind River Housing Authority, established by the Shoshone Indian Tribe and the Arapahoe Indian Tribe, requires that two members of the Board be non-members. See, Exhibit 6, attached hereto. In addition, the Zuni Pueblo has established the Zuni Tribal Enterprise Board of Directors, and the five-member Board may be comprised of "[a]ny person, Zuni or non-Zuni, resident or non-resident," who shows a willingness to further the purposes of the Title. See, Exhibit 7, attached hereto.

A particularly good example of tribal agency activities directly involving non-Indians is the Lummi Tribal Sewer and Water District Ordinance. The Lummi Ordinance involves the participation of non-Indians and non-members by permitting the election of two of the five members of the Sewer and Water Board from the entire community within the boundaries of the Lummi Tribal Sewer and Water District. See, Exhibit 8, attached hereto. The candidates and electors for these open positions consist of all persons residing within the District. In addition, the rules and procedures for voting and conducting the election are developed by a committee, which includes a non-Indian appointed by the Sewer and Water Board. Clearly, Lummi's regulation and administration of its water and sewer ordinance seeks to protect the interests of non-Indians and non-members within its reservation boundaries.

IV. Recommendation.

With increasing frequency, courts are interpreting federal laws and tribal laws, conduct, and contracts as waivers of sovereign immunity and creating exceptions to tribal immunity. In addition, tribes, themselves, are waiving their immunity from suit in appropriate circumstances. Moreover, federal law already provides a great deal of oversight of tribal affairs, even while acknowledging the fundamental importance of supporting tribal self-governance autonomy. In this context, Congress should remain very cautious in the area of tribal sovereign immunity from suit and refrain from legislating a sweeping waiver of tribal immunity.

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[50] See e.g. 24 Nav. Tr. Code § 433 (procedure for refund of Business Activity Tax).

EXHIBIT 1

YAVAPAI-APACHE NATION

AND

STATE OF ARIZONA

GAMING COMPACT

1993

In addition, public health standards for food and beverage handling shall be in accordance with United States Public Health Service requirements.

(b) Emergency Service Accessibility. The Nation shall require the Gaming Facility Operator to make provisions for adequate emergency accessibility and service.

(c) Tort Remedies for Patrons. The Nation shall establish procedures for the disposition of tort claims arising from alleged injuries to patrons of its Gaming Facilities, which procedures may be analogous to the remedial system available for similar claims arising against the State. The Nation shall not be deemed to have waived its sovereign immunity from suit with respect to such claims by establishing such procedures or by any provision of this Compact.

(d) Liability for Damage to Persons and Property. During the term of this Compact, the Nation shall maintain public liability insurance which provides no less than one million dollars ($1,000,000) for personal injury and property damage. The Nation's insurance policy shall include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to the limits of the policy set forth above.

SECTION 14. PATRON DISPUTES

(a) Refusal to Pay Winnings. Whenever the Gaming Facility Operator refuses payment of alleged winnings to a patron, and the Gaming Facility Operator and the patron are unable to resolve the dispute to the satisfaction of the patron and the dispute involves:

(1) At least five hundred dollars ($500), the Gaming Facility Operator shall immediately notify the Tribal Gaming Office. The Tribal Gaming Office shall conduct whatever investigation it deems necessary and shall determine whether payment should be made; or

(2) Less than five hundred dollars ($500), the Gaming Facility Operator shall inform the patron of his or her right to request that the Tribal Gaming Office conduct an investigation. Upon request of the patron, the Tribal Gaming Office shall conduct whatever investigation it deems necessary and shall determine whether payment should be made.

(b) Notice to Patrons. The Tribal Gaming Office shall mail written notice by certified mail, return receipt requested, to the Gaming Facility Operator and the patron of the decision resolving the dispute within thirty (30) days after the date that the Tribal Gaming Office first receives notification from the Gaming Facility

Operator or a request to conduct an investigation from the patron.

(c) Effective Date of Decision. The decision of the Tribal Gaming Office is effective on the date it is received by the aggrieved party as reflected on the return receipt.

(d) Review of Decision. Within thirty (30) days after the date of receipt of the written decision, the aggrieved party may file a petition with the Tribal Gaming Office requesting a review of the decision. The Tribal Gaming Office may set a hearing on the matter or may make a decision based solely upon the prior decision and other documentation provided to it by the patron and the Gaming Facility Operator. The Tribal Gaming Office shall then issue a written decision and mail it to the parties pursuant to the procedures set forth in Section 14(b). The decision of the Tribal Gaming Office shall be final and binding upon the patron and the Gaming Facility Operator and shall not be subject to judicial review, dispute resolution or other legal action.

SECTION 15. DISPUTE RESOLUTION

(a) Procedures and Provisions Subject to Dispute Resolution. The parties may discuss and reconsider Sections 4, 5, 7, 11, 12, 14 and all appendices to this Compact upon written notice and request by either party. Thereafter, if the Nation

EXHIBIT 2

RESOLUTION NO. 14-96
OF THE GOVERNING BODY OF THE YAVAPAI APACHE NATION

WHEREAS, pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701, the Nation has entered into a Gaming Compact ("Compact") between the Nation and the State of Arizona, which Compact defines the respective obligations and responsibilities of the Nation and the state with respect to Class III gaming activity on the reservation, and the Tribal Council has reviewed and approved the Compact; and

WHEREAS Section 13 of the Compact requires the Nation to establish procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities; and

WHEREAS no procedure currently exists to address adequately such tort claims; and

WHEREAS the Nation desires to comply fully with Section 13 of the Compact by adopting the attached tort remedy procedures for gaming facility patrons;

NOW, THEREFORE, BE IT RESOLVED that the Tribal Council approves the attached Yavapa Apache Nation Tort Remedy Procedures for Gaming Patrons and that these procedures are hereby adopted as laws of the Nation, effective immediately.

CERTIFICATION

I, the undersigned, hereby certify that at a duly called meeting of the Yavapai Apache Tribal Council, on March 19 1996, the Tribal Council voted to adopt this Resolution with an affirmative vote of a quorum of Tribal Council members.

Chairman

ATTEST:

Secretary

YAVAPAI-APACHE NATION
TORT REMEDY PROCEDURES FOR GAMING PATRONS

Section 1. **Policy.**

The purpose of these procedures is to provide a system for the disposition of tort claims arising from alleged injuries to the person or property of patrons of the Nation's Gaming Facility.

Section 2. **Applicability.**

These procedures apply to all persons who allegedly suffer personal injury and/or property damage arising out of their patronage of the Nation's Gaming Facility.

Section 3. **Tribal Court Jurisdiction.**

The Tribal Court shall have exclusive jurisdiction over all matters arising from the administration and enforcement of these procedures.

Section 4. **Definitions.**

The following words have the following meanings as used in these procedures:

A. "Gaming Facility" means all Class III gaming facilities owned and operated by the Yavapai-Apache Nation on its reservation, including but not limited to the Cliff-Castle Casino;

B. "Nation" means the Yavapai-Apache Nation;

C. "Patron" means any person who is a customer of the Gaming Facility;

D. "Person" means any natural individual;

E. "Tort" means an injury to the person or property of a patron;

F. "Tribal Council" means the Tribal Council of the Yavapai-Apache Nation; and

G. "Tribal Court" means the Yavapai-Apache Nation Tribal Court.

Section 5. **Limited Waiver of Sovereign Immunity.**

A. The Gaming Facility is a tribally-owned business and possesses the Nation's

sovereign immunity from suit.

B. The Nation hereby waives the sovereign immunity of the Gaming Facility and/or the Nation for the express, sole, and limited purpose of allowing patrons to bring tort claims against the Nation and/or the Gaming Facility in Tribal Court; provided that such waiver is made only to the extent that the nature of a tort claim is within the express coverage of the Nation's or Gaming Facility's public liability insurance policy in effect at the time of each judgment, order, or award, and no judgment, order, or award for such a claim against the Gaming Facility and/or Nation may exceed One Million Dollars ($1,000,000.00); further provided that any such tort claim must be timely and properly filed; and provided further that any judgment, order, or award may be satisfied only pursuant to: (i) the express provisions of the Nation's or Gaming Facility's public liability insurance policy in effect at the time of each judgment, order, or award; and (ii) if necessary, an action by the prevailing party against the insurer under such policy. This waiver is strictly limited and does not waive the immunity of the Nation or Gaming Facility with respect to other suits for monetary damages or to suits for punitive or exemplary damages and does not waive the immunity of the Tribal Council or any officer, employee, agent, or Board or Commission member thereof.

C. Except as otherwise provided in these procedures, nothing herein shall be interpreted or construed as:

1. a waiver of the sovereign immunity of the Nation and/or Gaming Facility beyond the limits set forth herein;

2. a waiver of the sovereign immunity of the Nation and/or Gaming Facility to impose liability for punitive, double, treble, incidental, consequential, or exemplary damages, interest prior or subsequent to judgement, attorney fees, court costs, expert fees, or civil penalties;

3. a waiver of the sovereign immunity of the Nation and/or Gaming Facility

for any other claims or obligations asserted against the Nation or arising out the Gaming Facility operations; or

4. a waiver of the sovereign immunity of the Nation and/or Gaming Facility from levy on any judgment, or from a lien, attachment, execution, or other judicial or non-judicial process upon the assets of the Nation or Gaming Facility.

Section 6. **Bringing Authorized Claims Against the Nation and/or Gaming Facility.**

A. Except as otherwise limited by these procedures, any person may bring a tort claim against the Nation or Gaming Facility arising out of the operation of the Gaming Facility by filing a written complaint with the Tribal Court within one hundred and eighty (180) days after the cause of action accrues. The complaint shall contain facts sufficient to describe the basis upon which liability is claimed, the facts supporting the claim, and a specific amount for which the claim is made and shall otherwise comply with the rules of procedures for the Tribal Court. Any claim that is not filed timely under this Section is barred, and no action may be brought thereon in the Tribal Court or in any other court.

B. For purposes of this Section, a cause of action accrues when a patron realizes that he or she has been injured or that his or her property has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality, or condition that caused or contributed to the damage; provided that, for causes of action that arose prior to the date these procedures were adopted, the cause of action shall be deemed to accrue on the date of such adoption.

Section 7. **Amendment; Effective Date.**

The Tribal Council retains the authority to amend these procedures, including but not limited to modification of the limited waiver of sovereign authority contained herein. The effective date of these procedures is _____.

EXHIBIT 3

CAMPO BAND OF MISSION INDIANS

ENVIRONMENTAL POLICY ACT OF 1990

(As Amended December 11, 1994)

TITLE II

CAMPO ENVIRONMENTAL PROTECTION AGENCY

§ 201. Establishment. There is hereby established the Campo Environmental Protection Agency ("CEPA").

§ 202. Governing Body; Appointment; Terms; Vacancies. CEPA shall be governed by a Board of Commissioners (the "Board"), which shall be composed of three (3) Commissioners, all of whom shall be members of the Campo Band. The Commissioners shall be appointed by the Chairman of the Campo Band with the advice and consent of the General Council. Each Commissioner shall serve for a term of four (4) years, provided that, in order to stagger the terms of office, one of the original Commissioners shall be appointed for a term of two (2) years, one for a term of three (3) years, and one for a term of four (4) years. A vacancy on the Board, howsoever caused, will be filled by the appointment procedure set forth in this Section, provided that any appointment that does not begin coincident with the staggered terms will be shortened as necessary to maintain the staggered terms.

§ 203. Chairman; Quorum; Meetings. The Commissioners shall elect a Chairman from among themselves. The business of the Board will be conducted at meetings of the Board duly called and noticed and at which a quorum is present. A quorum shall consist of two (2) Commissioners. Any substantive action of the Board must be taken by the affirmative votes of at least two (2) Commissioners and must be recorded in a written resolution of the Board. The Board shall meet at such places and times as may be

TITLE III

MISCELLANEOUS PROVISIONS

§ 301. Review of Commission Actions.

(a) Campo Band Environmental Court. There hereby is established the Campo Band Environmental Court ("Environmental Court"). The Environmental Court shall hear appeals from final actions and decisions of the Board in accordance with such rules and procedures as CEPA may establish by regulation. Any affected party may seek review of any final action or decision of the Board by filing an appeal in the Environmental Court within thirty (30) days of the entry of the final action or decision from which the appeal is taken. The Environmental Court shall hear appeals from the final actions or decision only after exhaustion of all administrative remedies provided by CEPA. The Environmental Court shall, upon the petition of an affected party, conduct a review of the record of the proceedings of CEPA but shall not take new evidence; it may modify or reverse a decision or action of CEPA only where such action or decision is not supported by law or is arbitrary and capricious. CEPA, upon request of the Environmental Court, shall provide to the Environmental Court a certified copy of all documents, records, transcripts, or other information that formed the basis for any action or decision as to which an affected party seeks review. The action of the Environmental Court on appeal shall be final.

(b) Review of CEPA Issuance of Preliminary or Permanent Injunctions. An Adverse Party aggrieved by a decision of the Board issuing or failing to

issue a preliminary or permanent injunction is entitled to judicial review thereof. Proceedings for review under this Subsection shall be instituted by filing a petition in the Environmental Court. The petition shall be served and filed within five (5) days after service of the decision of the Board. Failure to file timely a petition for review shall be deemed a waiver of the right to appeal. The Environmental Court shall proceed to determine such petition as expeditiously as the ends of justice require. The filing of the petition shall not stay enforcement of the decision of the Board, unless the Board or the Environmental Court orders a stay upon such terms as either deems proper. The Environmental Court may affirm the decision of the Board; it may remand the case for further proceedings; or it may reverse the decision, in whole or in part, if substantial rights of the Adverse Party have been abridged because the Board's findings, inferences, conclusions, decisions, rulings, or orders are not supported by law or are clearly arbitrary and capricious.

(c) Standing of Campo Band. The Campo Band, acting by and through the General Council, shall have standing to object to any final action or decision of CEPA and may appeal such final action or decision in the Environmental Court, subject to the provisions of this Section.

§ 302. Waiver of Immunity. The General Council hereby waives the sovereign immunity of CEPA for the express and sole purpose of allowing reviews of CEPA actions by the Environmental Court under §301, provided that any such appeal must be timely and properly filed, and provided further, that such waiver is made only to the extent necessary

to subject CEPA to suit for the sole purpose of declaring and adjudging rights and obligations under the environmental codes and regulations of the Campo Band. This waiver is strictly limited, specifically does not waive CEPA's immunity from suit for monetary damages, and specifically does not waive the sovereign immunity of the General Council, the Campo Band, or any officer, employee, or agent thereof.

§ 303. Unlawful Acts.

(a) It is prohibited for any person:

(1) Forcibly, or by bribe, threat, or other corrupt practice, to obstruct or impede the activities of CEPA and the Board;

(2) To commit fraud, or knowingly to assist another in the commission of fraud, with the intent to evade or defeat Tribal environmental codes or regulations; or

(3) With knowledge and intent, falsely to verify by written declaration any report, application for permit, or any other document submitted to or requested by CEPA.

(b) Any person who commits any of the above prohibited acts may be subject to criminal penalties and also be liable for any civil damages caused by the commission of such acts and may be excluded from the Reservation.

(c) Any person who commits any of the above prohibited acts, or whose employees or agents in the course of their employment or agency commit any of the

above prohibited acts, may have its rights to engage in activities on the Reservation suspended or terminated.

(d) The damages and sanctions for violation of this Section may be enforced in the Environmental Court by CEPA under such rules and procedures as CEPA may establish by regulation.

CAMPO BAND OF MISSION INDIANS

SOLID WASTE MANAGEMENT CODE OF 1990

AS AMENDED FEBRUARY 13, 1994

TITLE VI

ENFORCEMENT PROGRAM

§ 601. Enforcement Agency. CEPA is hereby designated as the enforcement agency entrusted with the duty and responsibility of ensuring the proper handling, treatment, composting, and disposal of solid waste on the Reservation and of ensuring compliance by all persons with this Code.

§ 602. Duties. CEPA shall:

(a) Enforcement of Code. Enforce all provisions of this Code and regulations adopted hereunder that pertain to the minimum standards for solid waste handling, treatment, composting, and disposal, all for the protection of the public health and safety and of land, air, and water.

(b) Enforcement of mitigation measures. Enforce compliance with feasible mitigation measures identified within Environmental Impact Statements prepared pursuant to NEPA.

(c) Enforcement by other agencies. Request enforcement by federal, state, and local agencies of their respective laws governing solid waste handling, treatment, composting, and disposal.

(d) Provide information to General Council. Provide to the General Council information that the General Council requests.

(e) Development of programs. Develop, implement, and maintain inspection, enforcement, and training programs.

(f) Recordkeeping. Keep and maintain records of its inspection, enforcement, and training programs.

(g) Consultation with health agencies. Consult with appropriate health agencies concerning all actions involving solid waste handling, treatment, composting, and disposal.

§ 603. Periodic Review. The General Council shall periodically review CEPA and its implementation of the enforcement program. This review may include the inspection by the General Council, or any person authorized by the General Council, of all books, records, accounts, and other documents of CEPA. If the General Council finds that CEPA is not adequately fulfilling its enforcement responsibilities, the General Council shall notify CEPA of its intention to take remedial action if CEPA does not correct the problems specified by the General Council.

§ 604. Fees and Taxes. In order to recover operating costs, CEPA may impose reasonable fees or taxes on each operator of a solid waste facility and solid waste transportation service. The fee or tax may be based on the weight, volume, or type of solid waste received, handled, treated, composted, or disposed of by any such operator, or on any other appropriate basis or combination thereof.

§ 605. Enforcement Actions.

(a) Notice to Chairman of General Council. Within ten days before issuing an enforcement order that is not for an emergency; within five days after issuing an enforcement order for an emergency; and within fifteen days after discovering a violation of a Tribal law, regulation, or permit that is likely to result in an enforcement action, CEPA shall provide a written statement providing an explanation of and

in violation of his facility permit; who constructs or operates a solid waste facility without a facility permit; who transports solid waste in violation of his solid waste transportation permit; who transports solid waste without a solid waste transportation permit; who violates any requirements found in the Campo Band of Mission Indians Solid Waste Management Code of 1990 or the Campo Band of Mission Indians Tribal Environmental Policy Act of 1990; or who violates any standard adopted by CEPA for the handling, treatment, composting, or disposal of solid waste shall, upon order of CEPA, cease and desist any improper action, clean up any solid waste, abate the effects thereof, and take any other remedial action directed by CEPA. Whenever CEPA determines that the construction or operation of a solid waste facility or the transportation of solid waste is causing or threatening to cause a condition of hazard, pollution, or nuisance due to the migration of hazardous waste or solid waste or for any other reason, CEPA may require the operator of the solid waste facility or the solid waste transporter to take corrective action necessary to abate any hazard, pollution, or nuisance or to protect public health and safety and the environment.

(b) Imminent threats; remedial actions by CEPA. If any of the circumstances set forth hereinabove pose an imminent threat to life or health, CEPA may expend any available monies to perform any cleanup, abatement, and remedial work required.

(c) Remedial actions by CEPA. If any of the circumstances set forth hereinabove do not pose an imminent threat to life or health, but CEPA deems it necessary for the public health and safety to

[February 1994]

§ 607. Compliance Schedule. CEPA shall develop a compliance schedule for any permitted solid waste facility or solid waste transporter that violates CEPA's minimum standards. The compliance schedule shall assure that diligent progress shall be made to bring the solid waste facility or solid waste transporter into compliance with CEPA's minimum standards within a specific period of time determined by CEPA. If the solid waste facility or solid waste transporter is not in compliance within the period specified, CEPA may revoke, suspend, or modify the permit until such time as violations of the minimum standards are remedied.

§ 608. Revocation, Suspension, or Modification of Permit.

(a) Grounds for suspension, revocation, or modification. After a hearing, any permit may be suspended, modified, or revoked by CEPA for cause, including but not limited to any or all of the following:

(1) Any violation of any term or condition contained in the permit, this Code or regulations promulgated hereunder, or the underlying lease or land use permit.

(2) Obtaining the permit by misrepresentation or failing to disclose fully all relevant facts.

(3) A change in any condition that requires either a temporary or permanent modification, reduction, or elimination of the permitted operation to bring it into compliance with the terms or conditions of the permit, this Code or regulations promulgated hereunder, or the underlying lease or land use permit.

admitted. Failure to file a Notice of Defense shall constitute a waiver of the right to a hearing.

(3) The Notice of Defense shall be in writing signed by or on behalf of the permittee.

(4) A copy of any Statement of Charges and Notice of Defense shall be sent by CEPA to the Chairman of the General Council.

(e) Hearing panel. All hearings shall be conducted by a three-person hearing panel. One member of the hearing panel shall be appointed by the Chairman of the General Council and one member by the CEPA Board of Commissioners. The third member shall be appointed by agreement of the other two appointees.

(f) Discovery; subpoenas and subpoenas duce tecum.

(1) Prior to the hearing, any party, upon written request made to any other party prior to the hearing, is entitled to (A) obtain the names and addresses of witnesses to the extent known to the other party including but not limited to those intended to be called to testify at the hearing, and (B) inspect and make a copy of any relevant documents in the possession or custody or under the control of the other party, including but not limited to statements made by any person pertaining to the subject matter of the proceeding, all writings pertaining to the subject matter of the proceeding, and investigative reports pertaining to the subject matter of the proceeding. Nothing in this Section shall authorize the inspection or copying of any writing or thing that is privileged from disclosure by law or otherwise made confidential or protected as attorneys' work product or otherwise.

explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(3) In reaching a decision, official notice may be taken, prior to submission of the case for decision, of any generally accepted technical or scientific matter pertaining to solid waste management, and of any fact that may be judicially noticed by the courts of California. Parties present at the hearing shall be informed of matters to be noticed, and those matters shall be noted in the record. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority.

(h) Issuance of decision. Within thirty days after the case is submitted for decision, the hearing panel shall issue its decision. Cases shall be decided by concurrence of at least two members of the panel. The decision shall be in writing and shall contain findings of fact, a determination of the issues presented, and the assessment of costs and penalties, if any. Copies of the decision shall be sent to all parties and to the Chairman of the General Council.

(i) Reduction of penalty or reinstatement. A person whose permit has been revoked or suspended by CEPA may petition CEPA for reinstatement after a period of not less than one year has elapsed from the effective date of the revocation or suspension or from the date of the denial of a similar previous petition. If CEPA declines to take the action requested, the petitioner, if he so requests, shall be afforded a hearing.

designated for meeting the costs of responses to environmental emergencies on the Reservation.

(c) Penalties in addition to others. Penalties under this section are in addition to, and do not supersede or limit, any and all other remedies, civil or criminal. In any civil action brought pursuant to this Code in which injunctive relief is sought, it shall not be necessary to allege or prove at any stage of the proceeding that irreparable damage will occur should the injunctive relief not be issued, or that the remedy at law is inadequate, and any form of injunctive relief shall issue without such allegations and without such proof.

CAMPO BAND OF MISSION INDIANS
CODE OF TRIBAL REGULATIONS

CAMPO ENVIRONMENTAL PROTECTION AGENCY REGULATIONS

TITLE I

AGENCY PROCEDURES

AS AMENDED MAY 31, 1994

Part 130. Adjudications

§130.01. Applicability. This Part applies to actions or decisions in any contested case.

§130.02. Publication of Notice. Except where immediate action is necessary to adequately protect human health and the environment, CEPA shall publish notice of all proposed settlements of civil enforcement actions in a local paper of general circulation at least thirty (30) days prior to the issuance of a final decision. CEPA shall receive and consider public comments on the proposed settlement of the enforcement action. The notice required under this Section shall invite public comment and shall state a date after which such comments will no longer be accepted.

§130.03. Reconsideration.

(a) Within five (5) working days after authorization or issuance, CEPA shall publish notice of all actions or decisions in civil enforcement actions in a local paper of general circulation.

(b) Upon written request from any affected person, the Board shall reconsider any action or decision.

(c) The written request for reconsideration shall include the affected person's name, address, and telephone number; the action or decision for which reconsideration is sought; the reasons why CEPA should reconsider its action or decision; and the relief sought.

(d) The written request for reconsideration must be received by CEPA within thirty (30) days from the date the challenged action or decision was authorized or issued by CEPA. If no request for reconsideration is timely made, the action or decision will be final and not subject to appeal.

(e) The Board will notify the affected party requesting reconsideration, upon at least twenty (20) days advance notice, of the date, time, and place of the reconsideration hearing. CEPA shall not set such reconsideration hearing more than sixty (60) days from the data of receipt of the written request.

(f) Evidence may be submitted to CEPA at or prior to the reconsideration hearing in any practical form, including but not limited to oral testimony, written evidence, and descriptive evidence. Formal

(1) a statement of the time, place, and nature of the proceeding;

(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(3) a reference to the particular provisions of tribal law involved; and

(4) a short and plain statement of the issues and matters asserted.

(d) Opportunity to Present Evidence. Any affected person who has requested a hearing under Subsection (c) of this Section shall have the opportunity to respond and present evidence and argument on all issues before the hearing panel.

(e) Informal Disposition. Unless prohibited by law, informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default.

(f) Record. The record before the hearing panel in a contested case shall include:

(1) all pleadings, motions, and intermediate rulings or orders in the case;

(2) evidence received by CEPA;

(3) a statement of matters officially noticed by CEPA;

(4) questions and offers of proof, objections, and rulings thereon presented at the reconsideration hearing;

(5) proposed findings and exceptions; and

(6) any decision, opinion, or report by the Board of Commissioners at the reconsideration hearing.

(g) Recording or Transcription of Hearing. Hearings shall be recorded or transcribed. A copy of the entire record or any part thereof shall be furnished to any affected person upon written request therefor and payment of the costs thereof.

(h) Findings of Fact. Findings of fact shall be based exclusively on the record, on evidence presented to the hearing panel, and on matters officially noticed.

in the record shall be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts or by incorporation by reference.

(c) Each affected party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence.

(d) The hearing panel may take notice of judicially cognizable facts and general, technical, or scientific facts within its specialized knowledge. Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. The hearing panel may use its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.

§130.06. Subpoenas; Witnesses; Contempt.

(a) Subpoenas. After proper service of notice, the hearing panel may:

(1) Issue a subpoena upon the request of any party and a statement by the party of the general relevance and reasonable scope of the evidence sought; or

(2) Issue a subpoena on its own motion.

Subpoenas may be served outside the Reservation to the maximum extent allowable in conformance with the requirements of the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, with respect to any activity or any consequence thereof occurring within the Reservation.

(b) Witness Fees; Costs of Production. Witnesses shall be paid the same fees and allowances in the same manner and under the same conditions as provided for witnesses in the courts of the State of California, provided, that CEPA shall fix the allowance for meals and lodging. Such fees and allowances and the cost of producing records required to be produced by subpoena shall be paid by the party requesting the issuance of the subpoena. CEPA shall pay the fees and allowances and the costs of producing records of any witnesses issued a subpoena by CEPA.

(c) Enforcement of Subpoena. If an individual fails to obey a subpoena or obeys a subpoena but refuses to testify when requested concerning any matter under examination or investigation at the hearing, the party that requested the subpoena may petition the Environmental Court for enforcement of the subpoena. The petition shall be accompanied by a copy of the subpoena and proof of service, shall set forth the specific manner in which the subpoena has not been complied with, and shall ask the Environmental Court to issue an order to compel the witness to appear and

Part 140. Revocation, Suspension, or Modification of Permits

§140.01. Grounds for Suspension, Revocation, or Modification.

After a hearing, any permit may be suspended, modified, or revoked by CEPA for cause, including but not limited to any or all of the following:

(a) Any violation of any term or condition contained in the permit, tribal law or regulations promulgated thereunder, or the underlying lease or land use permit.

(b) Obtaining the permit by misrepresentation or failing to disclose fully all relevant facts.

(c) A change in any condition that requires either a temporary or permanent modification, reduction, or elimination of the permitted operation to bring it into compliance with the terms or conditions of the permit, tribal law or regulations promulgated thereunder, or the underlying lease or land use permit.

§140.02. Statement of Charges. A hearing to determine whether a permit should be revoked, suspended, or modified may be initiated by CEPA by filing a written Statement of Charges that sets forth the acts or omissions with which the permittee is charged and specifies the terms, laws, conditions, rules, or regulations that the permittee is alleged to have violated. The Statement of Charges and all accompanying documents shall be delivered personally or by certified or registered mail, return receipt requested, to the permittee.

§140.03. Notice of Hearing. The Statement of Charges shall be accompanied by a notice advising the permittee of a date for a hearing, which hearing shall be held no earlier than twenty days (20) and no later than forty-five (45) days from CEPA's mailing or personal delivery of the Statement of Charges. The Notice shall inform the permittee that he or she has the right to inspect and copy documents relative to the Statement of Charges.

§140.04. Notice of Defense.

(a) Within fifteen days (15) after service, the permittee may deliver to CEPA a Notice of Defense in which he or she may object to the Statement of Charges upon the ground that the allegations contained in the Statement of Charges are untrue, that it does not state acts or omissions

is less than 150 miles from his place of residence, except that the hearing panel, upon affidavit of any party showing that the testimony of such witness is material and necessary, may endorse on the subpoena an order requiring the attendance of such witness. Fees and mileage shall be paid by the party at whose request the witness is subpoenaed.

§140.07. Evidence and Witnesses.

(a) Oral evidence shall be taken only on oath or affirmation. Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination, to impeach any witness regardless of which party first called him to testify, and to rebut the evidence against him. Any party who does not testify in his own behalf may be called and examined as if under cross-examination.

(b) The hearing need not be conducted according to the technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons may rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil actions. The rules of privilege recognized by law shall apply. Hearsay evidence may be used solely for the purpose of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(c) In reaching a decision, official notice may be taken, prior to submission of the case for decision, of any generally accepted technical or scientific matter pertaining to the subject of the hearing, and of any fact that may be judicially noticed by the courts of California. Parties present at the hearing shall be informed of matters to be noticed, and those matters shall be noted in the record. Any such party shall be given a reasonable opportunity on request to refute the officially noticed matters by evidence or by written or oral presentation of authority.

§140.08. Issuance of Decision. Within thirty (30) days after the case is submitted for decision, the hearing panel shall issue its decision recommending the action to be taken by CEPA. Cases shall be decided by concurrence of at least two members of the panel. The decision shall be in writing and shall contain findings of fact, a determination of the issues presented, and the assessment of costs and penalties, if any. Copies of the decision shall be sent to all parties and to the Chairman of the General Council. Within five (5) working days after issuance of any order or decision by the hearing panel, CEPA shall publish notice of the action in a local paper of general circulation.

§140.09. Revocation of Permit. CEPA shall not revoke any permit until the permittee has exercised or waived the right to appeal to

Part 150. Judicial Review of CEPA Actions

§150.01. Judicial Review of Final Agency Action. Any person affected by a final decision in a contested case is entitled to judicial review thereof exclusively under the provisions of these Regulations. Such person may not use any other procedure to obtain judicial review of such final decision, even though another procedure is provided elsewhere by a special law or other provision of Tribal law of general application.

§150.02. Right of Judicial Review. A person suffering legal wrong because of agency action, or adversely affected by agency action within the meaning of a relevant statute, regulation, or rule, is entitled to seek judicial review thereof.

§150.03. Petition for Review. Proceedings for review under this Part shall be instituted by filing a petition in the Environmental Court. The petition shall be served and filed within thirty (30) days after service of the final decision in a contested case. Failure to file a Petition for Review within thirty (30) days after service of the final decision shall constitute a waiver of the right to appeal. Copies of any such petition for review shall be served upon CEPA, the Chairman of the Board, and all parties of record by certified mail, return receipt requested. The Environmental Court, in its discretion, may permit other interested persons to intervene.

§150.04. Issues on Appeal. The Environmental Court may review only those issues specifically raised in the proceedings on reconsideration and in front of the hearing panel. Any issues not raised below shall be deemed to have been waived.

§150.05. Stay Pending Appeal. The filing of the petition shall not stay enforcement of the decision. Where other tribal laws provide for a stay of a CEPA decision, the decision may be stayed by the CEPA Board of Commissioners or the Environmental Court as provided in such laws. The CEPA Board of Commissioners or the Environmental Court may, for good cause shown, order a stay upon such terms as either deems proper.

§150.06. Record on Appeal. Within thirty (30) days after service of the petition, or within such further time as the Environmental Court may allow, CEPA shall transmit to the Environmental Court the original or a certified copy of the entire record of the proceeding under review, or such portions of the record as are requested by the parties. Any party unreasonably refusing to limit the record may be taxed by the Environmental

original judges shall be appointed for a term of two (2) years, one for a term of three (3) years, and one for a term of four (4) years.

(c) Vacancies. A vacancy on the Environmental Court, howsoever caused, will be filled by the appointment procedure set forth in this Section, provided that any appointment that does not begin coincident with the staggered terms will be shortened as necessary to maintain the staggered terms.

(d) Removal. Judges shall serve the entire length of term and shall be removed from office only for good cause. Commission of crimes, misdemeanors, or malfeasance in office constitutes good cause for removal.

(e) Conflicts of Interests. A judge of the Environmental Court may not participate in decisions relating to the governance and management of CEPA if the judge has a direct financial interest in the person or activity being regulated. Tribal membership does not preclude participation in decisions involving activities on or relating to property owned by the Band.

EXHIBIT 4

TITLE XVI

ZUNI BUSINESS CODE

CHAPTER 1. GENERAL PROVISIONS

§16-1-1. Scope and Intent.

It is the purpose of the Zuni Business Code to establish procedures and requirements consistent with Federal laws and regulations to govern the conduct of business on the Zuni Reservation. It is specifically intended to control and regulate the activities of non-Zunis and non-residents of the Reservation in their dealing with the Zuni Reservation and the people living thereon.

§16-1-2. Definitions Applicable to the Zuni Business Code.

(1) "Committee" shall mean the Zuni License Committee appointed as provided herein.

(2) "Established Business" shall mean a business set up at a permanent location with an approved business lease.

(3) "Itinerant Business" shall mean a business of a person who travels from place to place.

(4) "License" shall mean a formal permission to carry out a business authorized under this Business Code. A license shall be a revocable, nontransferable privilege to do a specified thing.

(5) "License Clerk" shall mean the Clerk of the Zuni License Committee.

(6) "Person" shall include individuals, groups of individuals, firms, partnerships and other associations, whether incorporated or not.

(7) "Surety bond" shall mean a written undertaking by one or more persons or companies acceptable to the Committee whereby such person or companies obligate themselves to be liable for another's debts, defaults or obligations. No surety bond shall be acceptable under this Code unless the sureties thereto consent in writing to the jurisdiction of the Tribe and its Tribal Courts for all purposes related to enforcing the obligations created therein.

(8) "Imitation Zuni Jewelry" shall mean any jewelry or precious-metal ware which is not in fact made by Zuni Indians, and which in any way resembles or is represented to resemble jewelry of Zuni manufacture; or any Indian Arts or Crafts which according to standards established by the Zuni Tribe or the standard prevalent among Zuni craftsmen is imitation, of poor quality or spurious.

§16-1-3. Enforcement.

(1) Jurisdiction over any act or failure to act declared herein to be a criminal offense shall be exercised by the Courts of the Zuni Tribe as in the case of other criminal offenses.

(2) The Courts of the Zuni Tribe shall have authority to enforce the provisions of this Business Code by injunction or otherwise in any civil proceeding maintained in the name of the Tribe or otherwise.

(3) Cancellation of any license or other privilege granted under this Business Code shall be handled in accordance with Chapter 3 of the Zuni Code of Creditors Rights and Responsibilities.

CHAPTER 2. LICENSING OF BUSINESSES

§16-2-1. Zuni License Committee.

(1) The Zuni License Committee (Committee) shall be responsible for reviewing and approving or rejecting all applications for business licenses, for issuing and renewing business licenses, and for investigating abuses or violations of this Business Bude or licenses issued hereunder and recommending and prosecuting proceedings to cancel business licenses.

(2) The Committee may adopt rules and regulations not inconsistent with this Business Code to govern the procedure for issuance of business licenses, the terms and conditions applicable to business licensees, record keeping and inspection requirements for licensees, and other matters reasonably related to the regulation and control of businesses on the Reservation. Such rules and regulations shall be subject to the approval of the Tribal Council and the Governor, and upon approval shall have the force of law on the zuni Reservation.

(3) The Clerk of the Zuni License Committee (License Clerk) shall receive applications for business licenses, keep records and files as directed by the Committee and perform such other functions relating to this Business Code as the Committee or the Tribal Council shall direct.

(4) The Zuni License Committee shall consist of four members who shall be appointed by the Governor with the approval of the Tribal Council.

§16-2-2. License Requirements.

(1) Unless expressly excepted herein, every business conducted on the Reservation shall hold a valid business license issued by the Committee.

(2) These licensing requirements shall not apply to the following:

(a) any activity or operation of the Zuni Tribe.

(b) Any business specifically authorized and excepted by the Tribal Council.

(c) Jewelry making or other arts and crafts production carried on by a Zuni individual or family.

(d) Livestock or other agricultural commodity production carried on by an individual or family.

(3) It shall be a civil offense for any person subject to these licensing requirements to conduct business on the Reservation without first obtaining such a business license, or to conduct business after such a license has expired or been suspended or revoked, or to conduct business in a manner not authorized by the license, or to violate any of the terms or conditions of the license or any rules and regulations adopted by the Committee.

(4) The Committee or the Tribe may, but need not, pursue informal remedies or seek civil restraint or license revocation or suspension for violation hereof, and by so doing shall not be deemed to have waived any right to proceed on a criminal offense, whether brought pursuant to this Code or to the criminal laws of other appropriate jurisdictions.

§16-2-3. Classifications of Licenses.

(1) In addition to the classifications of licenses specifically established in the succeeding sections, the Committee, with the approval of the Tribal Council and Governor, may establish additional classifications of business licenses and prescribe the applicable requirements and terms and conditions relating thereto.

(2) Persons carrying on more than one type of business on the Reservation will be required to secure licenses for all such types of business required to be separately licensed.

§16-2-4. Traders in Jewelry and Other Indian Arts and Crafts.

(1) Ay person otherwise subject to the licensing requirements of this Buisness Code who purchases or otherwise obtains jewelry and/or other Indian arts and crafts produced on the Reservation for purposes of sale or resale on or off of the Reservation shall be required to have a Jewelry, Arts and Crafts License from the Tribe.

(2) No person who is not a member of the Tribe who engages in the business of manufacturing or reproducing Indian jewelry and/or arts and crafts shall be eligible to receive a license under this section.

(3) Application for License.

(a) The applicant shall apply in writing on a form provided by the Committee setting forth the following:

(1) The full name and residence of the applicant.

(2) Three responsible references.

(3) The firm name, and furnish a copy of Articles of Incorporation of the firm if incorporated.

(4) Satisfactory evidence as to character, experience and business ability of the applicant and the employees of the applicant.

(5) Satisfactory evidence of the general fitness of the applicant and employees of the applicant to conduct business on the Zuni Indian Reservation.

(6) Satisfactory evidence as to present occupation, including a certification that he is not now engaged in the business of manufacturing or reproducing Indian jewelry or arts and crafts.

(b) Upon request of the Committee, the applicant shall furnish the following information:

(1) The capital invested or to be invested, and of this, the amount of capital owned and the amount borrowed or to be borrowed.

(2) The name of the lender of any borrowed capital, the date due, the rate of interest to be paid, and the names of any endorsers and security.

(3) A copy of any contract or trade agreement whether oral or written with creditors of financing individuals or institutions, including any stipulations whereby financing fees are to be paid.

§16-2-5. Established Business License.

(1) Every person otherwise subject to the licensing requirements of this Business Code who maintains an established business as that term is defined herein shall be required to have an Established Business License.

(2) Application for an Established Business License shall be on a form provided by the Committee and shall fully provide all of the information requested thereon.

§16-2-6. Itinerant Business License.

(1) Every person otherwise subject to the licensing requirements of this Business Code who carries on an itinerant business as that term is defined herein shall be required to have an Itinerant business License.

(2) Application for an Itinerant Business License shall be on a form provided by the Committee and shall fully provide all of the information requested thereon.

§16-2-7. Contractors License.

(1) Every person who engages in building or construction contracting for another shall be required to have a Contractors License specifying the type of work authorized to be done (e.g. general contracting or electrical or plumbing, etc.).

(2) Application for a Contractors License shall be on a form provided by the Committee and shall fully provide all of the information requested thereon.

(3) In addition to demonstrating proof of training or competence as a condition to receiving a Contractors License, any person receiving a Contractors License, any person receiving a Contractors License shall be subject to any limitations as to type of work to be performed indicated in the license.

(4) Any person receiving a Contractors License shall be required to conform all work performed to not less than the minimum New Mexico State, Federal or any Tribal codes, standards or regulations in existence or which may be established to govern the type of work performed.

(5) All contractors or other individuals subject to the requirements of obtaining a Contractors License shall, before any work is commenced, obtain a surety bond in amount equal to the contract price, for each separate contract to be performed, and conditioned for the faithful performance of the contract and prompt payment for materials furnished and labor performed under the contract. Such bond shall run to the owner and to any person who has furnished labor or materials and not been paid within forty (40) days, and such persons shall have a direct right of action against the sureties on the bond for enforcement of payment or completion of the project. Such bond shall be exhibited to the Committee or any interested person upon demand.

§16-2-8. Fees and Bonds.

(1) The Committee, with the approval of the Tribal Council and Governor, shall establish a schedule of fees to be paid for the issuance and renewal of business licenses.

(2) The schedule of license fees may, but need not, provide for reduced fees for enrolled members of the Zuni Tribe living on the Reservation.

(3) Application for any license or for the renewal of any license shall be accompanied by a surety bond of two or more sureties acceptable to the Committee in amount to be specified by the Committee, and such bond shall be for the duration of the license and shall guarantee the licensee's faithful compliance with the terms and conditions of the license, with any rules and regulations adopted by the Committee and the payment of any fines or penalties assessed against the licensee for any violation of this Business Code.

(4) Payment of all fees and bonds requried by this Business Code shall be in addition to any required under the terms of Part 252 of Chapter 1 of Title 25 of the Code of Federal Regulations.

§16-2-9. License Period and Renewal of Licenses.

(1) The license period for all licenses shall be one year.

(2) Application for renewal of any business license may be made not more than 90 nor less than 60 days prior to the expiration of the license, shall be made on a form to be supplied by the Committee, and shall be accompanied by all required fees and bonds.

§16-2-10. Duties of Licensee.

(1) All licenses issued hereunder shall be conspicuously displayed in all businesses having a fixed place of business on the Reservation and shall be carried in the possession of all licensees on the Reservation while conducting business. The Committee may authorize the issuance of licensee identification badges to be displaced by Itinerant Business, Jewelry, Arts and Crafts, and contractor licensees.

(2) The person to whom the license is issued shall, for all purposes related to the business license, be responsible for the entire operation of the business and for the conduct of his officers, agents and employees in relation thereto, and shall file and keep current with the License Clerk a list of all such officers, agents and employees.

(3) All licensees shall file annually with the License Clerk a financial statement prepared by a certified public accountant.

CHAPTER 3. FEDERAL TRADERS REGULATIONS

§16-3-1. Adoption of Federal Regulations.

(1) The rules and regulations found in Part 252 of Chapter 1 of Title 25 of the Code of Federal Regulations as published in the Federal Register, Volume 40, Number 164, on Friday, August 29, 1975, together with any subsequent additions to, corrections of, or deletions from said rules and regulations are hereby adopted by reference as the law of the Zuni tribe.

(2) Any such rules or regulations which are expressly applicable only to some other Reservation or are expressly not applicable to the Zuni Reservation are not adopted hereby.

§16-3-2. Requirements Cumulative.

The requirements of the Federal Regulations adopted herein shall apply in addition to and not in the place of the requirements established in this Business Code.

§16-3-3. Prohibited Acts; Enforcement.

(1) It shall be a civil offense for any person to:

(a) Fail to do any act required to be done by such Federal Regulations; or to

(b) Do any act forbidden to be done by such Federal Regulations.

(2) The Tribal Courts shall have jurisdiction over such offenses and may, in addition, enforce the requirements of said Federal REgulations by injunction or otherwise to a civil proceeding.

(3) The Tribal Courts will not assume criminal jurisdiction over non-Indians for any criminal offenses defined as such by said Federal Regulations.

CHAPTER 4. ANTIQUITIES

§16-4-1. Definitions.

"Protected Places and Objects" shall include, but not be limited to the following: abandoned village sites; abandoned homesites, village sites or homesites not abandoned but located at places of sacred, historical or scientific interest; gravesites, both ancient and recent; sacred springs, shrines and other sites, locations, or structures having past or present religious significance; hideaway places for relics or sacred objects, whether ancient or recent; relics, objects and/or artifacts of present or past religious, historical and/or scientific interest; geological formations or natural resources of sacred, historical or scientific interest; any other place, structure, formation, object or thing of past or present sacred, historical or scientific interest located on the Zuni Reservation.

§16-4-2. Prohibited Acts; Penalties.

(1) It shall be a civil offense for any person knowingly to excavate upon or move, remove, destroy, injure, deface, or desecrate any protected place or object within the Zuni Reservation. In the case of the disturbance of burial grounds, each disturbed gravesite shall constitute a separate offense hereunder. In the case of abandoned villages, each separate homesite which is disturbed shall constitute a separate offense hereunder. In the case of the removal or attempted removal of any object, each such object shall constitute a separate offense hereunder.

(2) The provisions of the preceding subsection shall not apply to any person or group of persons or institutional activity which is specifically licensed by both the Zuni Tribe and the Federal Government to carry on historical or scientific exploration, excavation or activity, provided, however, that the exception provided herein shall apply only to such person, persons or institutional activity while acting within the specific limits of permission and authority to carry on such activities contained in their license.

(3) In addition to any other penalty imposed herein, the Tribal Court shall order that any protected objects found in the possession of anyone in violation of this section be forfeited to the Zuni Tribe.

(4) It shall be a civil offense for anyone to knowingly sell or offer for sale any protected object removed from the Zuni Reservation without the written permission of the Zuni Governor and Tribal Council.

§16-4-3. Licensing Authority.

(1) The Tribal Council shall consider and approve or reject all applications for license authority to conduct historical or scientific research, excavation, or exploration on the Reservation which will affect in any way any protected place or object.

(2) Such license shall be granted only to responsible persons or institutions with a legitimate, specific, historical or scientific interest and purpose, with consideration given to the professional and educational credentials of the applicant.

(3) Such license, if granted, shall specify in detail the duration of the authority granted, the place or places to which it extends, the activities which are authorized, any specific limitations or prohibitions to be observed, and whether or not authority is granted to remove any objects or things from the Reservation, and if so, what kind and how many of such objects, and to where such removal is authorized.

(4) Upon the expiration of the license term or the completion of the licensee's work, the licensee shall provide the Tribal Council with a complete inventory of all objects to be removed from the Reservation and a detailed summary of all of the activities of the licensee on the Reservation. A catalogue of all such items shall be maintained by the Tribe and a number shall be assigned to each such item.

(5) License authority shall be conditioned upon the licensee's allowing a designated representative of the Tribal Council to inspect all objects to be removed from the Reservation to determine if their removal is within the terms of the license and not prejudicial to the religious or traditional interests of the Tribe. All objects found not to be within the license authority or whose removal would be contrary to the interests of the Tribe or its members shall be retained by the Tribe and not removed.

(6) The functions specified in this section may be carried out by the Tribal Council, by a designated sub-committee of Tribal Council members, or by a committee established for this express purpose by the Tribal Council.

CHAPTER 5. PROTECTION OF THE ZUNI NAME

§16-5-1. Declaration of Policy.

It is hereby declared as a matter of tribal policy that the use of the name "Zuni" in connection with the production or sale of items of Indian jewelry, arts or crafts is of special and unique importance and value to the Zuni Tribe and its members. It is hereby further declared that the best interests of the Zuni tribe and its members require that the use of the name "Zuni" be limited to use by the Tribe and its members.

§16-5-2. Prohibited Acts; Penalties.

(1) It shall be a civil offense for any person to do any of the following acts within the exterior boundary of the Zuni Reservation:

(a) design, manufacture, sell, advertise or otherwise knowingly aid in the design, manufacture, sale, or promotion of imitation Zuni jewelry as defined in §16-1-2(8) herein;

(b) have in his possession for disposition or sale to Indians or others, any limitation Zuni jewelry as defined in §16-1-2(8) herein;

(c) transport into, from, or through the Zuni Reservation any limitation Zuni jewelry, which imitation Zuni jewelry is intended for sale, or so transport any materials intended to be used in the design, manufacture, sale, or promotion of imitation Zuni jewelry;

(d) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of a trademark or service mark registered for use in connection with jewelry or precious-metal ware under the laws of the State of New Mexico, or of the United States;

(e) affix, apply, or annex, or use in connection with any jewelry or precious-metal ware or any container or containers for jewelry or precious-metal ware, a false designation of origin, or any false description or representation, including words, designs, or other symbols tending falsely to describe or represent the same, or with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported into, from, or through the Zuni Indian Reservation;

(f) employ, contract, offer to employ or contract, or otherwise induce or attempt to induce any person to aid in any of the activities described in (a), (b), (c), (d) or (e) above.

(2) In addition to any other remedy or penalty imposed hereunder, the Tribal Court shall order that any imitation Zuni jewelry found or confiscated on the Reservation be forfeited to the zuni Tribe.

EXHIBIT 5

ARTICLE IV

MEMBERSHIP

1) The Commission shall consist of five members at least three of whom shall be Navajos.

2) The Chairman of the Navajo Tribal Council shall at the times required under subsections (c) and (e), nominate a person qualified by virtue of education, experience, or office and upon confirmation by the Advisory Committee of the Navajo Tribal Council, such person shall be appointed to serve a term as a Commissioner.

3) The terms of office of Commissioners shall be five years.

4) A Commissioner shall be removed only for cause by the Chairman of the Navajo Tribal Council and upon ratification by the Advisory Committee of the Navajo Tribal Council; provided, that the person so removed may then appeal the removal to the Supreme Court of the Navajo Nation. For the purposes of this subsection, "cause" means:

(a) Incapacity: Physical or mental incapacity, where such incapacity extends or is expected to extend longer than six months.

(b) Nonfeasance: Failure to perform the duties of office, including, but not limited to, repeated and unexcused failure to attend the meetings and other official functions of the Commission.

(c) Ex parte violation: Participation in ex parte consultations with any representative of a taxpayer who is an appellant in a dispute before or with the Commission.

(d) Certain other acts: Any act that is a felony in the jurisdiction where committed, or any act involving moral turpitude that is a misdemeanor in the jurisdiction where committed.

5) A vacancy in the Commission, whether caused by death, removal or resignation shall be filled by an interim appointment made in accordance with this section to complete the vacated term.

6) Organizational Chart (SEE EXHIBIT "A").

Article V

MEETINGS & COMPENSATION

1) The official business of the Commission shall be conducted by a quorum of its members, at meetings duly called by its presiding officer or a designee.

(a) A quorum shall comprise three Commissioners and any substantive action of the Commission shall be taken by the affirmative vote of a majority of the Commissioners present.

(b) Except for special or emergency meetings which may be called when and if circumstances warrant it, at least one official regular business meeting shall be held by the Commission during each calendar quarter.

(c) From time to time, the Commissioner shall select their presiding officers and may delegate other specific duties among themselves.

EXHIBIT 6

June 7, 1991

RECEIVED
JUN 10 1991
WIND RIVER HOUSING
AUTHORITY

Mr. Frank Armajo
Executive Director
Wind River Housing Authority
P.O. Box 327
Fort Washakie, Wyoming 82514

Dear Mr. Armajo:

Enclosed is a copy of the Tribal Ordinance enacted in 1977 for Wind River Housing Authority. You will note that the final page is missing. Therefore, we have attached a copy of Article VIII and IX of the model tribal ordinance found in 24 C.F.R. 905.201. We have highlighted the language that was included on the final page of the 1977 Ordinance. You will also note the Footnotes, which explain allowable modifications.

If we may be of further assistance, please contact Ms. Nancy Todea, Housing Management Specialist, at (303) 844-2861.

Sincerely,

Ann Roman

Ann Roman
Chief, Housing Management Branch
Office of Indian Programs

Enclosure

TO:
Carmen
9 Pages
4/13/94

TRIBAL ORDINANCE # 4

Pursuant to the authority vested in the Shoshone Indian Tribe and the Arapahoe Indian Tribe of the Wind River Reservation, Wyoming, both with governing bodies recognized by the United States and the Secretary of the Interior as authorized to act for their respective Tribes, and the authority of such governing bodies to provide for the health, safety, morals and welfare of their respective tribes, the Joint Business Council of the Shoshone and Arapahoe Tribes hereby establishes a public body known as the Wind River Housing Authority (hereinafter referred to as the Authority) and enacts this ordinance which shall establish the purposes, powers and duties of the Authority.

In any suit, action or proceeding involving the validity or enforcement of or relating to any of its contracts, the Authority shall be conclusively deemed to have become established and authorized to transact business and exercise its powers upon proof of the adoption of this ordinance. A copy of the ordinance duly certified by the Secretary of the Council shall be admissible in evidence in any suit, action or proceeding.

ARTICLE I

DECLARATION OF NEED

It is hereby declared:

1. That there exist on the Wind River Reservation insanitary, unsafe, and overcrowded dwelling accommodations; that there is a shortage of decent, safe and sanitary dwelling accommodations available at rents or prices which persons of low income can afford; and that such shortage forces such persons to occupy insanitary, unsafe and overcrowded dwelling accommodations;

2. That these conditions cause an increase in and spread of disease and crime and constitute a menace to health, safety, morals and welfare; and that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety protection, fire and accident prevention and other public services and facilities;

3. That the shortage of decent, safe and sanitary dwellings for persons of low income cannot be relieved through the operation of private enterprise;

4. That the providing of decent, safe, and sanitary dwelling accommodations for persons of low income are public uses and purposes for which money may be spent and private property acquired and are governmental functions of Tribal concern;

5. That residential construction activity and a supply of acceptable housing are important factors to general economic activity and that the undertakings authorized by this ordinance to aid the production of better housing and more desirable neighborhood and community development at lower costs will make possible a more stable and larger volume of residential construction and housing supply which will assist materially in achieving full employment; and

6. That the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.

ARTICLE II

PURPOSES

The Authority shall be organized and operated for the purposes of:

1. Remedying unsafe and insanitary housing conditions that are injurious to the public health, safety and morals;

2. Alleviating

DEFINITIONS

The following terms, wherever used or referred to in this ordinance, shall have the following respective meanings, unless a different meaning clearly appears from the context:

"Area of Operation" means all areas within the jurisdiction of the tribe.

"Board" means the Board of Commissioners of the Authority.

"Council" means the Joint Business Council consisting of the Business Council of the Shoshone Tribe and the Business Council of the Arapahoe Tribe.

"Federal Government" includes the United States of America, the Department of Housing and Urban Development, or any other agency or instrumentality corporate or otherwise, of the United States of America.

"Homebuyer" means a person(s) who has executed a lease-purchase agreement with the Authority, and who has not yet achieved homeownership.

"Housing Project" or "Project" means any work or undertaking to provide or assist in providing (by any suitable method, including but not limited to: rental, sale of individual units in single or multifamily structures under conventional condominium, or cooperative sales contracts or lease-purchase agreements; loans; or subsidizing of rentals or charges) decent, safe and sanitary dwellings, apartments, or other living accommodations for persons of low income. Such work or undertaking may include buildings, land, leaseholds, equipment, facilities, and other real or personal property for necessary, convenient, or desirable appurtenances, for streets, sewers, water service, utilities, parks, site preparation or landscaping, and for administrative, community, health, recreational, welfare, or other purposes. The term "housing project" or "project" also may be applied to the planning of the building or improvements, the acquisition of property or any interest therein, the demolition of existing structures, the construction, reconstruction, rehabilitation, alteration or repair of the improvements or other property and all other work in connection therewith, and the term shall include all other real and personal property and all tangible or intangible assets held or used in connection with the housing project.

"Obligations" means any notes, bonds, interium certificates, debentures, or other forms of obligation issued by the Authority pursuant to this ordinance.

"Obligee" includes any holder of an obligation, agent or trustee for any holder of an obligation, or lessor demising to the Authority property used in connection with a project, or any assignee or assignees of such lessor's interest or any part thereof, and the Federal government when it is a party to any contract with the Authority in respect to a housing project.

"Persons of low income" means persons or families who cannot afford to pay enough to cause private enterprise in their locality to build an adequate supply of decent, safe and sanitary dwellings for their use.

ARTICLE IV

BOARD OF COMMISSIONERS

1. (a) (1) The affairs of the Authority shall be managed by a Board of Commissioners composed of six persons.

a. Two members of the Board shall be members of the Shoshone Tribe.
b. Two members of the Board shall be members of the Arapahoe Tribe.
c. Two members of the Board shall not be members of either Tribe.

(2) The Board members shall be appointed by the Council

EXHIBIT 7

TITLE XXI

ZUNI TRIBAL ENTERPRISE BOARD OF DIRECTORS

CHAPTER 1 -- GENERAL PROVISIONS

§21-1-1 Council Findings - The Zuni Tribal Council pursuant to its constitutional powers has created numerous tribal enterprises. These enterprises have, without exception, developed serious financial problems. The Zuni Tribal Council finds that these problems are a direct result of inadequate oversight of and direction to the employees of the various enterprises. The Zuni Tribal Council does not have sufficient time or resources to adequately perform these policy making functions or to provide the necessary oversight.

§21-1-2 Purpose - The purpose of this Title is to create a Board of Directors with the power to make the necessary policy decisions for all of the Tribe's enterprises. The Board of Directors shall exercise these powers with a minimum of interference from the Zuni Tribal Council but be bound by an obligation to the people of the Pueblo of Zuni to:

(a) Provide meaningful employment to the people of the Pueblo of Zuni;

(b) Protect the resources and culture of the people of Zuni;

(c) Generate surplus revenues for the benefit of the Pueblo of Zuni;

(d) Develope the reputation of Zuni Tribal Enterprises as financially sound businesses.

§21-1-3 Creation of the Board of Directors - There is hereby created a five person Board of Directors to be known as the Zuni Tribal Enterprise Board of Directors and to have such powers as are set out in this Title.

CHAPTER 2 -- BOARD OF DIRECTORS MEMBERSHIP

§21-2-1 Appointment of Board of Directors Members - The Zuni Tribal Council shall appoint the five members of the Zuni Tribal Enterprises Board of Directors. A member may be appointed for more than one term.

§21-2-2 Term of Office - The members of the Board of Directors shall serve staggered three (3) year terms. Terms of office shall expire on the first day of the new year and new terms of office shall begin at the same time. One member of the initial Board of Directors shall have his/her term expire on January 1, 1982; two members of the initial Board of Directors shall have their terms expire on January 1, 1983; two members of the initial Board of Directors shall have their terms expire on January 1, 1984.

§21-2-3 Vacancy on Board of Directors - There shall be a vacancy on the Board of Directors when any of the following occurs:

(a) There is a death of a member of the Board of Directors'

(b) A member of the Board of Directors resigns voluntarily;

(c) A member of the Board of Directors misses three consecutive regular Board of Directors meetings and the remaining members of the Board of Directors by unanimous vote, including the vote of the Chairperson, determine that the absent member no longer has the desire to act in the best interest of the Board of Directors and should be removed;

(d) The term of office for a member of the Board of Directors has expired.

§21-2-4 Filling Vacancies on the Board of Directors - Vacancies on the Board of Directors shall be filled by action of the Zuni Tribal Council. A kperson appointed to fill an unexpired term on the Board of Directors shall be appointed for the remaining portion of that term.

§21-2-5 Eligibility for Membership - Any person, Zuni or non-Zuni, resident or non-resident may be appointed to the Board of Directors if such person shows a willingness to further the purposes of this Title.

§21-2-6 Ex-Officio Member - The Zuni Tribal Council may in its discretion appoint one ex-officio member of the Board of Directors. This member may take part in any Board of Directors discussions in order to express the views of the Tribal Council. This member shall have no power to vote on any matter. The term of office of the ex-officio member shall be at the discretion of the Tribal Council.

CHAPTER 3 -- PROCEDURES OF THE BOARD OF DIRECTORS

§21-3-1 Adoption of Own Procedures - The Board of Directors may adopt any procedures, not inconsistent with this Title, for the conduct of its business.

§21-3-2 Quorum - Three members of the Board of Directors shall constitute a quorum for the conduct of any business. A majority vote of those present shall be needed for any action of the Board of Directors except when this Title explicitly provides otherwise.

§21-3-3 Meetings -

(a) Regular Board of Directors meetings shall be held monthly at a time and place to be set by the Board of Directors. A regular meeting of the Board of Directors may be cancelled or rescheduled by Board of Directors action.

(b) Special meetings of the Board of Directors may be called by the Chairperson or by a petition of two Board of Directors members.

(c) Notice of regular or special Board of Directors meetings shall be given to members of the Board of Directors as far in advance as is reasonably practical. No Board of Directors action shall be invalid because one or more members of the Board of Directors did not get notice of the meeting if a reasonable attempt to give notice was made.

(d) Any meeting of the Board of Directors may be open to the public or closed at the discretion of the Board of Directors.

CHAPTER 4 -- BOARD OF DIRECTORS OFFICERS

§21-4-1 Appointment - At the first meeting of the Board of Directors, the Board of Directors shall appoint, from among its members, a chairperson, vice-chairperson and secretary. The appointment shall continue until the first meeting of the new year, after the seating of any new Board of Directors members. At the first meeting of the new year, all new officers shall be appointed or reappointed by the Board of Directors. Should there be created a vacancy in a Board of Directors position held by an officer of the Board of Directors, the Board of Directors shall appoint someone from the Board of Directors to fill that position.

§21-4-2 Chairperson - The Chairperson shall preside over all meetings of the Board of Directors. The Chairperson shall not vote on Board of Directors matters except to break ties (except pursuant to a §21-2-3(c) vote). The Chairperson shall exercise those powers set out in this Title together with such additional powers as the Board of Directors shall delegate to the Chairperson.

§21-4-3 Vice-Chairperson - The Vice-Chairperson shall preside over all meetings in the absence of the Chairperson. The Vice-Chairperson shall exercise those powers set out in this Title together with such additional powers as the Board of Directors shall delegate to the Vice-Chairperson.

§21-4-4 Secretary - The Secretary shall be responsible for maintaining the records of the Board of Directors. The Secretary shall keep minutes consisting of all resolutions adopted by the Board of Directors. The Secretary may take additional minutes at the Secretary's discretion. The Secretary shall exercise those powers set out in this Title together with such additional powers as the Board of Directors shall delegate to the Secretary.

CHAPTER 5 -- BOARD OF DIRECTORS EXPENSES

§21-5-1 Reasonable Expenses - The Board of Directors may expend such amounts of money as are reasonably necessary for the performance of its duties (e.g. Board of Directors travel, preparation and distribution of minutes, publishing notices of meetings).

§21-5-2 Board of Directors Expense Account - The Board of Directors is hereby authorized to create an account of money in a form approved by the Board of Directors to be used for the payment of reasonable expenses. Each enterprise shall contribute to the expense account in an amount and at such intervals as are established by the Board of Directors. The Board of Directors may set different contribution amounts for different enterprises.

CHAPTER 6 -- BOARD OF DIRECTORS POWERS

§21-6-1 Delegation to the Board of Directors - The Zuni Tribal Council hereby delegates to the Zuni Tribal Enterprise Board of Directors all powers reasonably necessary for the performance of its responsibilities including but not limited to the following:

(a) To grant Tribal Charters for the creation of new Zuni Tribal Enterprises; subject to ratification by the Zuni Tribal Council;

(b) To revoke Tribal Charters for any existing Tribal Enterprise and to provide for the orderly disposition of the then existing assets of such an enterprise; subject to ratification by the Zuni Tribal Council;

(c) To provide for the employment and termination of employment for any employee of any enterprise and to create a policy manual to act as guide in such matters and to provide for the delegation of this power to enterprise managers;

(d) To apply for grants, or loans on behalf of any or all of the Tribal Enterprises, provided that when such grants or loans are sought from the federal government or any agency thereof that they shall be subject to the approval of the Zuni Tribal Council;

(e) To, in its sole discretion, determine when any enterprise has such surplus revenues that some of such revenues may be turned over to the Tribal General Fund without interfering with the present or future operation of the enterprise; and to turn over such surplus revenues;

(f) To authorize the lending of enterprise money for enterprise purposes, to invest and reinvest money and take and hold real and personal property as security for the payment of funds so loaned or invested;

(g) To set all salaries for all employees of all enterprises;

(h) To approve and authorize the sale, conveynace, mortgage, pledge, lease, exchange, transfer or other disposition of all or any part of the property or assets of any enterprise;

(i) To approve and authorize the purchase, taking, receiving, leasing or other acquisition, owning, holding, improving, use or other dealing with real or personal property or other interest therein, wherever situated when such property is an asset of an enterprise;

(j) To authorize suit on behalf of any enterprise;

(k) On behalf of any enterprise to make contracts and guarantees and incur liabilities and borrow money at such rates of interest as it may determine;

(l) To exercise its powers or authorize such exercise within or without the reservation;

(m) To delegate to any person or persons any of the powers of the Board of Directors.

CHAPTER 7 -- LIMITS OF BOARD OF DIRECTORS POWERS

§21-7-1 Commingling of Enterprise Funds - The Board of Directors may authorize the use of funds from more than one enterprise to be combined for a single purpose for the benefit of all enterprises so contributing. The Board of Directors shall not authorize the use of funds or assets of one enterprise to be used for the benefit of another enterprise or to have the assets of one enterprise generally comingled with the assets of any other enterprise.

§21-7-2 Consent to Suit - The Board of Directors shall have the power to consent to suit against any enterprise. Skuch consent shall only create liability up to the limits of the assets of the enterprise against which suit is authorized. Consent to suit against one enterprise shall not be valid if the purpose of the consent was to obtain a benefit for another enterprise. . This provision shall not be construed to allow suit against any enterprise, officer or employee thereof without an express consent to suit granted by the Board of Directors. No consent to suit shall be valid unless the consent is limited to suit in the Zuni Tribal Court.

CHAPTER 8 -- BOARD DUTIES

§21-8-1 Reports to the Council - The Board of Directors shall prepare and submit annual reports to the Tribal Council regarding the status of each enterprise on December 15 of each year.

§21-8-2 Audit - The Board of Directors shall authorize an annual audit or other appropriate financial report as to each of the enterprises and shall submit such reports to the Zuni Tribal Council.

CHAPTER 9 -- TRIBAL LIABILITY

§21-9-1 No Liability - No provision of the Title shall be read to authorize suit against the Zuni Tribe or any officer or employee therof. No provision of this Title shall be read to empower the Board of Directors to authorize suit against the Zuni Tribe or any officer thereof.

CHAPTER 10 -- LIABILITY OF DIRECTORS

§21-10-1 No Liability - There shall be no liability against any director for any action taken or not taken pursuant to the performance of their duties or the operation of any enterprise.

CHAPTER 11 -- ENTERPRISES GOVERNED BY BOARD OF DIRECTORS

§21-11-1 Existing Enterprises - The Zuni Tribal Enterprise Board of Directors is hereby given control over the following existing enterprises:

(a) Zuni Candle Company;

(b) Zuni Air Corporation;

(c) Zuni Conservation Enterprise;

(d) Zuni R.V. Campground;

(e) Zuni Building Company;

(f) Zuni Salt Lake Enterprise;

(g) Zuni Rental Enterprise.

§21-11-2 New Enterprises - The Zuni Tribal Enterprise Board of Directors shall have control over all new enterprises created pursuant to §21-6-1 (a) of this Title.

CHAPTER 12 -- TRANSFER OF CONTROL OVER EXISTING ENTERPRISES

§21-12-1 Transition Period - It is recognized that there will be a period of transition during which the existing enterprises must function and before the time when the Board of Directors has had time to delegate powers of day to day operation to the enterprise managers. Until such time as the Board grants or removes any power from any enterprise personnel, such personnel shall continue to exercise such power previously given them by the Zuni Tribal Council.

§21-12-2 Charter Issuance - The Board of Directors shall issue charters to the enterprises listed in §21-11-1. These charters shall be subject to ratification by the Zuni Tribal Council. Once ratified the enterprises shall be subject to the provisions of this Title and subject to the control of the Zuni Tribal Enterprise Board of Directors.

§21-12-3 Revocation of Prior Council Actions - Any prior action of the Zuni Tribal Council in creating a Zuni Enterprise Board of Directors or similar body is hereby revoked. Any prior tribal action dealing with any tribal enterprise, wkhich is inconsistent with this Title or which is inconsistent with any future Board of Directors action is hereby declared to be superceded by this Title or by such future Board of Directors action and to the extent of such inconsistency such prior action is of no effact.

§21-12-4 Validity of Executory Agreements - This Title shall have no effect on the validity of any existing agreements between any enterprise and any other person or entity.

EXHIBIT 8

LUMMI INDIAN BUSINESS COUNCIL

LUMMI TRIBAL SEWER AND WATER DISTRICT ORDINANCE

ARTICLE I.

SEWER AND WATER DISTRICT AND SEWER AND WATER BOARD

SECTION 1.01. ESTABLISHMENT OF DISTRICT. There is hereby established the Lummi Tribal Sewer and Water District encompassing all of the land and waters within the exterior boundaries of the Lummi Indian Reservation.

SECTION 1.02. SEWER AND WATER BOARD. There is hereby established the Lummi Tribal Sewer and Water Board to serve as the administrative Board for the Lummi Tribal Sewer and Water District.

SECTION 1.03. PURPOSE. The Lummi Tribal Sewer and Water Board (hereinafter referred to as "Board") shall be responsible for assuring that the operation of the system set out in this ordinance adheres to the dictates of the Sewer and Water Ordinance and any regulations promulgated thereunder, the requirements of regulating agencies, and the conditions of customers with the goal of keeping the District fiscally responsible and viable.

SECTION 1.04. BOARD MEMBERS. The Board shall consist of five (5) members. Two (2) members will be elected from the community within the boundaries of the District. Two (2) members will be elected from the Lummi Indian Tribal membership. The fifth member will be a member of the Lummi Indian Business Council, and shall be appointed by the Lummi Indian Business Council to the Sewer and Water Board position.

SECTION 1.05. TERM OF OFFICE. Except for the initial Board, all members shall serve two-year (2) terms, except for the representative of the Lummi Indian Business Council, who shall serve a one-year (1) term.

SECTION 1.06. ELECTIONS. Elections shall be held on the first Tuesday after the first Monday in November of each year. Each year, one (1) Indian position, one (1) open position, and the Business Council position shall be filled. [Resolution #84 1002]

SECTION 1.07. VOTING. Voting shall be by secret ballot. At least thirty (30) days prior to the scheduled date of the elections, an election committee made up of the Chairman of the Lummi Indian Business Council (or his designee), another Lummi Indian, and a non-Indian shall be appointed by the Sewer and Water Board to establish rules and procedures for the conduct of the election, including, but not limited to, the type of secret ballot (machine or paper), the number and type of election officials at the polls, and compensation to be paid these people. Candidates and electors for the Indian positions shall consist of members of the Lummi Indian Tribe qualified to vote in tribal elections. Candidates and electors for the open positions shall consist of all persons residing within the District for at least the ninety (90) days preceding the election and registered to vote in the elections of the state of Washington.

SECTION 1.08. NOMINATIONS AND QUALIFICATIONS. Within twenty-five (25) days preceding the date set for elections, any person qualifying as a candidate under the preceding sections may be nominated by submitting his or her name in writing to the election committee. Nominations shall be received by the election committee for ten (10) days and may not be received by the election committee later than fifteen (15) days prior to the date set for elections. The election committee will cause the names of all nominees to be posted at prominent places within the Lummi Indian Reservation and published in a newspaper of general circulation together with the notice of the election.

SECTION 1.09. CERTIFICATION OF RESULTS. Within 24 hours after the closing of the election, the election committee will count the ballots. The committee will then certify the election of the candidates with the highest number of votes from the eligible electors. Within ten (10) days of the election, the Chairman of the Lummi Indian Business Council shall issue a certificate of election to the certified candidates. The Lummi Indian Business Council shall appoint all candidates receiving certificates of election to the Board. The decision of the election committee on all election matters shall be final.

SECTION 1.10. INITIAL BOARD. The entire initial Board shall be appointed by the Lummi Indian Business Council in accordance with the membership pattern set out above. Two Indians and two non-Indians and the Lummi Indian Business Council representative shall be appointed to serve until the annual general Council meeting in January, 1977, or until their successors are elected or appointed. Two Indians and two non-Indians shall be appointed to serve until the annual general Council meeting in January, 1978, or until their successors are elected or appointed. At the expirations of the terms of the first members of the Board, terms shall be for a two-year period, except for the Lummi Indian Business Council representative.

SECTION 1.11. OFFICERS. Within thirty (30) days after the election, or after the appointment of the initial Board, there shall be an organizational meeting of the Board to elect a Chairman, Vice Chairman and a Secretary-Treasurer.

LAW OFFICES
SONOSKY, CHAMBERS, SACHSE & ENDRESON
SUITE 1000
1250 EYE STREET, N.W.
WASHINGTON, D.C. 20005
(202) 682-0240
TELECOPIER (202) 682-0249

MARVIN J. SONOSKY
HARRY R. SACHSE
REID PEYTON CHAMBERS
WILLIAM R. PERRY
LLOYD BENTON MILLER (AK)
DOUGLAS B.L. ENDRESON (WI)
MYRA M. MUNSON (AK)
ANNE D. NOTO (MD)
KAY E. MAASSEN GOUWENS (AK)
RICHARD A. POULIN (AK)
MARY J. PAVEL (WA)
TARA A. SBER
JAMES E. GLAZE (AK)
COLIN CLOUD HAMPSON

OF COUNSEL
ARTHUR LAZARUS, JR.
ROGER W DUBROCK (AK)
LINDSAY R NAAS (MD, MN)

ANCHORAGE OFFICE
SUITE 700
900 WEST FIFTH AVENUE
ANCHORAGE, ALASKA 99501
(907) 258-6377
TELECOPIER (907) 272-8332

JUNEAU OFFICE
229 FOURTH STREET
JUNEAU, ALASKA 99801
(907) 586-5880
TELECOPIER (907) 586-5863

Statement of Douglas B.L. Endreson

Before the Senate Committee on Indian Affairs
on Tribal Sovereign Immunity

September 24, 1996

Good morning, Chairman McCain, Vice-Chairman Inouye, and Committee Members. I appreciate the opportunity to testify before you this morning concerning the sovereign immunity of Indian tribes. My name is Douglas Endreson. I am with the law firm of Sonosky, Chambers, Sachse & Endreson, which represents Indian tribes, Alaskan Native entities and Indian and Native people throughout the United States.

I wish to first express my appreciation to the Committee for protecting the right of Indian tribes to be are heard on issues before Congress that affect their governmental rights. The importance of this commitment has become starkly apparent in both this and the last session of Congress, in which proposals that would have a direct and immediate impact on Indian rights have been advanced without any opportunity for Indian tribes to state their views to the Congress. In this season of attacks on Indian sovereignty, this Committee's commitment to protecting the right of Indian tribes has become of singular importance.

A. Sovereign Immunity is Essential to the Right of Self-government For All Governments

All governments seek to meet the needs of their citizens -- by protecting law and order, the environment, and economic interests, for instance – through the exercise of their sovereign authority. All governments find that their actions generate conflicts from time to time. For example, disputes over the scope of a government's power, conflicts between the exercise of that power and the rights of individuals, and liability claims against government actors, arise with respect to all governments.

Sovereign immunity protects a government's right to decide – in its own courts, or by actions of its legislature, or through other institutions of its government – how to address and resolve these disputes. For this reason, sovereign immunity is a vital part of the right of self-government for all governments, federal, tribal, and state.

Today, Indian tribes are focused on using their powers to achieve goals, such as building their economies, improving the reservation's quality of life, and protecting its environment and natural resources, that are important to all reservation residents, visitors, and businesses, Indian and non-Indian alike. That the tribes are able to pursue these goals is in large part a result of the success of the Self-determination policy, and of the federal government's steadfast commitment to that policy.[1]

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[1] The promotion of tribal self-government through the Self-determination policy is a major federal policy goal. See Presidential Memorandum for the Heads of Executive Departments and Agencies, April 29, 1994 (President Clinton); Statement by the President: Indian Policy, the White House, January 24, 1983 (President Reagan); and Special Message to the Congress on Indian Affairs, [1970] Pub. Papers 564 (Richard M. Nixon). Included in this policy is the "'overriding goal' of encouraging tribal self-sufficiency and economic development." California v. Cabazon Band of

The tools used to pursue these goals are the powers of self-government confirmed by the Supreme Court's decisions of the Self-determination era, which include the power to tax and regulate persons and activities within tribal territory,[2] to protect reservation resources,[3] and to adjudicate disputes in tribal forums.[4] The tribes' exercise of these powers has resulted in the growth of the reservation community and economy, bringing more people and businesses – Indian and non-Indian – to the reservation. In sum, the Self-determination policy works.

As with any government, the tribes' actions in pursuit of its objectives leads in some instances to disputes. Settled federal law recognizes the tribes' right to decide – in its own courts, or by actions of its legislature, or through other institutions of its government – how to address and resolve these disputes.[5] And as with all governments, the responsibility for resolving disputes that arise in the exercise of governmental powers is initially on the judiciary. For tribal courts, this

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Indians, 480 U.S. 202, 216 (1987)(quoting New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-35 (1983)). As the Supreme Court has noted, Congress has enacted numerous statutes in furtherance of the Self-determination policy. See, e.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-335 and n. 17; White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 and n. 10, 149 (1980).

[2] New Mexico v. Mescalero Apache Tribe, 462 U.S. at 336; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 137 (1982).

[3] New Mexico v. Mescalero Apache Tribe, 462 U.S. at 335.

[4] LaPlante, 480 U.S. 9, 15 (1987); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 (1978); Williams v. Lee, 358 U.S. 217, 220 (1959).

[5] See, e.g. United States v. Wheeler, 435 U.S. 313, 324 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. at 65-66.

responsibility includes deciding challenges to the scope and existence of tribal power[6], adjudicating individual rights claims, including those arising under the Indian Civil Rights Act, 25 U.S.C. § 1302[7], and resolving all disputes that arise under the substantive law that governs persons and conduct on the reservation. This is an enormous responsibility. Simply stated, the decisions of the tribal courts will define the legal expectations on which persons – Indian and non-Indian – and entities will rely when living, visiting, and doing business on the reservation.

As with all governments, sovereign immunity is essential to protect tribal governments' right to decide how to address and resolve these disputes, and is a vital part of the right of self-government. Settled law has long recognized this, and accorded Indian tribes the common law immunity from suit traditionally held by all governments.[8]

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[6] These disputes may arise under tribal or federal law. The former is subject to exclusive tribal jurisdiction, while the latter is subject to the exhaustion rule set out by the Supreme Court in Nat'l. Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 857 (1985) and La Plante, 480 U.S. at 16, which requires that the issue be decided first in the tribal court.

[7] In Santa Clara Pueblo, 436 U.S. at 65, the Court held that the provisions of 25 U.S.C. § 1302 are, with one exception, enforceable exclusively in tribal forums, and refused to imply a private right of action under the Act. The exception is for claims arising under the habeas corpus provision of the Act, 25 U.S.C. 1303, under which Congress has expressly authorized the Court to hear such claims. Id. at 70. The Ninth Circuit has recently held that tribal remedies must be exhausted before an action may be brought under Section 1303. Wetsit v. Stafne, 44 F.3d 823 (9th Cir. 1995).

[8] Santa Clara Pueblo, 436 U.S. at 59 and Oklahoma Tax Comm'n v. Potawatomi, 498 U.S. 505, 509 (1991).

B. Congress Has Correctly Rejected Attacks Made on the Tribal Judiciary and Should Continue To Do So

During the same period that Indian tribes have been engaged in, first, establishing their governmental powers, and, second, the applying these powers to improve the reservation, tribal opponents have repeatedly called on Congress to reverse the decision in Santa Clara Pueblo v. Martinez,[9] waive tribal sovereign immunity from suit, and authorize the federal courts to hear ICRA claims.[10] Those seeking the reversal of Santa Clara Pueblo have consistently alleged that tribal courts are biased and are not competent tribunals in which to adjudicate claimed violations of individual rights. They have done so despite the fact that these very claims have been rejected by the Supreme Court.[11] Furthermore, these attacks have been advanced without any attempt to show that decisions of the tribal courts support these allegations. Nor have tribal court critics sought to advance any suggestions as to how to improve the tribal courts, rather than attack them.

Congress has consistently rejected these calls, and unlike tribal opponents, has sought to determine what kind of assistance would enhance tribal court development. The decisions of the tribal courts show that Congress was right to do so, and should continue its support for tribal self-government and the tribal judiciary.

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[9] In Santa Clara Pueblo, the Supreme Court held that tribal courts have exclusive jurisdiction over civil actions arising under the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302. 436 U.S. at 65-66.

[10] See, e.g., S. 517, 101st Cong., 1st Sess. (1989).

[11] LaPlante, 480 U.S. at 18-19 (citing Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65).

1. The United States Civil Rights Commission and the Congress Have Correctly Rejected Calls to Reverse the Santa Clara Pueblo Decision

At Congress' direction, the United States Civil Rights Commission undertook an examination of tribal court enforcement of the Indian Civil Rights Act.[12] Beginning in 1986, the Commission conducted numerous hearings and heard testimony from a wide variety of witnesses, including tribal judges, tribal council members, Indian law scholars, Bureau of Indian Affairs' officials, and United States Attorneys.[13] The Commission collected additional information from field interviews, written statements from Indian tribes, correspondence, and responses to requests for information.[14] In 1991, the Commission published its findings and recommendations in a report entitled "The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights, June 1991" ("Report").

The Report traced the evolution of tribal courts since the 1880s, and concluded that "[o]nly in the last 20 years have these courts been permitted to develop."[15] The Commission frankly attributed the lack of development to "[s]hifts in Federal Indian policy,"[16] and their recent development to the self-determination policy and the congressional mandate that tribal courts

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[12] The Indian Civil Rights Act: A Report of the United States Commission on Civil Rights, June 1991 ("ICRA Report").

[13] Id. at 1.

[14] Id. at 1-2.

[15] Id. at 30.

[16] Id.

enforce the ICRA.[17] The Report recommended against the enactment of legislation that would reverse the Santa Clara Pueblo decision, stating that it would be a "further encroachment of tribal government sovereignty" which is "unwarranted and inappropriate at this time in light of the Federal Government's poor record of support for the costs of insuring Indian civil rights."[18]

Throughout the Report, the Commission observed that tribal courts have historically suffered from a lack of funding, training and resources.[19] The Report also highlighted areas where tribal courts were experiencing difficulty as a result of inadequate training and resources. These areas included "[d]efining the parameters of judicial review" particularly in actions brought against the tribal council,[20] and the invocation of the defense of sovereign immunity.[21] The Commission acknowledged that tribal governments should address these areas with financial support and with the encouragement of the federal government. For example, the Report suggested that the federal government could "play a positive role in encouraging the tribes to examine the extent to which they can enact statutory waivers of their sovereign immunity for adjudication of civil rights claims . . . ."[22] Through the federal government's establishment of pilot projects, the Report proposed, tribal

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[17] Id. at 31.

[18] Id. at ii-iii.

[19] Id. at 36, 41 (quoting statements reflecting inadequate funding of tribal courts made by John Collier, the Commissioner of Indian Affairs in 1941 and Senator Daniel Inouye in 1988).

[20] Id. at 51-63.

[21] Id. at 63-67.

[22] Id. at 67.

governments could "take the lead" in considering the enactment of limited waivers of sovereign immunity.[23]

Overall, the Commission recognized that tribal justice systems are in a period of "transition,"[24] and that the federal government should permit Indian tribes, as sovereign nations, to strengthen and improve their tribal justice systems through the exercise of the powers of self-government without federal interference, "such as by way of imposing Federal court review."[25] The Commission also recommended that the federal government support the development of tribal justice systems by providing adequate resources, training and funding for their operation,[26] and encouraged Congress to go forward with legislative proposals that authorized funding of tribal courts.[27]

In 1993, Congress took action to provide such support by enacting the Indian Tribal Justice Act, 25 U.S.C. §§ 3601 et seq. Rather than intrude on tribal sovereignty by providing for federal court review of tribal court decisions, the Act expresses strong support for the tribal judiciary and seeks to provide Indian tribes with the funding and resources essential to the further development of tribal justice systems. Congress' commitment to tribal self-government is reflected in the Act's declarations which state "Indian tribes possess the inherent authority to establish their own form of

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[23] Id.

[24] Id. at ii (emphasis in original).

[25] Id. at 51.

[26] Id. at 51, 72-73.

[27] Id. at 72-73.

government, including tribal justice systems" and that "tribal government involvement in and commitment to improving tribal justice systems is essential to the accomplishment of the goals of this Act."[28] The Act also declares that "Congress and Federal courts have repeatedly recognized tribal justice systems as the appropriate forums for the adjudication of disputes affecting personal and property rights" and "serve as important forums for ensuring the public health and safety and the political integrity of tribal governments."[29]

To promote the continued expansion and effective operation of tribal courts, the Act authorizes federal funding for inter alia "the employment of judicial personnel," "the development[] and maintenance of" a law library and records management system, the "construction or renovation of facilities for tribal justice systems," and "the development, revision, and publication of tribal codes, rules of practice, rules of procedures, and standards of judicial performance and conduct."[30] The Act also established the Office of Tribal Justice Support to provide technical and other assistance to tribal justice systems.[31] Unfortunately, however, recent appropriations show that tribal courts continue to suffer from the lack of adequate resources.[32]

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[28] 25 U.S.C. § 3601(4) and (9).

[29] 25 U.S.C. § 3601(5)-(6).

[30] 25 U.S.C. § 3613 (b)(2)-(7).

[31] 25 U.S.C. § 3611.

[32] A principal purpose of the Indian Tribal Justice Act, Public Law 103-176, was to provide statutory authorization for funding for tribal court operations. Specifically, the Act authorized $58.4 million, with $50 million to be used for the basic operations of tribal judicial systems. However, since the enactment of the Indian Tribal Justice Act, funding for tribal courts has in fact declined. The amount expended for tribal judicial systems in FY 1996 was $10.443

In sum, Congress has to date responded to attacks on tribal courts by seeking to determine what could be done to provide assistance to these courts, and has rejected calls to abrogate their authority. Congressactions have been consistent with the recommendations of the United States Civil Rights Commission, which unlike tribal court critics, actually sought to determine the problems facing tribal courts before making its recommendations. Congress' judgment has been correct, as we show next.

2. Decisions of the Tribal Courts Show That Congress Was Correct and That Tribal Courts are the Proper Forum for The Adjudication of ICRA Claims

There is no question that the exercise of tribal powers to improve the reservation economy and quality of life, and the growth of the tribal community have created a need for tribal statutory and common law to define the substantive law and protect the individual rights of residents of that community and participants in the reservation economy. This is a natural occurrence in the development of the tribal self-government. While the pace of this development has been unusually quick, the response of Indian tribes to these needs has, despite the limited resources available to do

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million, which was $4 million less than was expended in FY 1995. The lack of funding for tribal judicial systems has also been the subject of Congressional hearings, most recently in August of 1995, at which the Honorable William C. Canby, Jr., Judge, United States Court of Appeals for the Ninth Circuit, testified that the current lack of funding for tribal courts is a crisis and that "[a] collapse of the tribal court system for lack of resources would be a major judicial disaster, not just for the tribes and their courts, but for our whole system of civil and criminal justice." Statement of the Honorable William C. Canby, Jr., Judge, United States Court of Appeals for the Ninth Circuit, Oversight Hearing on the Indian Tribal Justice Act, Senate Committee on Indian Affairs 103rd Congress, Second Session (August 2, 1995).

so, matched this pace.

Indian tribes have responded to the expanded need for tribal statutory and common law through the enactment of codes by their legislative bodies and through the development of common law in the tribal courts. The reservation community – Indian and non-Indian – has responded to these developments by using the tribal courts to decide disputes in a broad variety of areas, including contract and tort claims,[33] challenges to tribal tax laws,[34] employment disputes,[35] conservation

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[33] Pitts v. Earling, 22 Indian L. Rep. 6052 (C.S.&K. Ct. App., Dec. 5, 1994) (contract for sale of undivided Indian trust and fee lands is not enforceable absent prior approval by Secretary of Interior); Puyallup Nation Housing Authority v. Miles, 21 Indian L. Rep. 6049 (Puy. Ct. App., Dec. 9, 1991) (interpreting housing lease); Greene v. Bourgeau, 21 Indian L. Rep. 6057 (Nez Perce Tr. Ct., Apr. 13, 1994) (under Nez Perce tradition there is no implied rental agreement for occupancy of plaintiff's trailer when the parties made no agreement for rent); Bauer v. Mashantucket Pequot Gaming Enterprise, 22 Indian L. Rep. 6145 (Mash. Peq. Ct. App., Oct. 24, 1994) (personal injury suit).

[34] Mustang Fuel Corp., et al. v. Cheyenne-Arapaho Tax Comm'n et al., 21 Indian L. Rep. 6058 (Chey.-Arap. Sup. Ct., Jan. 3, 1994) (Tribe has authority to tax extraction of natural resources on allotted Indian trust land by non-Indian company); Hercules, Inc. v. Skull Valley Band of Goshute Indians, et al., 20 Indian L. Rep. 6025 (Goshute Tr. Ct., Mar. 25, 1993) (Tribe has authority to impose ad valorem tax on property held by non-Indian corporation).

[35] Hoopa Valley Indian Housing Authority v. Gerstner, 22 Indian L. Rep. 6002 (Hoopa Ct. App., Sept. 27, 1993) (affirming trial court's upholding TERO Commission's reinstatement of director of housing authority after a hearing); PC&M Construction Co. v. Navajo Nation, et al., 21 Indian L. Rep. 6016 (Nav. Sup. Ct., Nov. 16, 1993) (appeal of suit against company for failure to pay tribal minimum wage).

violations, [36] and domestic relations and child custody matters.[37] The use of the tribal courts to resolve these and other disputes reflects a growing confidence in the tribal judiciary within the Indian and non-Indian reservation community.

These cases also include actions against Indian tribes and tribal officials alleging that their conduct did not comport with the requirements of the Indian Civil Rights Act, or with procedural rights guaranteed under tribal law. The decisions in these cases address threshold issues, such as the application of the doctrine of judicial review, as well as the issue of whether such actions are barred by tribal sovereign immunity, and, when it is within the court's jurisdiction to do so, the merits of the underlying claim. Contrary to the claims made by the tribal opponents, these cases show that tribal courts are committed to protecting individual rights under federal and tribal law, and to effective enforcement of the Indian Civil Rights Act.

We point out first that a number of these cases have required tribal courts to consider whether to apply the doctrine of judicial review. This is an issue of singular importance, the resolution of

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[36] Squaxin Island Indian Tribe v. Johns, 22 Indian L. Rep. 6011 (Sq. I. Ct. App., Apr. 6, 1993) (violation of tribal fishing code); Naff v. Colville Confederated Tribes, 22 Indian L. Rep. 6032 (Colv. Ct. App., Jan. 26, 1995) (violations of tribal fish and wildlife code); Bowen v. Upper Skagit Indian Tribe, 21 Indian L. Rep. 6002 (U. Skag. Ct. App., Apr. 24, 1990) (conviction for fishing in closed area).

[37] Miner v. Banley, 22 Indian L. Rep. 6044 (Chy. R. Sx. Ct. App., Feb. 3, 1995) (child custody proceeding); Lulow v. Peterson, 22 Indian L. Rep. 6069 (C.S.&K. Tr. Ct., Mar. 21, 1995) (holding no cause of action for services rendered in relation to cohabitation without marriage); DuMarce v. Heminger, 20 Indian L. Rep. 6077 (N. Plns. Intertr. Ct. App., Sept. 25, 1992) (interpreting requirements of traditional adoption procedure).

which determines the role of the judiciary within the government, as is illustrated by the United States Supreme Court's historic decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The reported tribal court decisions show that several different tribal courts have exercised judicial review of tribal council actions just since 1991.[38]

These decisions also demonstrate frequent consideration of the question whether the action sub judice is barred by sovereign immunity.[39] When tribal agencies and officials assert immunity in an action brought under tribal law, the tribal constitution or the Indian Civil Rights Act, the tribal courts determine whether Congress or the Tribe has expressly waived tribal immunity from suit, or

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[38] Burns Paiute Indian Tribe v. Dick, 22 Indian L. Rep. 6016 (Burns Paiute Ct. App., Feb. 14, 1994)(holding tribal exclusion order violates ICRA's due process provision); Colville Confederated Tribes v. Wiley, et al, 22 Indian L. Rep. 6059 (Colv. Ct. App., Mar. 27, 1995); Hicks v. Carerra, et al, 22 Indian L. Rep. 6065 (Inter-Tribal Ct. App. of Nev., Jan. 30, 1995); Hudson v. Hoh Indian Tribe, d/b/a the Hoh Tribal Business Committee, 21 Indian L. Rep. 6045 (Hoh Ct. App., May 28, 1992)(exercising review of tribal council's decision to discharge plaintiff); Shoshone Business Council v. Skillings, 20 Indian L. Rep. 6007 (Shos. & Arap. Ct. App., Jan. 28, 1993)(exercising review of tribal business council's actions); Wells, Jr. et al. v. Blaine, Jr., et al., 19 Indian L. Rep. 6035, 6036-37 (N. Plns. Intertr. Ct. App., Nov. 15, 1991)(reviewing tribal council's removal of tribal council members).

[39] See e.g., Hudson v. Hoh Indian Tribe, d/b/a/ the Hoh Tribal Business Committee, 21 Indian L. Rep. 6045, 6046-47 (Hoh Ct. App., May 28, 1992); Kakwitch v. Menominee Tribal Enterprises, 21 ILR 6112 (Men. Sup. Ct., Aug. 9, 1994); Shoshone Business Council v. Skillings, et al., 20 Indian L. Rep. 6007 (Shos. & Arap. Ct. App., Jan. 28, 1993); Davis v. Keplin, 18 Indian L. Rep. 6148 (Turt. Mt. Tr. Ct., Sept. 6, 1991); Sulcer v. Barrett, Jr., 17 Indian L. Rep. 6138, 6139 (C.B. Pot. Sup. Ct., Sept. 5, 1990)(holding tribal business committee members immune from suit as long as they acted within the scope of their authority); Wells v. Blaine, Jr., 19 Indian L. Rep. 6035, 6036-37 (N. Plns. Intertr. Ct. App., Nov. 15, 1991); Committee for Better Tribal Government, et al. v. Southern Ute Election Board, 17 Indian L. Rep. 6095 (S. Ute. Tr. Ct., Aug, 13, 1990); Francis v. Wilkinson, 20 Indian L. Rep. 6015 (N. Plns. Intertr. Ct. App., Jan. 21, 1993); Davis v. Turtle Mountain Housing Authority, 17 Indian L. Rep. 6035 (Turt. Mt. Tr. Ct., Feb. 13, 1990)(holding sovereign immunity does not bar declaratory judgment action brought against tribal housing authority).

expressly vested the court with jurisdiction over such actions.[40] Several decisions hold that immunity was waived in the tribal constitution or in the tribal code,[41] while others find a waiver in the Indian Civil Rights Act.[42]

Where Indian tribes have enacted ordinances expressly waiving sovereign immunity, tribal courts have sought to give effect to both the purpose and policy of the ordinance. Thus, in Bauer

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[40] Kakwitch v. Menominee Tribal Enterprises, 21 Indian L. Rep. 6112 (Men. Sup. Ct., Aug. 9, 1994)(holding that tribal constitution waived immunity of tribe and tribal enterprise with respect to actions brought under the tribal constitution, by-laws, ordinances and the Indian Civil Rights Act); Bordeaux v. Wilkinson, 21 Indian L. Rep. 6131, 6132 (Ft. Bert. Tr. Ct., Oct. 1, 1993)(holding tribal constitution waived immunity of tribal council members with respect to suits brought under ICRA); Davis v. Keplin, 18 Ind. L. Rep. 6148 (Turt. Mt. Tr. Ct., Sept. 6, 1991); see also Francis v. Wilkinson, 20 Indian L. Rep. 6015 (N. Plns. Intertr. Ct. App., Jan. 21, 1993)(holding tribal constitution waived sovereign immunity of tribal council from ICRA claims); Gonzales v. Allen, 17 Indian L. Rep. 6121, 6123-24 (Sho.-Ban. Tr. Ct., Sept. 17, 1990)(holding that sovereign immunity bars court from awarding back pay, but awarding injunctive relief); Murphy v. Standing Rock Sioux Election Commission, 17 Indian L. Rep. 6069, 6072-73 (St. Rk. Sx. Tr. Ct., Apr. 20, 1990)(holding tribal election commission violated plaintiff's constitutional rights to due process and equal protection); Oglala Sioux Tribal Personnel Board v. Red Shirt, 16 Indian L. Rep. 6052, 6053 (Ogl. Sx. Tr. Ct. App., Oct. 20, 1983)(holding sovereign immunity does not bar ICRA claim brought against tribal personnel board).

[41] See, e.g., Hudson v. Hoh Indian Tribe, d/b/a the Hoh Tribal Business Committee, 21 Indian L. Rep. 6045, 6046-47 (Hoh Ct. App., May 28, 1992)(holding that tribal constitutional provision permitting redress of grievances limited tribe's immunity for purposes of a wrongful termination challenge); Kakwitch v. Menominee Tribal Enterprises, 21 Indian L. Rep. 6112 (Men. Sup. Ct., Aug. 9, 1994); Bordeaux v. Wilkinson, 21 Indian L. Rep. 6131 (Ft. Bert. Tr. Ct., Oct. 1, 1993); Francis v. Wilkinson, 20 Indian L. Rep. 6015 (N. Plns. Intertr. Ct. App., Jan. 21, 1993); Murphy v. Standing Rock Sioux Election Commission, 17 Indian L. Rep. 6069 (St. Rk. Sx. Tr. Ct., Apr. 20, 1990).

[42] See, e.g., Davis v. Keplin, 18 Indian L. Rep. 6148 (Turt. Mt. Tr. Ct., Sept. 6, 1991); Oglala Sioux Tribal Personnel Board v. Red Shirt, 16 Indian L. Rep. 6052 (Ogl. Sx. Tr. Ct. App., Oct. 20, 1983).

v. Mashantucket Pequot Gaming Enterprise,[43] the tribal appellate court held that the tribal ordinance waived the tribal gaming enterprise's immunity from personal injury suits, and that the lower court had erred in dismissing plaintiff's claim on the ground that she had misnamed the tribal gaming enterprise in her complaint. And in Raymond v. Navajo Agricultural Products Industry,[44] the Supreme Court of the Navajo Nation examined each of the four exemptions from sovereign immunity provided by the Navajo Sovereign Immunity Act to determine whether they applied to the employment-related claims brought by plaintiff against a tribal entity. While holding that none of the exemptions applied, the Court explained that plaintiff should have pursued the administrative remedy provided under the Navajo Preference in Employment Act, which authorized an appeal to the tribal court.

These decisions also show that a number of the tribal courts have adopted as tribal law the remedy that the Supreme Court made available for claimed violations of federal law in Ex parte Young, 209 U.S. 123 (1908). The Young doctrine authorizes actions for prospective injunctive relief against government officials for claimed violations of federal law by declaring that actions of government officials that are beyond the scope of their authority are not actions of the sovereign, and that therefore such actions are not barred by sovereign immunity. The Young doctrine has been applied by a number of tribal courts as a remedy for claimed violations of tribal law, thus avoiding

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[43] 22 Indian L. Rep. 6145 (Mash. Peq. Ct. App., Oct. 26, 1994).

[44] 22 Indian L. Rep. 6100 (Nav. Sup. Ct., July 20, 1995).

immunity in the same manner as do the federal courts.[45] Applying the same doctrine, tribal courts have dismissed claims against tribal officials in the absence of allegations that the defendants acted beyond the scope of their authority,[46] and have recognized tribal immunity when an action brought against tribal officials is in reality an action against the sovereign.[47] In sum, the tribal courts have, through the development of tribal common law, made new remedies available to litigants whose claims would otherwise be barred by immunity.

The individual rights claims that have been presented to and decided by the tribal courts address issues such as the right to equal protection of the law,[48] the right to an opportunity to be

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[45] See, e.g., Combrink v. Allen, 20 Indian L. Rep. 6029, 6030 (Ct. Ind. App., Tonkawa, Mar. 5, 1993)(holding sovereign immunity does not bar petition for mandamus directing president to comply with tribal law where president acted beyond the scope of her authority); Wells, Jr. v. Blaine, Jr., et al., 19 Indian L. Rep. 6035, 6037 (N. Plns. Intertr. Ct. App., Nov. 15, 1991)(holding that the doctrine of sovereign immunity does not bar actions against tribal officials who have acted outside the scope of their authority); accord Lovermi v. Miccosukee Tribe of Indians of Florida, 23 Indian L. Rep. 6090 (Micc. Tr. Ct., Apr. 17, 1996); Committee for Better Tribal Government, et al. v. Southern Ute Election Board, et al., 17 Indian L. Rep. 6095, 6097 (S. Ute Tr. Ct., Aug. 13, 1990).

[46] See, e.g., Lovermi v. Miccosukee Tribe of Indians of Florida, 23 Indian L. Rep. 6090 (Micc. Tr. Ct., Apr. 17, 1996); Committee for Better Tribal Government, et al. v. Southern Ute Election Board, et al., 17 Indian L. Rep. 6095, 6097 (S. Ute. Tr. Ct., Aug. 13, 1990); accord Sulcer v. Barrett, Jr., 17 Indian L. Rep. 6138 (C.B. Pot. Sup. Ct., Sept. 5, 1990).

[47] See Sulcer v. Barrett, Jr., 17 Indian L. Rep. 6138, 6139 (C.B. Pot. Sup. Ct., Sept. 5, 1990); accord Day v. Hopi Election Board, 16 Indian L. Rep. 6057, 6059 (Hopi Tr. Ct., Feb. 29, 1988, July 18, 1988)(holding that defendants were not liable for money damages because the doctrine of sovereign immunity bars any suit "that could potentially reach into the public treasury").

[48] Burns Paiute Indian Tribe v. Dick, et al., 22 Indian L. Rep. 6016 (Burns Paiute Ct. App., Feb. 14, 1994).

heard,[49] and to have adequate notice,[50] privacy rights,[51] as well as rights to a jury trial,[52] speedy trial,[53] and the right to counsel in criminal proceedings.[54] The tribal courts have also upheld the right of individuals to a hearing prior to significant governmental actions such as employment termination[55] and termination of parental rights.[56] While these decisions cannot be evaluated simply

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[49] In re the Welfare of D.D., 22 Indian L. Rep. 6020 (Port Gam. S'Klallam Ct. App., Jan. 7, 1994) (parental rights may not be terminated without an adequate opportunity to be heard); In Re the Matter of B.F.C., a Minor Child, 21 Indian L. Rep. 6035, 6036 (Nook. Ct. App., Mar. 12, 1990)(trial court's denial of motion for continuance reversed on grounds movant was not permitted to argue his motion).

[50] See Chehalis Indian Tribe v. Jansen, 22 Indian L. Rep. 6001 (Chel. Ct. App., Dec. 6, 1993)(personnel service of process adequate in lieu of service by certified mail); Baldy, Sr., et al. v. Hoopa Valley Tribal Council, 22 Indian L. Rep. 6015 (Hoopa V. Ct. App., Mar. 16, 1994)(publication of notice in local weekly newspaper of enrollment hearing adequate notice); Tulalip Housing Authority v. Moses, 22 Indian L. Rep. 6070 (Tul. Ct. App., May 25, 1994) (judgment vacated for improper service of summons and complaint on defendant); Hicks v. Harold, et al., 20 Indian L. Rep. 6091 (W. Nev. Intertr. Ct. App., May 13, 1994)(extraterritorial service of process permitted).

[51] Tonasket v. CIPP, 20 Indian L. Rep. 6125 (Colv. Ad. Ct., Nov. 29, 1992)(right to privacy under tribal law not violated by drug testing of tribal employee).

[52] See Laramie v. Colville Confederated Tribes, 22 Indian L. Rep. 6072, 6074 (Colv. Ct. App., May 1, 1995)(once demanded in a criminal case a right to trial by jury cannot be waived by silence); Coleman v. Colville Confederated Tribes, 20 Indian L. Rep. 6106 (Colv. Ct. App., July 22, 1993) (defendant knowingly waived right to jury trial).

[53] Suquamish Indian Tribe v. Purser, 21 Indian L. Rep. 6090, 6092 (Suq. Ct. App., Sept. 18, 1992) (criminal case dismissed on grounds that new trial would violate defendant's right to speedy trial); Sisseton-Wahpeton Dakota Nation v. Cloud, 21 Indian L. Rep. 6115, 6117 (N. Plns. Intertr. Ct. App., Apr. 18, 1994)(declaring right of criminal defendant to speedy trial); Yakima Indian Nation v. Settler, 20 Indian L. Rep. 6075 (Yak. Tr. Ct., June 25, 1993)(criminal case dismissed for failure to effect speedy trial).

[54] Lummi Indian Nation v. Solomon, 21 Indian L. Rep. 6085 (Lum. Ct. App., Sept. 21, 1992) (finding that appellant made knowing and conscious waiver of right to counsel).

[55] Regan v. Finkbonner, 21 Indian L. Rep. 6026 (Nook. Ct. App., Feb. 15, 1990)(employee has right to grievance hearing after termination at which she and her supervisors are present);

by looking at the judgment to see who won, they plainly show that tribal courts are committed to the protection of individual rights, and have no reluctance to rule against the tribal government.[57]

Tribal court decisions have also recognized that as tribal economic development creates more employment opportunities for tribal members and non-Indians, and brings more people to the reservation, the role of tribal law and of the tribal courts in protecting individual rights has become even more important.[58] Furthermore, where tribal law and precedent have bound the court to dismiss an action on sovereign immunity grounds, two tribal courts have actually suggested that the tribal government take action to remedy the effects of the doctrine.

Thus, in Lovermi, a wrongful termination case, the court recognized that the sovereign immunity defense constituted an "insurmountable obstacle" and that without a waiver "remedies

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Hudson v. Hoh Indian Tribe, d/b/a the Hoh Tribal Business Committee, 21 Indian L. Rep. 6045, 6046 (Hoh. Ct. App., May 28, 1992)(tribal employee has right to challenge her termination in tribal court).

[56] In the Matter of D.J., 21 Indian L. Rep. 6083 (Hopi Child. Ct., Apr. 29, 1994)(due process requires adequate and timely petition by children's services agency prior to termination of parental rights); In the Matter of M.H., 20 Indian L. Rep. 6040, 6042 (N. Plns. Intertr. Ct. App., Mar. 5, 1992)(parent has right to a hearing prior to removal of children).

[57] See, e.g. Burns Paiute Tribe v. Dick, et al, 22 Indian L. Rep. 6016, 6017-18 (Burns Paiute Ct. App., Feb. 14, 1994 (exclusion ordinance held overbroad and resulted in denial of equal protection); Schwab v. CTEC Construction, 21 Indian L. Rep. 6027, 6029 (Colv. Admin. Ct., Jan. 3, 1994) (termination of non-Indian held discriminatory).

[58] See Lovermi v. Miccosukee Tribe of Indians of Florida, 23 Indian L. Rep. 6090, 6901 (Micc. Tr. Ct., Apr. 17, 1996)(observing that the number of employment disputes in tribal court will continue to rise along with increasing economic development and employment opportunities for Indians and non-Indians).

may be unavailable for violations which are properly proven and shown."[59] While holding the claim barred by sovereign immunity because there was no waiver, the court suggested that the tribal government consider providing for judicial review of final decisions rendered by the tribal personnel board.[60] Similarly, in Clement v. LeCompte, the tribal court recommended that the tribal legislature consider enacting an ordinance providing for a limited waiver of sovereign immunity.[61]

In sum, analysis of the reported tribal courts decisions shows that tribal courts are ready and willing to respond to claims of unfairness based on tribal law or the Indian Civil Rights Act.

C. Congress Should Continue its Support for Tribal Courts and Should Continue to Reject Attempts to Secure Legislative Reversal of the Santa Clara Pueblo Decision

Indian tribes have made remarkable changes in their economies and communities in the relatively short period that the Self-determination policy has been in effect. This has been accomplished largely through the exercise of the tribal powers confirmed during the Self-determination era, and supported by Congress through enactments that implement the Self-determination policy, including the Indian Tribal Justice Act.

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[59] Id. at 6091 (internal citation and quotations omitted).

[60] Id.

[61] Clement v. LeCompte, 22 Indian L. Rep. 6118 (Chy. R. Sx. Ct. App., Jan. 12, 1994).

As with any government, the exercise of these powers has in some instances generated conflicts between individuals and the tribal government. Under settled law, these conflicts are subject to adjudication exclusively in the tribal courts, and as a result of the actions that have been brought, both the principle of judicial review and the applicability of immunity defenses to actions against Indian tribes and tribal officials are now the subject of a substantial tribal jurisprudence. The decisions in these cases show that tribal courts are committed to the protection of individual rights under both federal and tribal law. In sum, these decisions show that tribal courts are, as the Supreme Court held in Santa Clara Pueblo, "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." Id., 436 U.S. at 65 (citations omitted).

As a result, Congress should continue to reject calls to reverse the Santa Clara Pueblo decision and should continue its support for tribal courts. Neither the rhetoric of tribal opponents, nor the duration of their attacks on tribal courts offer any reason to change the course that Congress has set. The sovereign immunity of Indian tribes protects the right of the tribes to craft their own remedies for claims against the tribe, both by legislative enactment and through the development of common law, and should not be modified. Rather than consider proposals to abrogate tribal immunity, Congress should continue its support of tribal courts and tribal self-government.

COUNCIL OFFICE

Marlene Dawson
Council Member
At Large

Office (206) 676-6690
County (206) 384-6637
FAX (206) 738-2550
SCAN 769-6690
Home (206) 384-0823

Whatcom County Courthouse
311 Grand Avenue
Bellingham, WA 98225-4038

September 24, 1996

Members of Committee of Indian Affairs

Subject: TRIBAL SOVEREIGN IMMMUNITY

I am here today to explain that federal and state dollars are financing hostile, unfriendly tribal governments that are using sovereign immunity as a means to deny hundreds of thousands of citizens their due process and constitutional rights that are normally guaranteed all citizens of this great Nation, regardless of race or national heritage.

We are appealing to this body to provide for us a level playing field so we can protect our rights in a democratic formed court of law and hold tribal government accountable for their tyranny.

I reside in Ferndale, Washington within the exterior boundaries of the Lummi Reservation, which is considered a leader among self-governing tribes. This is an open reservation of an approximate equal percentage native and non-Indian residents where the land base excluding the tidelands is little over 13,000 acres. The treaty forming this reservation divided the land base into allotments so the individual native could sell their land when they saw fit and pursue the American Dream off the Reservation.

In 1934 all the tribes of our nation were provided the option to reverse the federal government's goal of assimilation, through the Reorganization Act, and set up a separatist and socialistic form of government. The voting members of this reservation voted to continue assimilation.

But today, Lummi tribal council members refuse to honor the vote taken in 1934. Certain council members have publicly stated they can not be held accountable to decisions made by prior councils. The tribal council interferes with the buying and selling of land. Certain Lummi leaders refuse to pledge alliance to our nation's flag. Tribal council members state the Federal Supreme Court decisions on tribal issues don't apply to them because each reservation of the 557 total is unique, so each tribe they say must litigate the issues at hand in order for it to be relevant to their reservation.

It is tribal leadership found on this reservation and others which are making life difficult, costly, unpleasant and impossible for tribal and non-tribal residents alike. The Lummi Law and Order have assaulted law abiding non-Indians on their beach front property, made false accusations against property owners, stopped non-Indian residents to search car trunks, chased small children from the beaches stating they were trespassing on tribal tide lands, threaten well drillers with confiscation of their equipment when they were complying with state

water law as it relates to fee land and have allowed private non-Indian property to be used and abused by their members stating their treaty allows them use of private property. As well, a Lummi tribal member pulled out a resident's survey stakes which marked the mean high tide and boundary of his property. This followed harassment by Lummi Law and Order with a survey crew which had been called out after a Whatcom County Judge ordered the survey to establish the jurisdiction boundary on a waterfront confrontation.

While the Lummi Law and Order prevent non-Indians access to the 1,000 acre park land of Portage Island, purchased with state and federal tax dollars, they allow their own members free rein. Lummi Business Council, through their Law and Order, threatened confiscation of road equipment used by a subcontractor of the county unless the county and the contractor paid an employment tax to the tribe. This tribal leadership even went so far as to try to eject a candidate for congress from the reservation when that candidate was on private property at personal invitation. This gentleman now serves as our congressman, Jack Metcalf.

While an enter at your own risk sign should be hung at the entrances of this reservation, we have instead signs that state all entering are now subject to Lummi Laws. Lummi laws, which it must be added, are near impossible to access because tribes are not subject to the Freedom of Information Act or the Privacy Act.

I have been contacted by prior tribal educators who have been shorted thousands of dollars in their teaching contracts. Unable to collect, they contacted the Interior Department and were told this kind of thing occurs all the time. This tribe as well as their leaders violate Whatcom County stop work orders for building and zoning violations for land in fee status. The former Humane Society director told me it was impossible to get closure from the tribe on a service contract as it concerns tribal dogs so neighbors are faced with marauding and nuisance dogs. Is it true residents ask that Indian owned dogs have more rights than I do? Is it true people ask that this tribe can't be held accountable for their actions?

This tribal council derails off reservation industry by refusing to meet, discuss or demonstrate good faith negotiation on tribal environmental concerns. Yet, the tribal council violated sound environmental practices by building a gas station in a wet land and has sabotaged two large residential developments by drilling commercial wells 100' from the association's wells when a 1,000' distance is recommended for noninterference. As one tribal member publicly stated, "Keeping non-Indian development out requires drastic action". As well, the Lummi Council Chair, Mr. Cagey stated to a news reporter, "We'd like to shut it down temporarily, [roads] not forever. We'd like to shut it down, keep all the non-Indians out".

The hostile, unfriendly action of sabotaging non-Indian water aquifers began on the Lummi Reservation in two non-Indian residential developments on two residential lots in 1993. One of the developments happens to be in the area I reside, Sandy Point.

Two years after the initial tribal drilling of the well which included installation of a large storage tank and pump house surrounded

with a chain link fence and razor wire, the tribe began to deplete our water to dangerous levels. It was memorial day weekend of 1995 when we were left with a two week supply of water for fire protection and domestic use to serve over 600 existing homes.

While tribes are pushing to use control of utilities to stop non-Indian development, across the nation tribes are also pushing to collect taxes in violation of Supreme Court cases like Montana, which states taxing of non-Indians must be consentual. Where tax issues are boiling and festering on open reservations, tribal courts have the issue stuck in the tribal appeal process. The requirement to access tribal court before going to state or federal court is expensive and ineffective.

With 575 petitioners, I recently attempted to address the legality of the Lummi Utility Tax Ordinance and it's lack of proper Dept. of Interior authorization in tribal court. The process began at the Lummi Sewer Board level where the Lummi Indian Business Council's attorney Mr. Johnsen, who drafted the tax ordinance, is also the attorney for the sewer board which collects the utility tax from the ratepayers. At the sewer board appeal, this same attorney acted as hearing examiner. After failing at this level, I went to tribal court.

The tribal judge requested a pre-court hearing with himself, the sewer board attorney, Mr. Johnsen and myself. The judge made a request, on behalf of the tribal council, that we try to settle out of court. The tribal attorney, stated he would try to get Dept. of Interior approval. Knowing this tribe had failed to honor numerous contracts and agreements and knowing that six months earlier, to no avail, the sewer board had directed Mr. Johnsen to get confirmation that the tribe's tax ordinance had been approved, I declined to consider an out of court settlement. I wanted a court determination on the facts.

The tribal judge then requested to speak with me privately. While he stated I had a good argument, he stated it appeared he would have to dismiss my case on technicalities. I didn't have my signature notarized, so perhaps he thought, I'd want to reconsider a settlement. I explained that others were willing to bring the issue forward and that the second time loop holes could be addressed. I was also told I would not be able to represent the 575 petitioners and that I could only represent myself.

I then documented what had occurred at the pre-court conference and asked for leniency from the court on technical issues because no one had been prejudiced or damaged by my omissions. In addition, I stated my presence was for personal appearances only and wanted it known that I was not consenting to the court having any jurisdiction over me. The clerk stamped my statement, took it to the judge, and gave me a copy.

When the court hearing opened, I was berated by the judge for taking up the court's time, asked why I had not informed him earlier of my feelings on the court jurisdiction issue and was also asked to be fined by the tribal attorney, Mr. Johnsen. The Judge stated he was going to dismiss the entire case on my refusal to submit to the court's jurisdiction. The legal technicalities had now become a non-issue.

The attorney followed up by stating he had already spent thousands of dollars in preparing and addressing the court that the issue was sure to rise again, and that the Judge after all was there not to determine the legality of the tax but only whether it was appropriate and cost effective for the sewer board not to have addressed the issue of the tax's legality. Now, at no time was this a consideration I had raised. I wanted the facts reviewed, the illegal nature of the tax was always the focus along with the attorney's conflict of interest and conspiring by the tribal attorney. The Judge then agreed to continue the hearing, but told me I would be subject to the jurisdiction of the court. To make a long story short, the good argument, recognized privately by the judge was dismissed for lack of sufficient evidence. It is quite obvious that where there is no separation of power, the tail wags the dog as it concerns tribal court.

The same tribal court story can be retold as it concerns two non-Indian property owners who tried to hold the tribe accountable for their bad faith negotiations with the city of Bellingham. The tribe, in purchasing off reservation water from the city of Bellingham, secured a contract after tribal attorney, Mr. Johnsen, told the city council members that in addition to federal law, their own Lummi tribal policies prevented them from discriminating with water service. Yet, non-Indians are now being denied access to this off reservation water. This is occurring even though the water lines were paid with federal tax dollars and run past their lots. Residents feel it unjust they are required to pay stand by fees for an available sewer connection, but can't receive it's compliment the water. In addition, a tribal member recently told me members will also be denied water unless they sign a contract stating they will never sell their land to non-Indians. Residents have even been threaten with litigation should we try to bring off-reservation water in from the city of Ferndale.

It is my opinion the Justice Department and the Department of Interior contribute to policies which violate better relations within reservations and sound federal policy. Interior funds helped to finance a 1981 Lummi Water Resource Planner who made specific recommendations to the tribe which included the question of whether the tribe really should get into the water perveyorship business. Jean C. Caldwell wrote the following, "Because of the amount of platted land out of trust ownership and because the tribe cannot regain control easily over the land, the Tribe needs to think very carefully before removing this constraint to development on the reservation .... Yet, if the tribe neglects water development, it is possible a non-tribal water district will form and continue development anyway... If tribal control over water development does not look like it can be maintained then the tribe should upgrade the aqua-culture water system independently from the domestic water system and address the negative option of limiting housing development and industrial growth on the reservation through water facilities". Besides the Interior Department financially supporting consultants like Caldwell who encourage tribal management of water and zoning to be used in ways which inhibit non-Indians from utilizing their land, our Justice Department supports segregated tribal schools.

As a reservation resident who must pay illegal utility taxes to the tribe, I wondered how my son was going to be processed when he made application to the N.W. Indian College which is located on the Lummi

Reservation. For tuition purposes, they wanted to consider him a non-resident because of his race. Non-member Indians from out of state get the lower resident rate as do in-state tribal residents. I appealed this school policy to the Justice Department and was told tribal "political status" permits them to use differential treatment. Now I can understand differential treatment spelled out for a tribe through property rights created in a treaty, but no where have I found a treaty that obligates maintenance of segregated schools or the use of preferential rates for Indians. Our federal policy against segregated schools and the use of preferential rates is being violated on reservations across the nation. If the education of Indian students is to be improved and all citizens treated fairly, education of Indian students must be integrated into the public school system where the federal and state dollars are held accountable. As well, if the federal tax dollar is going to be used to encourage the education of native religion and culture, then the choice of any school should be allowed to all American parents.

A C.E.O. could spend months negotiating a contract with a tribe and invest hundreds of thousands into his business only to learn that tribal councils don't adhere to agreements made by preceding councils. With out a strong economic base, Indian tribes are left with only two ways to get money, grants and the other in our area we call enviro blackmail or greenmail. Since the Lummi tribe is located on the shores of Puget Sound and has historically been a fishing tribe, one can well imagine the environmental road blocks that can be erected for industries trying to locate in our region. Yet, it's a well known fact roadblocks disappear following the payment of large sums of money. Greenmail has become so common place across the United States on reservations that we are losing our once reliable sense of civic and moral outrage. Such compromising actions are not good for the tribal people and most definitely they are not good for business.

Moral, cultural, and spiritual afflictions can't rely totally on politics but while other minorities flourish we must ask ourselves why life for members on reservations is sub-standard in spite of the billions of dollars filtered through reservations.

I will start by stating that there has been no other group of American citizens who have played the role of Peter Pan like the American Indians. The first essential step to promoting maturity and personal growth is to make our Native American groups personally responsible for their actions. This can only be done by eliminating the century old pattern of sovereign immunity to tribes. Such action, along with providing justice to non-Indians with direct access to state and federal courts, will be the beginning of a new and better age on reservations.

While federal policy prevents our financing socialistic, separatist governments abroad, there is irony to the situation that we breed and feed such system within our own borders. I respectfully plead, if nothing is going to be done to reverse the trend of socialism and separatism inside our boarders, at least give reservation non-Indian residents an ability to defend themselves from tribal tyranny. It is imperative our constitutional and civil rights be protected. Our due process must not be set aside to benefit another citizen group.

Today, along with the President, even the IRS is held accountable and can be sued. Tribal members living on reservations are state citizens. They are eligible to run and hold any office within our state and are entitled to all benefits without discrimination. There is no reason concerns initiated by non-Indians shouldn't be directly addressed in state or federal court. Non-Indian citizens deserve a judicial system with checks and balances. The enforceabilty of promises and contracts made by tribal councils, along with the assurance of good faith negotiation will depend on eliminating sovereign immunity. Until Congress ensures tribal accountability, economic development on reservations will continue to be stunted or non-existent and tribal relationships with other governing bodies confrontational.

During the 1950s, the tribe was involved in a land claims suit against the United States, from which it was eventually awarded about $386,000 in 1970. The Klallam Tribe possesses guaranteed fishing rights as a result of the 1974 Boldt Decision, which allocated 50 percent of the commercial salmon harvest to western Washington treaty tribes (the salmon runs had been largely decimated between 1910 and 1926 by the construction of the Elwha and Glines Canyon dams). The Boldt Decision also allows tribes some say over outside development activities which might jeopardize the salmon runs. To this end, the tribes have assumed an active role in the protection and enhancement of their natural resources. Additionally, the 1992 Elwha River Ecosystem and Fisheries Restoration Act was designed to fully restore the river's ecosystem and native fisheries. The Lower Elwha Klallam Tribe operates a number of salmon hatcheries and remains quite active in the region's commercial fishing industry, which primarily targets salmon, crab, and other groundfish and shellfish.

GOVERNMENT

The reservation is governed by the elected Lower Elwha Tribal Community Council. The tribal constitution was adopted on May 6, 1968. The constitution was established under provisions of the 1934 IRA. The council elects three of its members to two-year terms on the tribal business committee.

ECONOMY

CONSTRUCTION

The tribal Housing Authority serves as the contractor for the construction of homes and other structures on the reservation. In 1994, it constructed 43 homes and an office building; in 1995 another 20 homes were slated for construction. Significant numbers of tribal members are employed in these projects.

FISHERIES

The tribe operates a salmon hatchery, which presently employs seven tribal members. Additionally, a number of tribal members find employment in the region's commercial fishing industry. Fishery development and enhancement projects have been funded in the past through grants from the BIA and other agencies.

FORESTRY

Though the region surrounding the reservation has traditionally been a major timber-producing area, this industry has a negligible economic impact on the Lower Elwha economy. It has had a negative environmental impact, too: according to the tribe, over-harvesting of timber has muddied the Elwha River and reduced viability for salmon runs.

GAMING

The tribe operates Saturday night bingo at the Tribal Center, an activity which generates significant revenues and employs four tribal members. Additionally, the tribe recently signed a Class III gaming compact with the state of Washington. Casino development plans are now in the works.

GOVERNMENT AS EMPLOYER

The tribal government employs approximately 60 people, mostly through its administrative, health, environmental, and fisheries programs.

SERVICES

Tribally owned or affiliated businesses are limited to a smoke shop (which employs five) and the bingo hall; several seasonal fireworks concessions are run by a number of families within the tribe.

TOURISM AND RECREATION

Though the reservation itself offers little in the way of facilities for visitors, nearby Port Angeles is a bustling tourist community. Outdoor activities are extremely popular in the area, these include fishing and boating, and in the spectacular Olympic National Park, hiking, camping, mountain climbing, and skiing.

INFRASTRUCTURE

Scenic U.S. Highway 101 offers the primary road access to the reservation. Nearby Port Angeles is served by commercial air, bus, rail, and truck lines. Commercial truck lines also serve the reservation directly. Water transportation is widely available, as the reservation sits at the mouth of the Elwha River, directly on the Strait of Juan de Fuca.

COMMUNITY FACILITIES

Electricity is provided through the Klallam County Public Utility District. The tribe maintains its own water system, while sewage services are provided through individual septic systems and drain fields. A tribal health clinic and various health programs are funded by the Indian Health Service under a federal contract. There is also a hospital in Port Angeles. The Tribal Center houses administrative offices and other facilities such as the clinic. As for education facilities, children attend the local public schools.

Lummi Reservation

Federal reservation
Lummi and Nusack
Whatcom County, Washington

Lummi Indian Nation
2616 Kwina Road
Bellingham, WA 98226
(360) 734-8180
Fax: 384-4737

Total area	21,000 acres
Allotted	11,300 acres
Non-Indian	11,300 acres
Total labor force	588
High school graduate or higher	64.8%
Bachelor's degree or higher	03.7%
Unemployment rate	22.6%
Per capita income	$5,446
Total reservation population	3,164

LOCATION AND LAND STATUS

The Lummi Reservation is located in northwest Washington, five miles west of the city of Bellingham, 100 miles north of Seattle, and about 50 miles south of Vancouver, B.C. The reservation consists of a peninsula, which forms Lummi Bay on the west and Bellingham Bay on the east; a smaller peninsula; and a 1,000 acre island off the tip of the main peninsula, named Portage Island. In total, the reservation area spans approximately 13,000 acres of upland area and 8,000 acres of tidelands. About 9,700 acres are currently under Indian control, the majority being allotted. The Point Elliot Treaty of 1855 marked the creation of the Lummi Reservation. In 1873, by executive order, certain portions of the treaty boundary were redrawn, which marginally enlarged the reservation.

CULTURE AND HISTORY

Before the Treaty of Point Elliot and the subsequent establishment of the Lummi Reservation, the Lummi occupied the northern San Juan Islands and the adjacent mainland from Bellingham Bay to Point Roberts. Salmon was the primary source of food. Many tribal ceremonies and beliefs are centered around salmon. The western red cedar also played a significant role in the tribe's material and spiritual life, serving as building material for sacred longhouses, utensils, and tools. During this time, tribal members made frequent visits to Hudson's Bay Company trading posts

The history of the tribe during the 20th century is inexorably tied up with fishing and treaty fishing rights. After the treaty, the federal government expected the tribe to adopt agriculture as its primary means of subsistence. The Lummi, however, continued to travel to off-reservation sites for fishing and gathering, particularly to their traditional reef-net locations. As it turned out, the tribe's reef-net fishing territory placed it at the epicenter of the budding commercial salmon fishing industry of the region. Gradually, organized commercial interests squeezed the Lummi out of the industry by appropriating their prime net locations. This development led to a lawsuit by the tribe during the 1890s, claiming a violation of its treaty-guaranteed fishing rights. The government was finally ordered to pay $57,000 in 1970, a settlement refused by the Lummi as insultingly inadequate. In 1974, they participated in another lawsuit over treaty fishing rights, this time against the state of Washington. The suit culminated in a court-ordered allocation of the state's commercial salmon harvest. In 1988, the tribe was involved in a federal ruling which held that income generated from a treaty right is not subject to federal taxation.

In 1969, the tribe developed an aquaculture project on reservation tidelands for salmon to spawn and for oyster planting. The salmon are released into the Noosack River; the oysters are planted in other reservation waters. In recent years, the Lummi have attempted to diversify their tribal economy through investment in a gaming operation, seafood processing plants, and the development of a marina. Development of education facilities has been an important focus for the tribe during recent decades as well. For instance, the tribe has actively promoted a program in the tribal school system to keep the language and other traditions alive and strong.

GOVERNMENT

The Lummi Nation operates under a constitution approved on April 10, 1970. It is not organized under the 1934 Indian Reorganization Act. The governing body is the Tribal Business Council, which consists of 11 members elected to three-year staggered terms by the General Council. The General Council is composed of all enrolled adult members of the tribe. The Business Council organizes on a yearly basis and elects a chairman, vice-chairman, secretary, and treasurer.

ECONOMY

AGRICULTURE AND LIVESTOCK

The region surrounding the reservation has traditionally supported a number of agricultural enterprises. Seasonal berry-picking is the main source of agricultural employment amongst tribal members.

FISHERIES

Fishing remains the primary source of private employment on the reservation. The tribal fishing fleet consists of 302 skiffs, 105 gillnetters, and 30 purse seiners. At least 550 independent business people within reservation boundaries make their livings solely through fishing. Moreover, a tribally owned seafood processing plant, the Lummi Processing Venture (leased to a private contractor), employs about 70 persons during peak season. Additionally, Fish Point Seafood is a privately owned processing plant on the reservation (owned by a Lummi member) which also employs as many as 70 people at any given time. Finally, the tribe operates both a salmon and a shellfish hatchery, which repopulate area waters.

FORESTRY

The reservation forest consists mostly of scattered stands of Douglas fir, cedar, alder, maple, and hemlock. A BIA-funded reforestation program is replanting most of the unproductive forest lands at a rate of about 75 acres per year. As for local employment in the timber industry, a Georgia-Pacific pulp mill in the area employs a number of Lummi Indians.

GAMING

The Lummi Casino features poker and blackjack, as well as a restaurant.

GOVERNMENT AS EMPLOYER

The Tribal Business Council is the largest single employer on the reservation, currently employing 236 people through its various departments. The Indian Health Service Clinic employs an additional 33 people, the Northwest Indian College faculty and staff consists of another approximately 145 full-time employees.

MANUFACTURING

The tribe operates no manufacturing concerns, though members find employment in area plants, which include a plastics manufacturer, an airplane parts plant, and two oil refineries.

SERVICES

Aside from the various seafood-related businesses, there are several small businesses on the reservation. These include two native crafts and clothing stores featuring baskets, wool blankets, and more. Also the tribe owns the Fisherman's Cove Complex, which consists of a restaurant, grocery store, marine repair, and a boat storage facility.

TOURISM AND RECREATION

The region of the reservation is extremely popular with visitors, given its beautiful waters and forests which produce excellent fishing, boating, hiking, and the like. The tribe also hosts a number of special events such as the Lummi Stommish (Water Festival). This is held during the second or third week of June and features canoe races, dances, arts and crafts, and salmon barbecues.

TRANSPORTATION

The tribe maintains a significant fleet of fishing vessels (see Fisheries above).

INFRASTRUCTURE

Interstate 5 runs north-south two miles from reservation boundaries, while State Highway 540 crosses the reservation east-west. Commercial air, bus, and train service are all available in Bellingham, five miles from the reservation. Commercial truck lines serve the reservation directly. Bellingham also features a modern deep-water harbor.

COMMUNITY FACILITIES

Electricity is provided the reservation through Puget Power of Washington. Gas service is provided by Cascade Natural Gas Company. The reservation gets its water primarily from

Lummi's Treaty

Appendix: The Point Elliott (Muckilteo) Treaty

TREATY WITH THE DWÁMISH &c. INDIANS. JAN. 22, 1855.

TREATIES.

UNITED STATES OF AMERICA
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Treaty between the United States and the Dwámish, Suquámish, and other allied and subordinate Tribes of Indians in Washington Territory. Concluded at Point Elliott, Washington Territory, January 22, 1855. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859.

JAMES BUCHANAN,

PRESIDENT OF THE UNITED STATES,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING: Jan. 22, 1855.

Preamble.

WHEREAS a treaty was made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, the twenty-second day of January, one thousand eight hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the Dwámish, Suquámish, Sk-táhl-mish, Sam-áhmish, Smalh-kahmish, Skope-áhmish, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mi-h, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-há, Nook-wa-cháh-mi-h, Mee-see-qua-guilch, Cho-bah-áh-bi-h, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes and duly authorized by them; which treaty is in the words and figures following to wit:

Contracting parties.

Articles of agreement and convention made and concluded at Múckl-te-óh, or Point Elliott, in the Territory of Washington, this twenty-second day of January, eighteen hundred and fifty-five, by Isaac I. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the under-signed chiefs, headmen and delegates of the Dwámi-h, Suquámi-h, Sk-táhl-mish, Sam-áhmish, Smalh-kamish, Skope-áhmi-h, St-káh-mish, Snoquálmoo, Skai-wha-mish, N'Quentl-má-mish, Sk-táh-le-jum, Stoluck-whá-mish, Sno-ho-mish, Skágit, Kik-i-állus, Swin-á-mish, Squin-áh-mish, Sah-ku-méhu, Noo-whá-ha, Nook-wa-cháh-mi-h, Mee-see-qua-guilch, Cho-bah-áh-bish, and other allied and subordinate tribes and bands of Indians occupying certain lands situated in said Territory of Washington, on behalf of said tribes, and duly authorized by them.

Cession of lands to the United States.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the eastern side of Admiralty Inlet, known as Point Pully, about midway between Commencement and Elliott Bays; thence eastwardly, running along the north line of lands heretofore ceded to the United States by the Nisqually, Puyallup, and other Indians, to the summit of the Cascade range of mountains; thence northwardly, following the summit of said range to the 49th parallel of north latitude; thence west, along said parallel to the middle of the Gulf of Georgia; thence through the middle of said gulf and the main channel through the Canal de Arro to the Straits of Fuca, and crossing the same through the middle of Admiralty Inlet to Suquamish Head; thence southwesterly, through the peninsula, and following the divide between Hood's Canal and Admiralty Inlet to the portage known as Wilkes' Portage; thence northeastwardly, and following the line of lands heretofore ceded as aforesaid to Point Southworth, on the western side of Admiralty Inlet, and thence round the foot of Vashon's Island eastwardly and south-

Boundaries.

Vol. x. p. 1132.

eastwardly to the place of beginning, including all the islands comprised within said boundaries, and all the right, title, and interest of the said tribes and bands to any lands within the territory of the United States.

Reservation.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tracts of land, viz: the amount of two sections, or twelve hundred and eighty acres, surrounding the small bight at the head of Port Madison, called by the Indians Noo-solik-um; the amount of two sections, or twelve hundred and eighty acres, on the north side Hwhomish Bay and the creek emptying into the same called Kwilt-seh-da, the peninsula at the southeastern end of Perry's Island called Shâis-quihl, and the island called Chah-choo-sen, situated in the Lummi River at the point of separation of the mouths emptying respectively into Bellingham Bay and the Gulf of Georgia. All which tracts shall be set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes or bands, and of the superintendent or agent, but, if necessary for the public convenience, roads may be run through the said reserves, the Indians being compensated for any damage thereby done them.

Whites not to reside thereon unless, &c.

Further reservation for school.

ARTICLE III. There is also reserved from out the lands hereby ceded the amount of thirty-six sections, or one township of land, on the northeastern shore of Port Gardner, and north of the mouth of Snohomish River, including Tulalip Bay and the before-mentioned Kwilt-seh-da Creek, for the purpose of establishing thereon an agricultural and industrial school, as hereinafter mentioned and agreed, and with a view of ultimately drawing thereto and settling thereon all the Indians living west of the Cascade Mountains in said Territofy. Provided, however, that the President may establish the central agency and general reservation at such other point as he may deem for the benefit of the Indians.

Tribes to settle on reservation within one year.

ARTICLE IV. The said tribes and bands agree to remove to and settle upon the said first above mentioned reservations within one year after the ratification of this treaty, or sooner, if the means are furnished them. In the mean time it shall be lawful for them to reside upon any land not in the actual claim and occupation of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner.

Rights and privileges secured to Indians.

ARTICLE V. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimed lands. Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens.

Payment by the United States.

ARTICLE VI. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of one hundred and fifty thousand dollars, in the following manner — that is to say: For the first year after the ratification hereof, fifteen thousand dollars; for the next two years, twelve thousand dollars each year; for the next three years, ten thousand dollars each year; for the next four years, seven thousand five hundred dollars each year; for the next five years, six thousand dollars each year; and for the last five years, four thousand two hundred and fifty dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same; and the Superintendent of Indian Affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

How to be applied.

Indians may be removed to reservation, etc.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require and the welfare of the said Indians be promoted, remove them from either or all of the special reservations hereinbefore made to the said general reservation, or such other suitable place within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of such removal, or may consolidate them with other friendly tribes or bands; and he may further at his discretion cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home on the same terms and subject to the same regulations as are pro-

Lots may be assigned to individuals.

vided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President and payment made accordingly therefor. Vol. x. p. 1044.

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe except in self-defence, but will submit all matters of difference between them and the other Indians to the government of the United States or its agent for decision, and abide thereby. And if any of the said Indians commit depredations on other Indians within the Territory the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the laws of the United States, but to deliver them up to the authorities for trial.

Tribes to preserve friendly relations.

to pay for depredations.

not to make war except, &c.

to surrender offenders.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribe who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

Annuities to be withheld from those who drink etc., ardent spirits.

ARTICLE XI. The said tribes and bands agree to free all slaves now held by them and not to purchase or acquire others hereafter.

Tribes to free all slaves and not to acquire others.

ARTICLE XII. The said tribes and bands further agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservations without consent of the superintendent or agent.

not to trade out of the United States.

ARTICLE XIII. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of fifteen thousand dollars to be laid out and expended under the direction of the President and in such manner as he shall approve.

$15,000 appropriated for expenses of removal and settlement.

ARTICLE XIV. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and employ a blacksmith, carpenter, and farmer for the like term of twenty years to instruct the Indians in their respective occupations. And the United States finally agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

United States to establish school and provide instructors, furnish mechanics, shops, physicians, &c.

ARTICLE XV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

Treaty when to take effect.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals, at the place and on the day and year hereinbefore written.

Signatures, Jan. 22, 1855.

Eighty-three signatures follow.

Consent of Senate, March 8, 1859.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of its articles by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,

"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of treaty between the United States and the chiefs, headmen and delegates of the Dwámish, Suquámish and other allied and subordinate tribes of Indians occupying certain lands situated in Washington Territory, signed the 22d day of January, 1855.

"Attest: "ASBURY DICKINS, *Secretary*."

Proclamation, April 11, 1859.

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, one thousand eight hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this eleventh day of April, in [SEAL.] the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

JAMES BUCHANAN.

By the President:
LEWIS CASS, *Secretary of State.*

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FILED IN THE
LUMMI TRIBAL COURT
LUMMI INDIAN RESERVATION
JUL 17 1996
BY _____ CLERK

July 17, 1996

Presiding Judge Doucette
Lummi Tribal Court
2616 Kwina Rd.
Bellingham, Was 98226

Re: Case # 96. CA 6175

Your Honor:

My presence here today is for personal appearance only. It in no way implies an acceptance of Lummi Tribal Court jurisdiction.

Per our pre-court appearance July 15, 1996 at 10:00 AM, between Respondent's legal representative Mr. Harry Johnsen and myself, the idea of trying to come to a settlement was proposed by your Honor. In that I was not conformable with this idea because I felt it necessary to establish a record. it was requested we speak privately.

During our private conversation, you stated it was your preference a settlement be achieved. You stated while my arguments were good, you would have to dismiss the entire proceeding on technicalities and that perhaps knowing this I'd prefer a settlement. One such technicality was that my signature was not notarized. I had delivered my material personally. The Second, if I understand it correctly, is that the Respondents had not been put on notice. It would appear this had been done by contracting the personal representative for the tribe who also represents the district. It was to his office materials were personally delivered.

The fact legal counsel for the respondent has shown up at each hearing date and in fact assisted in the scheduling shows there has been no prejudice resulting my from actions.

Courts often provide minor leeway for those inexperienced in the ways of court or legal proceedings, in that I am representing myself and petitioners, I would hope there could be some reconsideration given and that the case not be dismissed.

Marlene Dawson
Ms. Marlene Dawson

July 13, 1996

Lummi Tribal Court
c/o Lummi Tribal Offices
2616 Kwina
Bellingham, WA 98226

RE: Case# 96 6CA6175 (Marlene Dawson vs Lummi Tribal Sewer District)

Dear Court

Ms Dawson has requested that I submit a statement to the court as a result of a motion I made at the December 14, 1995 Lummi Tribal Sewer District Board meeting I am Secretary/Treasurer on the Lummi Tribal Sewer District Board As per the meeting minutes on page 3, I made the following motion.

"Kris Heintz made a Motion that the District respond by letter to all persons contacting the District regarding taxation authority, summarizing the points in the legal memo regarding delegation of authority and also that the District staff contact BIA and ask them to confirm that the Tribal Ordinance in question had been approved at the appropriate level, also that a brief explanation of the Tribal taxing authority be given and that the District suspend any late charges on the tax portion of any bills from the date of objection Finally, that a copy of the District's hearing procedures be provided with such letters The Motion was seconded by Jeff MacKay. The Board debated the Motion with several members objecting to the waiver of late charges. The Motion failed 2 in FAVOR (Kris Heintz, Jeff MacKay), 3 OPPOSED (Tim Ballew, Jim Wilson and Bill Ballew) Kris Heintz then made the same Motion with the exception that the references to the late fee waiver were deleted The Motion was seconded by Jim Wilson and passed 5 in FAVOR, 0 AGAINST " [Emphasis supplied]

To date, I have not seen a response from the BIA in regards to my motion, nor has any response been part of any information received by the Lummi Tribal Sewer Board at any of its regular meetings.

Sincerely,

Kristine A. Heintz

Kristine A. Heintz
3411 Robertson Road
Bellingham, WA 98226
(360) 384-6067

cc Marlene Dawson

Reviews mixed to Lummi water plan

DON ANDERSON HERALD PHOTO

RAISES CONCERNS: Tim Slater, gesturing, says he's concerned non-Indian property owners on the reservation wouldn't have redress for wrongs done them in the name of the water code.

RESOURCES: Proposed tribal control stirs non-Indians pro and cons.

BY BEN SANTARRIS
THE BELLINGHAM HERALD

LUMMI INDIAN RESERVATION — Non-Indian residents who embrace tribal authority over all water supplies here spoke out Thursday.

At least a half-dozen differed with organized non-Indian opposition to Lummi Nation's proposed water code, which would require permits and metering for every use and stiff penalties for violators.

Among them: Jean Hammes, a Whatcom County native of 2640 Mackenzie Road.

When she and her husband, Bill, moved onto the reservation in 1975, they accepted they were living on land with special status.

"We felt that we would be under tribal jurisdiction, like it or lump it," said Hammes, a retired teacher.

So far, she hasn't had a problem, she said.

Tom Richardson, 3005 Haxton Way, said he expected to be treated like a Canadian on U.S. soil when he bought his home five years ago.

He was surprised to hear claims that non-Indian residents are under Whatcom County jurisdiction, he said. He wonders whether people who make those claims have forgotten that the reservation was set aside for Lummi Nation.

"I think there are those of us who want to spend money fighting the tribe to govern its homeland," he said. "I can say I won't be among them."

The sympathetic non-Indian speakers were the only ones who somewhat surprised several tribal officials at the hearing at Lummi Neighborhood Facility.

Many speakers from among the mostly non-Indian crowd of nearly 70 people covered terrain trod in previous reservation controversies. Speakers debated whether:

■ Federal case law gives the tribe authority over non-Indian residents. (Tribal leaders say it does. Many non-Indians say it

See WATER, Page A2, Col 1

Lummis support code

LUMMI INDIAN RESERVATION — Lummi Nation members at Thursday's hearing said it was about time the tribe did something about reservation water woes.

No Lummis spoke against the tribe's proposal.

Many told of youthful memories of better, more plentiful water supplies. Others said they feared future generations would not have enough water.

"If we don't do something, we won't have anything left for our kids," said tribal employee Raynette Finkbonner, 1620 Country Lane.

Finkbonner, 40, who has two children, said she would like to live on the reservation, but she doesn't want to sink money into a home without knowing whether water will be drinkable.

She previously moved out of a home at the southern tip of the reservation partly because the water was smelly and discolored, she said.

Verne Johnson, a Lummi Indian Business Council member and director of the tribe's water task force, said the tribe's 6-month-old casino is giving many of its 240 employees new hopes — and money — for a reservation home.

Their readiness forces water issues, he said.

Jack Cagey, a Lummi elder who has lived on the reservation all his life, congratulated Johnson on the water code proposal.

"It's about time that Lummi Nation took steps to take over our water resources," Cagey said. "It's our reservation."

▼ What's next

KEY POINTS: Lummi Nation's water strategy:

■ Adopt a water code within two months, establishing water-management rules, permits, bureaucracy, penalties and planning.

■ Sue the state, Whatcom County, its cities and other defendants within a year over allocation of Nooksack River basin waters.

■ Use the water code to support court arguments that the tribe has the ability to manage reservation water supplies.

■ Restrict future non-Indian development of the reservation using provisions of the water code.

■ Protect fish habitat from over-allocation of river basin waters using the lawsuit.

doesn't.)

■ The reservation's underground water supplies are in dire trouble. (Tribal leaders say they are. Many non-Indians say they aren't.)

■ The tribe may legally treat tribal members differently from non-Indians. (Lummi leaders say it may. Many non-Indians say it may not.)

The non-Indian Fee Land Owners Association and representatives of at least a half-dozen water associations sent the tribe a letter protesting the water code proposal. Several representatives also spoke.

Tim Slater, a Bellingham attorney whose family has owned 180 acres on the reservation since about 1920, said he was concerned non-Indian property owners would have no redress for wrongs done them in the name of the code.

Appeals would lead to tribal court, which he said isn't independent enough from tribal government. Any appeal to federal court would be dismissed in the face of the tribe's claims of sovereignty, he said.

A Lummi Tribal Court order on Wednesday issued at the behest of tribal government leaders demonstrated his point, he said.

The order asked state Sen. Jack Metcalf, a Republican from Langley who's taken positions contrary to tribal rights claims, to leave the reservation. Metcalf ignored the order.

Slater said he saw the order as an attempt to violate Metcalf's constitutional right to free speech. It also showed the tribal court will follow orders from government, even in improper actions, he said.

Dave Williams, a non-Indian resident, earlier this week said most non-Indians wouldn't bother showing up at a tribal hearing because they have no say in tribal decisions.

"There's a large contingent of people who just don't think it has any value," said Williams, 50, of 3413 Lena Road.

"The fact is, it's their meeting," he said. "It's their code."

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD • BELLINGHAM, WASHINGTON 98226-9298 • (206) 734-8180
DEPARTMENT _____ EXT _____

5-12-94

Mr. and Mrs. Albert Sperry
16748 Samgerry Drive.
Valinda, Ca. 91744

In response to your recent request to be provided water to your property, located on Haxton Way, from the Lummi Nation Water System I have attached a letter stating the Nation's current policy regarding requests such as yours. Please be advised that until we have completed the project as described - in the attached letter - and the LIBC has directed us we will not be permitting new non-reserved water on the Reservation.

The following is quoted from LIBC Resolution #90-108

"NOW THEREFORE BE IT RESOLVED, that the Lummi Indian Reservation has no surplus water for additional non-Indian development and that all water present on the Lummi Indian Reservation is subject to the sole regulatory authority of the Lummi Indian Nation."

Thank You

Sincerely,

Henry Cagey, Chairman
Lummi Indian Business Council

THURSDAY, DECEMBER 16, 1993

Well tests legal waters

Non-tribal group sees Lummi drilling as threat to supply

BY LEO MULLEN
THE BELLINGHAM HERALD

SANDY POINT — Water and a thin wire separate the Lummi Nation and non-tribal Lummi Reservation residents in their latest standoff.

The razor wire runs a cyclone fence around a new well the tribe is drilling at Sandy Point, a community of private land owners on the reservation.

The tribe wants the well for water to expand salmon egg production at a nearby hatchery. It later could provide water for tribal homes on the reservation, said Leroy Deardorff, the Lummi water resource administrator.

But officers of Sandy Point Improvement Co., a private homeowners association, say tribal officials are using the well as a pawn in a dispute over water and ultimate control over reservation residents.

"What better way to control everyone but to control the water?" asked Hugh Pottle, a Sandy Point resident and association treasurer.

Tribal officials said they only are tapping water to meet growing Lummi needs, a right guaranteed by the Point Elliott Treaty of 1855.

"It's not our intent to make it a race and use up the water," Deardorff said. "But we see our resource — literally in our minds — being taken."

Tribal officials and representatives of non-tribal reservation residents often are at odds over water and other issues. Sandy Point is comprised mostly of non-Lummi permanent and vacation residents.

The tribe began drilling the well last week. It sits on a residential lot between a private mobile home and the association well that supplies water to Sandy Point homes.

Both the association and tribal well sites are surrounded by cyclone fences with barbed wire. The tribal fence has an extra strand of razor wire. A Lummi Law and Order officer was stationed nearby during drilling.

The extra security is because of past confrontations with non-tribal members over wells drilled on the reservation, including one last year also at Sandy Point, Deardorff said.

"There are some colorful people down there (Sandy Point)," he said.

In another incident, tribal officials tried to stop another private association from drilling a well on the reservation, but were blocked by Whatcom County sheriff's deputies.

The height of the fence around the tribe's new well and

See WELL, Page A2, Col. 1

PHILIP A. DRYER HERALD PHOTO

DISPUTE DEEPENS: Razor wire atop a cyclone fence surrounding a new Lummi Nation well is the latest point of contention between tribal and nontribal members at Sandy Point.

Quotable

"It's not our intent to ... use up the water. But we see our resource ..... being taken."

Leroy Deardorff, Lummi water resource administrator

Quotable

"What better way to control everyone but to control the water?"

Hugh Pottle, a Sandy Point resident

▼ OFF PAGE A1

Well

Continued from Page A1

the razor wire violate county ordinances that apply at Sandy Point, association officers said.

"The county, we think, should be backing us up," Pottle said.

The Lummi Indian Business Council — not the county or state — has jurisdiction on the reservation, tribal officials said. "We assert our own authority," Deardorff said.

Jeff Monsen, acting director of the Whatcom County Public Works Department, said the county lacks authority over tribal wells on the reservation and plans no action against the well. "County jurisdiction is in doubt," he said.

The tribe built its well near the association well to force jurisdictional issues, association members said. Those include who gets how much water in case the competing wells wind up drawing off each other or depleting the limited resource, they said.

Steve Hirschey, the Ecology Department's regional water resource supervisor, agreed.

"That's no doubt," he said. "I'm surprised it took them (the Lummis) so long to punch the well."

Tribal officials contend the treaty and other federal laws grant all water on the reservation to the tribe.

"The water is our resource," Deardorff said. "It belongs to the tribe."

But Hirschey said it is unclear whether Indian tribes own well water on reservations. "That's a debatable topic," he said.

The state recently granted the Sandy Point association enough well water to supply 100 more homes, Pottle said. The association serves about 800 water users, but the community has 400 more undeveloped lots.

The tribe opposes state intervention, including the association's additional water allotment, and opposes new homes at Sandy Point, Deardorff said.

"The water is our resource. It belongs to the tribe," he said. "We have told everybody we are going to use all the water we believe belongs to us."

The tribal well could threaten the association's ability to supply those future homes, Pottle said.

"This is our main concern — having enough water to serve those we are obligated by law to serve," he said. "We will be monitoring our wells very closely when they start pumping."

Hirschey said the well poses many thorny questions not yet answered by laws or courts. If challenged legally, one possible outcome is that Sandy Point may have to curtail water use, Hirschey said.

"Sandy Point knows that very clearly," he said.

But Hirschey said he believes the site has plenty of well water to meet the stated uses of both the tribe and association, possibly preventing the need to make the Lummi well a test case.

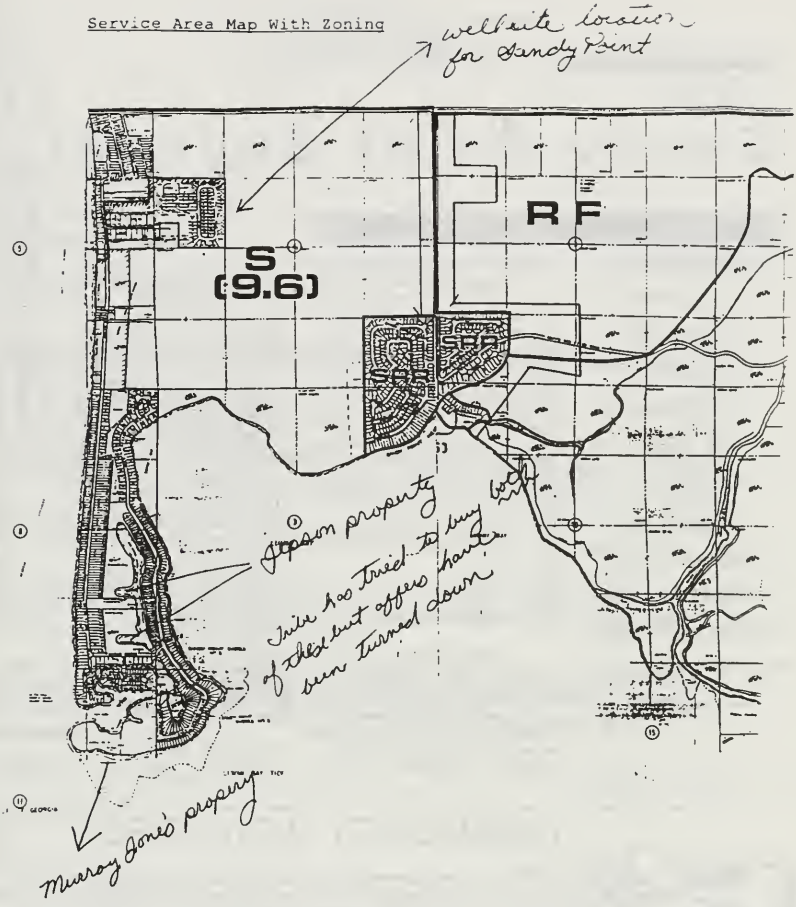
The state is notifying the tribe about some concerns with the well, including its nearness to a septic tank, Hirschey said.

Merle Jefferson, the tribe's natural resource director, said the Lummis will look for other places on the reservation to dig more wells to meet the tribe's growing population and needs.

The reservation has 3,340 residents — 51 percent Indian and 49 percent non-Indian. Census estimates project annual growth at 2 percent.

"As we have new housing needs, we'll dig new wells," Jefferson said.

Service Area Map With Zoning



Volume 5 Number 3
June, 1996

Sandy Point Sounder

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SANDY POINT WATER INFO

A critical issue in getting more water hookups at Sandy Point hinges on how much water is needed based upon how much water we use now considering the myriad types of users. Below is a tabulation of water use in recent years at Sandy Point in terms of acre-feet, a term used to describe how much water a supplier is allowed in a water right authorized by the State.

YEAR	ACRE-FEET USED	REMARKS
1986	258	Highest record of use
1987	230	
1988	116	Water meters installed April
1989	108	
1990	108	
1991	119	moratorium on new hookups
1992	129	
1993	135	
1994	127	
1995	113	

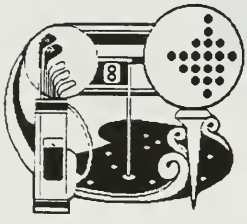
Water emergency in effect May, 1995

Sandy Point has a water right of 143 acre-feet. Before more hook-ups can be given, a number of requirements have to be satisfied. The Sandy Point Improvement Co (SPIC) has been trying to satisfy those requirements for the past five years using engineers, attorneys, and now the water negotiations. The State emphasizes water conservation. The table above shows that water meters had the greatest affect on conservation. Noteworthy is that total water use has declined since 1993. Thanks to community sacrifices in 1995, water use was lowest since 1990. Even with full authorized water use, the SPIC aquifer may not supply enough water since the Lummi well started pumping from the same source in 1993. In 1986 prior to our present authorized 143 acre-feet, Sandy Point was using over twice as much water as we presently do, which proves our aquifer was adequate for all future development prior to the Lummi well. Hopefully the negotiations will resolve this matter by July. An acre-foot is roughly equivalent to water one foot deep on a football field. In one year Sandy Point uses enough water to fill a football field 100 feet deep.

Thanks to a wet Spring and Lummi cooperation, the Sandy Point well is supplying adequate water. Never-the-less, conserve-all you can, so we can avoid a renewed water emergency like last summer.

(Thanks to ***Dale Petersen*** *for this most informative article– editors !)*

COMMUNITY ACTIVITIES



NOTICE: Golf Club Committee is in the process of reorganization. The first meeting is to be held Wednesday **June 26, 7:00pm at the Marina.** Come and bring your ideas-- your participation is critical to the continued success of golf course program. In addition,--properly witnessed and signed we have received word that **George Coward made a Hole-in-One on the 8th Hole** on March 19 at 3:15pm. Congratulations!

SANDY POINT CLEAN-UP: Once again on April 20 the community turned out to spruce up the area and it is looking better-- most people commenting that everyone seems to be doing a better job during the year at keeping litter off the streets and vacant lots. In addition, South Cape was improved!! The Manna area requires the most work --and appears to be a war zone with the

S.P. Clean-up continued on page 3

Mark Asmundson
2626 Ontario Street
Bellingham, WA 98226

March 25, 1996

Via Facsimile 380-6331

Lummi Water & Sewer Board

Re: Contract between the City of Bellingham and the Lummi Nation for the Provision of Water

Dear Members of the Water & Sewer Board:

I have been asked to clarify my understanding of the circumstances in which the City of Bellingham agreed to extend water to the Lummi Nation a few years ago.

While there were many issues discussed and debated, one issue that had been raised had to do with the availability of water to residents of the reservation property.

It is my recollection that the representation of the attorney for the Lummi Nation set forth that the Tribe was prohibited by its own internal regulations from making allocation of water on the basis of tribal membership.

I certainly cannot speak authoritatively on this subject, given the passage of time, but it is my recollection that any concern about the limitation on access to water supplies was alleviated by the assurances of the attorney for the Lummi Nation concerning the internal operating rules.

I hope this statement is of some value to you.

Very truly yours,

Mark Asmundson

Mark Asmundson (Mr. Asmundson is now the mayor of Bellingham)

Councilmember Gischer: I think that addresses the concern that we had, that we've have inserted that language in there initially so that in fact whether there were Indian, non Indians, own land, didn't own land, that they wouldn't be discriminated against. It appears to me that's already taken care of in their sewer and water code.

Councilmember T. Johnson: There were three or four questions that Mr. Johnson, on December 7, were asked the council and were asked the City Attorney, and in perusing them I, you know, I thought it was quite germane to the non discrimination issue, however, the language from the Lummi Sewer Code, I'm not sure if it applies, if no distinctioo of race would also apply to hook up charges or not.

S. Johnson: Again, I'm not sure of how much you got, but section 8.04 refers to connection fees. (Councilmembers: We don't have that.) It's virtually identical language. (Gischer: But the first part of 8.03 says fixing rates and charges) I can read from the version I have that says: "No distinction in connection fees shall be made on the basis of race, color, creed, religion, or tribal membership of the owner or occupier of the property served. Nor shall any distinction be made on the basis of ownership of land whether it be trust, tribally, or individually owned." I think that's the same language that's in 8.03.

Then it goes on to enumerate some factors that can be considered: Difference in cost of construction of facility serving a property; length of time from construction; amortization and depreciation schedule for the portions of the system serving that property; replacement costs for that portion of the system serving the property; capital contributions made to the system or portions thereof by the owner of surrounding property; and any other matters which present a reasonable difference or ground for distinction and connection fees.

Then it goes on to provide for what are called latecomer agreements which are methods by which present property owners reimburse, or, the future users reimburse a developer for building part of the system.

Asmundson: Right we have similar provisions in the City. Most of the councilmembers are at least familiar with the basics of the latecomer provisions. Skip, just as a matter of ritual, if somebody feels any property owner, within the confines of the reservation, feels that they have been discriminated against in fashion that violates section 8.03 or 8.04, what is their recourse?

S. Johnson: Well, their first recourse would be with the sewer and water district itself. And then appeals from there would go to the council and from there to the Tribal Court, and there is a Court of Appeals as well, but that is the end of the system. There's no way to get into the U.S. Supreme Court or anything directly from the Tribal Court.

Asmundson: Councilmembers, Tip, you want to go on to question two?

T. Johnson: Well, I think all four of the questions that were asked, I mean they were basically positing to what extent does the City intend this non discriminatory basis to apply. Maybe what we ought to do in section one is delete the word, starting at the big black arrow, where it says, delete the words, "On a discriminatory basis." I'll just continue the sentence to the end to the last word,"hearing.

The Lummi Tribal Council is not respecting the good faith negotiation they used to get Bellingham water for the reservation. Their legal council showed language in the sewer/water code that indicated they wouldn't discriminate but are doing it anyway.
M. Dawson

U. S. Department of Justice

Office of the Deputy Attorney General

Office of Tribal Justice

Washington, D.C. 20530

August 2, 1995

8 / 1995

Honorable Marlene Dawson
Council Member
Whitcom County Council
Courthouse
311 Grand Avenue
Bellingham, WA 98225-4038

Dear Ms. Dawson:

This is a response to your letter dated July 6, 1995 to the Attorney General regarding federally funded segregated school systems on Indian reservations.

You raise a concern as to whether federal funding of schools for Indian children on an Indian reservation is in violation of our federal desegregation policy. The answer is no.

From the earliest days of our Republic, the United States of America has recognized Indian tribes as domestic dependent nations, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), and our Constitution recognized the self-government of Indian tribes in the Supremacy Clause affirmation of Indian treaties entered into under the Articles of Confederation, which governed our Nation from 1776 until 1789. In early Indian treaties, the United States undertook a duty to "protect" Indian tribes, establishing one of the bases for our Federal trust responsibility to Indian tribes.

Accordingly, Indian people are not considered a "racial group," but rather are considered to be members of domestic dependent nations with whom the United States has a special "political" relationship. Therefore, the United States may fund schools for Indian children on Indian reservations in accordance with the Constitution.

In 1834, Congress reported that: "The education of the Indians is a subject of deep interest to them and to us." H.R. Rep. No. 474, 23rd Cong., 1st Sess. 20 (1834). Unfortunately, the United States education policy towards Indians was often laced with our cultural biases. For example, in 1838, the Commissioner of Indian Affairs reported:

How does the Constitution and a tribe's political status have anything to do with segregated schools. This jargon is consistent with the Dept. of Interior's lack of follow through when it comes to ensuring tribes are held to the standards established in all federal policy, including that of prohibiting segregated schools. M. Dawson

> The principal lever by which Indians are to be lifted out of the mire of folly ... is education ... To teach a savage man to read ... is to throw a seed on a rock. ... Manual-labor schools are what the Indian condition calls for.

Comm'r Ind. Aff'r. Ann. Rep., S.Doc. No. 1, 25th Cong., 3rd Sess. 450 (1838). Given this attitude, and the many discriminatory policies applied to Indian people over the years, it is not surprising that the Handbook of Federal Indian Law explains:

> ...Indian education was characterized by a Senate subcommittee in 1969 as "A National Tragedy -- A National Challenge," both because of its lack of success in preventing high rates of illiteracy and dropping out, and because it ignored the needs and culture of Indian people.

F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982 ed.) at 678. Today, the goal of Indian education is to give Indian communities greater control over the education of Indian children, so that these young people have an opportunity to succeed in their future endeavors and to continue the fine traditions of their people. This policy is consistent with our Nation's pledge to "protect" the Indian tribes and our corresponding, trust responsibility.

We appreciate your concern for your constituents. If we may be of any further assistance, please do not hesitate to contact us.

Sincerely,

Herb Becker

Herbert A. Becker
Director

/MCV

Allowing segregated schools on reservations is an example of the mind set that tribes don't have to be held accountable to the same federal laws that affect other citizens.

M. Dawson

Tuition 1994-95
page 2

Credits	Resident Tuition	Non-Resident Tuition	Fees	Resident Total/Qtr.	Non-Resident Total/Qtr.
1	12.00	52.00	32.50	44.50	84.50
2	24.00	104.00	65.00	89.00	169.00
3	36.00	156.00	97.50	133.50	253.50
4	48.00	208.00	130.00	178.00	338.00
5	60.00	260.00	162.50	222.50	422.50
6	72.00	312.00	195.00	267.00	507.00
7	84.00	364.00	227.50	311.50	591.50
8	96.00	416.00	260.00	356.00	676.00
9	108.00	468.00	292.50	400.50	760.50
10	120.00	520.00	325.00	445.00	845.00
11	132.00	572.00	357.50	489.50	929.50
12-18	144.00	624.00	390.00	534.00	1014.00
19	156.00	676.00	400.00	556.00	1076.00
20	add 12.00	add 52.00	add 10.00	add 22.00	add 62.

Even though we live on the Reservation and pay utility taxes to the tribe, our children are considered non-resident for fee purposes to their N.W. Indian College. Residence is based on race not location of home.

TUITION AND FEES
1994-95 Academic Year

The cost of obtaining an education at Northwest Indian College is shared by Lummi Indian Tribe and other participating northwest Indian tribes hosting NWIC classes and/or activities as well as the Bureau of Indian Affairs, which provides a per student subsidy for resident students meeting tribal enrollment criteria. Non-resident students are assessed a higher tuition to offset BIA subsidy provided for resident students. Tuition and all fees are approved by the NWIC Board of Trustees and are subject to change with notice.

Tuition, fees and book costs must be paid at the time of registration, unless special arrangements are approved by the Business or Financial Aid office prior to registration. Unpaid tuition and fees will be deducted from financial aid awards to students.

Tuition	Resident Students: $12 per credit for 12-18credits Non-Resident Students: $52 per credit for 12-18 credits Tuition for credits in excess of 18 will be charged at the respective rate for each credit taken in that quarter.
Registration and Computer Fee	A fee of $10 per credit to support the costs of maintaining and processing student records, including the college computer system and computer labs.
Student Activity Fee	A fee of $7.50 per credit, up to 12 credits, to support student government sponsored activities, for NWIC students.
Building Fee	A fee of $15 per credit, up to 12 credits for facility maintenance, improvement and/or expansion.
Application Fee	A one-time fee of $25, paid by all full-time students seeking admission into a specific degree or certificate program.
Resident Student	Resident students are defined as those students who live on or near an Indian reservation and can demonstrate Indian ancestry or enrollment in a federally recognized tribe or Alaskan native corporation. Spouses and/or dependents of resident students as well as employees (and/or their spouse or dependents) of NWIC and tribal (or other Indian agencies) within the NWIC service area may also be considered resident students.
Non-Resident Student	All students who do not meet the definition above, including members of indigenous groups from outside the United States.

approved 6-21-94

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD • BELLINGHAM, WASHINGTON 98226-9298 • (206) 734 8180
DEPARTMENT _____ EXT _____

Exhibit — J

July 14, 1993

Mr. P. J. Murray-Jones
South Cape Properties Ltd.
A10 55 Tai Hong Street
Lei King Wan
Hong Kong

Dear Mr. Jones;

On June 15, 1993 the Lummi Indian Business Council (LIBC) reviewed your application for the extension of sewer services to your proposed development on the south cape of Sandy Point. The LIBC denied approval for this sewer extension application.

There are three reasons for this denial. First, the project has not been approved by the Lummi Planning Department, as required by Section 4.08 of the Lummi Tribal Sewer and Water District Ordinance. Second, there is no assured supply of domestic water to your project that complies with Lummi Nation laws and policies. And third, an internal review by our technical staff recommended against extending the sewer onto a landform that is unstable and subject to ongoing erosion and flooding and is vulnerable to damage from seismic activity.

You may contact us through the Planning Department if you wish to submit information in a hearing before the LIBC for a review this decision.

Sincerely,

Henry Cagey, Chairman
Lummi Indian Business Council

cc: Lummi Sewer Board
Lummi Planning Commission
Lummi Water Resources Dept
Whatcom County Shorelines Dept

United States Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle WA 98101
Alaska
Idaho
Oregon
Washington

EPA

December 18, 1991

Reply To
Attn Of: SO-155

Ms. Linnea G. Smith
2808 Leeward Way
Bellingham, Washington 98226

Re: Lummi Tribal Sewer Board Elections

Dear Ms. Smith:

I received your letter addressed to Regional Administrator Dana Rasmussen in which you raised concerns about the Lummi Tribal Sewer District's (District) recent elections. Your letter raised issues relating to the District's alleged failure to distribute information regarding candidates prior to the end of the candidate sign-up period; to disseminate information regarding absentee ballots, even after such failure was brought to its attention; to allow non-tribal input into election oversight and ballot counting; and to adopt election policies and procedures.

The Environmental Protection Agency (EPA) in the late 1970's assisted in funding approximately $6 million dollars to the design and construction of a sewerage system to serve the Lummi Indian reservation. The system included two outfalls, two treatment plants, and the associated interceptor system and pump stations.

In order to obtain the EPA grant, the tribal business council chair signed an agreement which included the assurance that the tribe would comply with EPA regulations prohibiting recipients of EPA grants from discriminating against anyone on the basis of race, color, or national origin. 40 C.F.R. Part 7 (1973). The regulations applicable to the Lummi project prohibit, among other things, grant recipients from denying a person the opportunity to participate as a member of any planning or advisory body that is an integral part of the program. 40 C.F.R. § 7.4(b)(vii) (1973).

See letter of Aug 27th and intent of problems in getting E.P.A. to follow up on discrimination by Lummi. Federal offices are roadblocks to maintaining civil right concerns of non-Indians

We would like to schedule a meeting with you and representatives of the sewer district to gain a better understanding of the facts supporting your allegations. We also need to determine whether our regulations encompass some or all of your concerns. If so, our preference is to informally resolve the issues. I propose meeting on January 7, 1992 at 10:00 in our Seattle office.

Please call me at your earliest convenience at (206) 553-8311. I look forward to hearing from you.

Sincerely,

Sharon I. Haensly

Sharon I. Haensly
Assistant Regional Counsel

cc: Cecil Carroll, EPA Washington Operations Office
Henry Cagey, Chair, Lummi Business Council
Julie Jefferson, Lummi Tribal Sewer District Election Committee
Skip Johnsen, attorney, Lummi Tribal Sewer District
Eugene DeCoteau, Manager, Lummi Tribal Sewer District

SOUTH CAPE PROPERTIES LTD

25B, WEALTHY PLAZA
133 SHAU KEI WAN ROAD
HONG KONG
TEL: 2568 0264,2568 0203
FAX: 2568 6066

Our Ref: SCP/149

27 AUG 96

PERSONAL

Mr C Clarke
Regional Administrator
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue
Seattle, WA 98101

E.P.A. is proving ineffective in following up on discrimination charges. Non-Indians are at a complete loss to get anyone to help them with civil right violations! M.D.

Dear Mr Clarke

RE: COMPLAINT OF RACIAL DISCRIMINATION BY LUMMI TRIBE IN VIOLATION OF IT'S SEWER GRANT AGREEMENT

I am very concerned to receive the letter of 21 AUG 96 over your name, but signed for you by another, for the following reasons:-

(A) You say that my complaint was "filed untimely and could therefore not be investigated." Your letter of 3 NOV 94 to which you refer, states that this 180 calendar days requirement may be "waived for good cause. EPA's office of Civil Rights will determined if a waiver is justified."

I would submit that the fact that I have been in contact and correspondence with your Agency for some two years, of itself constitutes a waiver, otherwise you would, of course, have informed me that I was out of time in November 1994.

(B) Be that as it may, this complaint of racial discrimination is not an isolated one-off incident, but of on-going

discrimination. The sewer was denied on 23 MAR 93, was being denied on 9 NOV 94 and is still being denied today. Therefore, my legal advice is that the 180 day rule cannot possibly apply in this instance.

(C) You make no mention of the additional complaint about the Lummi Indian Tribe, which was sent to Mrs Contreras by courier on 17 MAY 96, concerning racial discrimination by the Tribe against non-Indians on the reservation - including myself - by not supplying them with water provided by the City of Bellingham, despite earnest assurance to the City Council when the agreement was signed that there would be no such discrimination.

(D) The prolonged delay in dealing with this matter - from 9 NOV 94 to 21 AUG 96 - is I am sure you will agree, unfortunate to say the least. I see no reason, other than reluctance to get involved, why you should have waited for the Court decision before deciding that my application was "untimely." There appears to be no reason why the two actions could not have proceeded concurrently, as they concern three quite different breaches of three different undertakings freely given by the Lummi to three different bodies, not to practise racial discrimination.

Then again your office "lost" the twenty page statement with the thirty-five enclosures I gave Mrs Contreras on 9 NOV 94, but did not let me know this until 22 APR 96. I received no letter from her dated 9 FEB 96.

You are incorrect, by the way, in your assertion that the Judge had simply said that there was no remaining basis for exercising jurisdiction under the terms of the Consent Decree.

You will see that she also added "with the possible exception of paragraph 24." [My attorneys and other attorneys connected with the case believe the Judge should have omitted the word "possible"]

Paragraph 24 states "However, for good reason shown and upon motion to the Court by any party, the Court may enter such further Orders as may be necessary or appropriate to effectuate the purposes of this Decree." This provision is without a time limit.

The Judge held that South Cape Properties Ltd., not being a party to the original Decree "accordingly cannot invoke paragraph 24." It is open to question whether "any party" means any party to the Decree or any party who is affected by racial discrimination, depending on your stance.

The Court therefore did not investigate my complaint of racial discrimination by the Lummi in contravention of the Consent Decree - there was no hearing. I hope this makes the position quite clear.

I look forward to a very early response - one which will prevent any possible suspicion entering anyone's mind that you consider that non-discrimination rules apply only to racial discrimination against the Lummi Indian Tribe and not to racial discrimination by the Tribe against non-Indians.

The sensible [and easy] way out is for the L.I.B.C. to be persuaded that it should lift the ban on the Lummi Sewer District from extending the sewer to my property, whereupon my complaint will be withdrawn. The District, which approved the extension on 29 APR 93, is, of course, keen to increase the number of their customers and thus maximise it's much needed revenue.

You can be assured that I do not intend to let the matter rest.

P. J. Murray-Jones
Lt. Commander

PJM/TD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue
Seattle, Washington 98101

AUG 2 1 1996

E.P.A. lost 20 pages and documentation of discrimination and now any complaint is untimely; Discrimination is ~~on going~~ how can it be untimely!

Lt. Commander P.J. Murrey-Jones
South Cape Properties, Ltd.
25B, Wealthy Plaza
138 Shau Kei Wan road
Hong Kong

RE: Complaint File #1R-94-R10

Dear Commander Jones:

This is in response to your letter of July 22, 1996, regarding the status of your complaint in which you alleged discrimination on the basis of race when you were denied a sewer extension by the Lummi Indian Tribe.

Although you initially filed your complaint in November 1994, EPA did not receive any of the documentation pertinent to the specifics of your complaint until May 1996. *

After reviewing this documentation, we find that your complaint was filed untimely and therefore cannot be investigated. According to the records you provided, you were denied sewer extension to South Cape at Sandy Point, Ferndale, on March 23, 1993. You filed your complaint on November 9, 1994. This date was well beyond the 180-day time period within which a complaint should be filed. You were notified of the procedures to file a complaint in a letter (faxed to you by Cecilia Contreras) on November 3, 1994.

In December 1994 EPA learned that you had made a request to reopen a consent decreee entered in 1982 regarding alleged violations of the decree. Issues related to your discrimination complaint were included in the consent decree. The decree, entered in Federal district Court, resolved litigation related to the construction of a wastewater treatment plant on the reservation. In October 1994, the court granted your request to reopen the decreee to determine whether the decree has been violated. For this reason, EPA decided that we would await the outcome of the court's review before initiating an investigation of your complaint. In July 1995 the court determined that it had no remaining basis for exercising jurisdiction because of the length of time that had elapsed. EPA was informed about this determination in November 1995.

* This is just not true - I gave them a 20 page submission with 35 pages of

Printed on Recycl

Due to government furloughs during the period November 1995 through January 1996, we were unable to pursue your complaint until the end of January 1996. At that time we asked you to reiterate the issues raised in the complaint and to include documentation related to the issues. We received your response on May 7, 1996.

I apologize for the delay in advising you of our determination. However, the delay did not affect the outcome of this complaint.

This is the final agency action regarding your complaint. If you have any questions about this matter, please contact Cecilia Contreras at the above address or at 206/553-2899.

Sincerely,

Chuck Clarke
Regional Administrator

cc: Mary St. Peter
Office of Civil Rights

WHATCOM COUNTY
PLANNING AND
DEVELOPMENT SERVICES
5280 Northwest Drive
Bellingham, WA 98226

MICHAEL T. KNAPP, A.I.C.P.
Director

COPY

Director Senate Committee on Indian Affairs
838 Hart Office Building
Washington, D.C. 20510-6424
Attention: Nina

Subject: Congressional Hearing/Senate Committee on Indian Affairs

Dear Committee Members:

In so far as Whatcom County issues building permits on fee lands owned by Lummi Indians inside the boundaries of the Lummi Indian Nation and the Tribe does not recognize Whatcom County jurisdiction regarding County Zoning and enforcement of County Codes, management of Indian owned fee lands in contrast to Trust Lands is difficult if not impossible. By failing to recognize our jurisdiction, the situation creates potential liability for Whatcom County in that we may be left to correct health and safety problems on properties received by tribal or non-tribal members through tax foreclosures and/or later sales to non-Indians.

The Lummi Reservation is an open reservation. The roads and easements are maintained by Whatcom County. In so far as the tribe manages the reservation sewer system, they must provide sewer availability slips before construction. During this process, the Tribe redirects fee land owners to their own tribal planning department for site and planning approval. This situation creates confusion and often a burden on our tax assessor who uses Whatcom County Planning approvals to notify all landowners of their new tax assessments.

While the solution to these issues is not easily resolved, it is important to consider methods and solutions that will enable Indian Nations and Counties to jointly agree on ways to insure life-safety compliance.

Sincerely,

Michael Knapp

Michael Knapp, Director
Whatcom County Planning and Development Services

Post-it® Fax Note 7671	Date 9/20/94	# of pages ▶ 1
To DARLENE DAWSON	From M. KNAPP	
Co./Dept.	Co WHATCOM CO	
Phone #	Phone #	

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA ROAD • BELLINGHAM, WASHINGTON 98226-9298 • (360) 384-1489
DEPARTMENT _____ EXT _____

Friday, June 7, 1996

RECEIVED
JUN 13 1996
Whatcom Co. Planning Division

Whatcom County Planning Commission
5280 Northwest Road
Suite B
Bellingham, WA 98226

Dear County Planning Commissioners,

The Lummi Indian Nation urges you not to renew the County's 1972 Interim Zoning Ordinance for lands within the boundary of the Lummi Reservation. Whatcom County has shown no legitimate governmental interest in continuing the Interim Zoning Ordinance and does not have the funds or staffing to provide planning services to fee lands on the reservation. Furthermore, continuation of the Interim Zoning Ordinance perpetuates spot zoning, infringes on the legitimate sovereignty of the Lummi Nation, and hinders the Tribal government in carrying out its responsibilities as the recognized governmental authority within the bounds of the Reservation.

For land use planning to be successful and meet the goals of the community, zoning and development rules must be consistent throughout a neighborhood. One set of rules for one parcel and another completely different set for the adjacent property will eventually lead to failure of both planning efforts. This type of "spot zoning" is considered poor planning, and in fact is illegal in most jurisdictions. The current situation of Whatcom County attempting to apply its outdated zoning code to individual parcels of land on Lummi Reservation is a type of spot zoning, and defeats land use goals of both the County and the Lummi Nation. This situation threatens the ability of the established Tribal government to carryout meaningful land use planning for all reservation residents.

Since the first adoption of the Interim Zoning Ordinance, Whatcom County has shown no legitimate governmental interest in continuing to apply the Ordinance to fee lands on the Reservation. All individual fee parcels or groups of fee parcels are surrounded by Tribal lands, which are adversely affected by the County's outdated Interim Zoning Ordinance. Reservation residents suffer from the confusion created Whatcom County's assertion of land use jurisdiction on the Reservation, impeding economic development and residential development, and prohibiting consistent protection of environmental resources. The County's application of its Shoreline Program to land within the Reservation has materially harmed Tribal tidelands by allowing the construction of shoreline structures that prevent natural shoreline process of erosion and deposition. No county resources are protected or county interests forwarded by continuing the Interim Zoning Ordinance. However, important Tribal interests and resources are

tidelands

materially harmed by the continued imposition of the County's Interim Zoning Ordinance.

Whatcom County does not assert zoning jurisdiction over lands owned by its citizens which are located within the jurisdictions of Bellingham, Skagit County, or British Columbia. What legitimate governmental interest does Whatcom County have in attempting to assert authority over lands outside its jurisdiction and within the legally defined bounds of the Lummi Reservation?

The Lummi Zoning Ordinance, first adopted in 1973 and since amended, applies to all lands within the Reservation and has been approved by the Bureau of Indian Affairs. The Lummi Zoning Ordinance provides for a variety of land use designations, residential densities, and development standards. The Tribal zoning and land use process provides for public participation, appeals and legal review of all land use decisions, regardless of property ownership status. Tribal members, fee land owners, neighbors, and any interested party have the ability and right to present their case and seek protection of property rights through the tribal appeal system. The fact that only enrolled Lummi Tribal members are eligible to vote in Tribal elections has no bearing on this issue on land use jurisdiction. Canadian citizens who own property in Whatcom County are not eligible to vote in County elections just as US citizens are not eligible to vote in Canadian elections, even if they own land and live in British Columbia. The fact that all residents of the Reservation have the right and ability to influence land use decisions through established legal process sufficiently protects their legitimate property rights.

Not only has Whatcom County not shown any legal interest in imposing its zoning laws to lands within the Reservation, the county admits that it's funding and ability to regulate land use throughout the county, let alone the Reservation, is severely constrained by diminishing revenues. Indeed, the level of staffing in the County Planning Department has been steadily reduced by the County Council since 1993 to meet revenue shortfalls. The county's inability to provide adequate planning services to fee land owners is evident in the fact that the Interim Zoning Ordinance has been hobbled together and recycled for the last 24 years.

Based on the reasons stated above, the Whatcom County Planning Commission must not approve continuing the Interim Zoning Ordinance for lands within the boundary of the Lummi Reservation. To do otherwise perpetuates bad planning practices and disrespects the sovereign government of the Lummi Nation. I urge you to repeal the Interim Zoning Ordinance.

Thank-you.

Sincerely,

Henry Cagey
Chairman
Lummi Indian Business Council

5-31-94

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD. • BELLINGHAM, WASHINGTON 98226-9298 • (206) 734-8180
DEPARTMENT: EXT.

August 29, 1994

J.E. Ryan
Building Services Division Manager
5280 Northwest Drive
Bellingham, WA 98226

Re: Building Permit BLD94-1050
3133 Sunset Drive

Dear Ms. Ryan;

The Lummi Nation has the following comments on the above permit application:

Jurisdiction

The Nation does not recognize the jurisdiction of Whatcom County to issue permits on the Lummi Reservation.

Shorelands

Although this permit states that the bluff is not eroding and therefore the setback is from OHWM and not the top of the bank, in April of this year a shorelines permit was issued by the County for 3113 Sunset, several lots away, for construction of a retaining wall. In that permit, SHS94-0006 and SH894-0003 a conditional use permit was issued "to retard bank erosion."

Now this permit is issued that states that the bank is stable and not eroding. This is inconsistent and we object to issuing a shoreline setback from OHWM. The Whatcom County Shoreline Management Plan requires that setbacks be measured from the top of eroding banks (23.90.C.1), and this permit violates the County ordinance. The setback should be measured from the top of the bank and no variance allowed. In addition, the maximum height of 30 ft violates the shorelands ordinance, as this residence is within 100 feet of OHWM and therefore is limited to 25 feet. The County has been notified by the Lummi Nation many times that we object to allowing shoreline construction which later requires shoreline protection to be built. As property owners and government authority over the adjacent tidelands, we object to this process which results in damage to our tidelands and resources.

Water Supply

The Sunset Water Association which is the water supply for this residence is operating under a state permit based on Reservation groundwater withdrawals. This is water that belongs

to the Lummi Nation under its Treaty-reserved water rights. The state and Lummi have agreed to negotiate a settlement of the Tribe's senior right and until that is complete, there is no certainty that there will be surplus water available for non-Tribal use. The County should not allow residences to be constructed for which there may not be a future water supply.

For the above reasons the Lummi Nation objects to the permit as it stands. Please call me (647-6272) or Merle Jefferson (647-6225) if you would like to discuss this further.

Sincerely,

Leroy Deardorff
Administrator
Water Resources

cc: DOE Shorelands

SECTION 4.07. NEW CONSTRUCTION. No new construction shall be permitted which does not use the public sewer unless the owner shall execute an agreement with the Board in which the owner shall (1) promise to connect to the public sewer as soon as the same becomes available for connection as defined in Section 4.06 hereof; and (2) agrees to participate in, support, and become a part of any local improvement District or utility local improvement District which shall be formed to serve the property or any part thereof; and (3) agrees to pay any and all charges associated with the extension of the sewer system to the property or any part thereof.

SECTION 4.08. CONNECTION PRIORITY. After the initial connections to the system, or in any case after January 1, 1984, all connections to the system shall be made on a first come first served basis, without regard to the race, color, creed, religion, or tribal membership of the owner, provided that no connection shall be made until the Lummi Planning Department shall certify that the structure to be connected is in present compliance with applicable tribal zoning, subdivision, building, plumbing, electrical, construction, or other health and safety codes and ordinances as adopted by the Lummi Indian Tribe.

LUMMI CODE OF LAWS

PREAMBLE

The following Code of Laws relative to the Lummi Indian Reservation and to rights and duties in areas off reservation fishing and hunting areas secured by the Treaty of Point Elliott of 1855, is hereby enacted.

TITLE 1 - LUMMI RESERVATION COURT - GENERAL RULES

[History] Res S-13 (10/7/74)

Chapter 1.1 Establishment of Court

1.1.01 Establishment of Court

There is hereby established for the Lummi Indian Reservation in Washington a court to be known as the Lummi Reservation Court, hereafter referred to as the Reservation Court.

Chapter 1.2 Jurisdiction

1.2.01 "Lummi Reservation Court Jurisdiction" Defined

The jurisdiction of the Reservation Court and the effective area of this Code shall include all territory within the Lummi Reservation boundaries, including fee patented lands, allotments, assignments, roads, waters, bridges, and lands used for agency purposes, and lands outside the boundaries of the Reservation held in trust by the United States for individual Lummi Indians or for the Lummi Tribe of the Lummi Indian Reservation, and it shall be over all persons found therein. It shall include jurisdiction over members of the tribe when fishing at usual and accustomed grounds and stations recognized by the Treaty of Point Elliott of 1855, and when hunting or gathering roots and berries on open and unclaimed lands as guaranteed by the Treaty.

Chapter 1.3 Appointment and Removal of Judges

1.3.01 Number of Judges

The Reservation Court shall consist of one chief judge whose duties shall be regular and permanent and at least two associate judges who may be called into service when the occasion arises.

1.3.02 Appointment, Compensation and Terms

Each judge shall be appointed by the Business Council and shall be compensated on a basis to be determined by the Council. Each judge appointed by the Council shall hold office for a period of six (6) years, unless sooner removed for cause as provided in this chapter, or by reason of the abolition of the office, but shall be eligible for reappointment.

The term "signature" as used in this Code shall be defined as the written signature, official seal or thumb print of any individual.

1.10.03 Business Council

The term "Business Council" or "Council" as used in this Code shall refer to the Business Council of the Lummi Tribe of the Lummi Indian Reservation of Washington.

1.10.04 Agency

The term "Indian Agency" in this code shall refer to the Western Washington Regional Agency of the United States Department of the Interior, Bureau of Indian Affairs, Everett, Washington.

1.10.06 Court

The terms "Court", or "Reservation Court", as used in this code shall refer to the Lummi Reservation Court or the Lummi Court of Indian Offenses as the case may be.

1.10.07 Person

The term "person" shall include any natural person, corporation, trust, unincorporated association, partnership, and federal, state or local governments, agencies or subdivisions thereof.

Chapter 1.11 Relations with the Court

1.11.01 B.I.A. Employees

No field employee of the Bureau of Indian Affairs shall obstruct, interfere with or control the functions of the Tribal Court nor shall he influence such functions in any manner except as permitted by this Code or in response to a request for advise or information from the Court. Employees of the Bureau of Indian Affairs, particularly those who are engaged in social service, health and education work, may assist the Court, upon its request, in the proper treatment of the individual offenders.

Chapter 1.12 Consent to Jurisdiction

1.12.0 Implied Consent

Entrance by any person into the Lummi Reservation or Reservation Court jurisdiction as defined in Section 12.1.010 of this Code shall be deemed equivalent to and construed to be an acceptance of the jurisdiction of the Reservation Court and a consent to such jurisdiction over his person concerning any legal action pursuant to this Code and shall further be deemed a consent to a service of summons or process by registered mail with return receipt requested at his last know address.

CLERK OF THE COUNCIL
Dana Brown-Davis
BUDGET/PROGRAM ANALYST
Bob Woods

WHATCOM COUNTY COUNCIL
COURTHOUSE
311 Grand Avenue
Bellingham, WA 98225-4038

COUNCIL MEMBERS
Barbara E. Brenner
Tom Brown
Marlene Dawson
Robert A. Imhof
Ward Nelson
Alvin Starkenburg
Kathy Sutter

April 4, 1996

Representative Jack Metcalf
VIA Fax
733-5144

Dear Representative Metcalf:

The Records Department at the Portland Bureau of Indian Affairs office has indicated the Lummi Utility Tax is no longer active but are prohibited from putting anything in writing. Could you contact the Interior Department and provide me written verification as to whether appropriate authorization is active and also as to whether any authorization at the approporiate level has ever been granted?

Sincerely,

Marlene Dawson
Council Member

Post-it™ brand fax transmittal memo 7671	# of pages ▸ 1
To JACK METCALF	From MARLENE DAWSON
Co.	Co.
Dept.	Phone # 676-6690
Fax # 733-5144	Fax # 738-2587

c: Dana Brown-Davis, Clerk of the Council
Correspondence file

The congressional offices can't get anything in writing either. The Dept. of Interior's refusal to communicate encourage tribal actions that are inappropriate.

CLERK OF THE COUNCIL
Dana Brown-Davis
BUDGET/PROGRAM ANALYST
Bob Woods

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Bellingham, WA 98225-4038

COUNCIL MEMBERS
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Ward Nelson
Alvin Starkenburg
Kathy Sutter

April 17, 1996

Representative Jack Metcalf
Civic Center Building
322 N. Commercial
Suite 203
Bellingham, WA 98225

SUBJ: Status of Tribal Employment Rights Office (T.E.R.O.) Ordinance

Dear Representative Metcalf:

Since all ordinances adopted by the Lummi Tribe affecting non-Indians must be approved by the Commissioner of Indian Affairs or his delegate, may we have the status of the enclosed T.E.R.O. Ordinance. The Portland Area Director, despite numerous requests concerning adoption of tribal ordinances, has never provided any written documentation showing his approval or disapproval. Consequently, I am asking for a written verification of approval or denial from the Interior Department and would appreciate your help in securing a written response.

Sincerely,

Marlene Dawson

Marlene Dawson
Council Member

c: Senator Slade Gorton
Senator Patty Murray
Jeff Monsen, Whatcom County Public Works
Dana Brown-Davis, Clerk of the Council
Correspondence file

MD/jm
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Judge Barbara Rothstein
United States District Court
Western District of Washington
Seattle, WA 98104-1187

May 5, 1995

Dear Honorable Judge Rothstein

Subject: 1980 Consent Decree

As you are the author of the 1980 Consent Decree in the Lummi Indian Tribe vs. Wilbur Hallauer case, I would like to draw your attention to the Lummi Business Council's violation of 11 d and 11 e. The Tribal Council has acquired through the Self-governance Act control of their tribal member's trust land as it related to real estate transactions. I am the agent for an out of the area Lummi tribal member by the name of Mrs Grace Erickson. Her two sisters had adjoining parcels of property that were transacted through the bureau of Indian Affairs and sold. Over a year ago I delivered a purchase and sale agreement, signed by both parties on Mrs. Erickson's property to the Lummi Tribal Council's real estate division. As of this time there has been no action taken after telephone calls plus letters by both myself and Mrs. Erickson. Mr. Hostlier, the manager of that division recently told me that they did not like land to be taken out of the trust. My client, needless to say, is very distraught about the situation. The Tribe, while apparently not willing to purchase the property at market value, is holding their member economically hostage. Since she lives outside the area, it is difficult for her to address the problem herself. In addition, she has financial limitations.

As a federal judge currently reviewing the Consent Decree, you have some very important power and influence as it comes to protecting the lives and property of indians as well as non-Indian people on the reservation.

Respectfully,

Betty Wallace

Betty Wallace
Licensed Real Estate Agent

2110 Iron Street
Bellingham, WA 98225
(360) 671-4624

CLERK OF THE COUNCIL
Ramona Reeves
BUDGET/PROGRAM ANALYST
Bob Woods

COUNCIL MEMBERS
Barbara E. Byrne
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Ward Nelson
Alvin Starkenburg

WHATCOM COUNTY COUNCIL
COURTHOUSE
311 Grand Avenue
Bellingham, WA 98225-4038

October 17, 1994

The Honorable Slade Gorton
3206 Federal Bldg.
915 2nd Avenue
Seattle, WA 98175

Dear Senator Gorton:

In so much as our State Attorney General's office will not address these questions, I am now requesting that your office help direct a response. Assuming the Lummi Tribe's tidelands are classified as Public Domain (Hagen vs. Utah) has there been any legislation to prevent recreational uses in properties under this classification? For example, is there legislation to prevent upland property owners whose land abutts Tribal tidelands from anchoring or resting their boats on them? Could you also answer whether there are present federal shoreline protection laws, or state laws that the Tribe must abide by, which would prohibit Tribal members from driving their cars on Tribal tidelands or setting up overnight or semi-permanent fish camps on the shoreline?

In addition to Hagen vs. Utah, I am also aware of a 1960 Senate report stating there is no federal statute against trespass on trust land, which I assume pertains to open space and unallotted Tribal lands. Your prompt attention to this inquiry will be much appreciated.

Sincerely,

Marlene Dawson

Marlene Dawson
Whatcom County Council Member

c: Shirley Van Zanten, County Executive
Dan Gibson, Prosecuting Attorney
Laura Eckert, Interagency Committee of Outdoor Recreation
Ramona Reeves, Council Clerk
AB 94-390

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CLERK OF THE COUNCIL
Ramona Reeves
BUDGET/PROGRAM ANALYST
Bob Woods

COUNCIL MEMBERS
Barbara E. Brenner
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Larry Harris
Kenneth R. Henderson
Robert A. Imhof
Ward Nelson
Alvin Starkenburg

WHATCOM COUNTY COUNCIL
COURTHOUSE
311 Grand Avenue
Bellingham, WA 98225-4038

September 27, 1994

Wyman Babby
Assistant Secretary of the Interior
United States Department of the Interior
Office of the Secretary
Washington D.C. 20240

Dear Secretary Babby:

This is my fourth letter to you in over two months. While I have yet to receive any response, I am hoping to receive some in the near future. I am sure you are pressed for time like the rest of us. From my former letters you can tell that on an on-going basis, I have constituents who contact me about civil rights violations coming from the Lummi Reservation. These violations are being promoted and supported by Lummi Business Council.

Who would you suggest as the best contact person in terms of addressing these problems and getting them rectified? The American Civil Liberties Union won't touch Tribal civil right violations. The Civil Rights Commission says they deal with only state issues. The Equal Economic Opportunity Council is a Federal agency that deals only with employment. The F.B.I. says they deal only with criminal violations. The Attorney General says they are not in a position to provide assistance. Sheri Freeman, who oversees tribes of self-governance, was of no help. The Bureau of Indian Affairs, an agent told me, is not to serve the general public.

It is unconscionable when public officials dance around legitimate issues presented to them by citizens seeking redress. I want to help my constituents! Again, where do I go to get help as it concerns civil rights violations on a reservation?

Secretary Wayman Babby
September 27, 1994
Page Two

Enclosed is the latest letter from a constituent. In addition, I've enclosed pages from the Lummi Code Book, and a Sheriff's report which I've already copied to Attorney General Janet Reno, Senator Slade Gorton and Senator Patty Murray.

Sincerely,

Marlene Dawson

Marlene Dawson
Whatcom County Council Member

c: Slade Gorton, U.S. Senator
Patty Murray,U.S. Senator
Janet Reno, Attorney General
Ramona Reeves, Council Clerk
AB 94-390

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MEMBERSHIP FEE $20.00
Concerned? Send contributions to the
Fee Land Owners Association,
177 Telegraph Road, Suite 647,
Bellingham, WA 98226

NOOKSACK RIVER WATER RIGHTS

The following is a belated account of an informative Water Rights presentation given by Tom Anderson, Manager of the PUD #1, and Chair of the Nooksack Water Users Steering Committee, [composed of the cities of Bellingham, Lynden, the Agricultural Preservation Committee, and the PUD], to the Whatcom County Council at a special meeting on Tuesday, Feb. 13.

The Steering Committee got together because they considered it necessary to address the Tribes' intent to establish a senior "reserved right" claim to Nooksack Basin water resources (to prepare for litigation should that be inevitable), to protect existing surface water rights, and ensure a predictable water supply for the future.

Anderson touched on many topics in his 45 minute talk. Of special interest were his comments on negotiations vs. litigation with the Tribes over water rights issues. The Steering Committee, he said, recommends negotiations for several reasons. An adjudication would be enormously expensive (the Yakima adjudication cost about $12 million according to Anderson), take several years to be resolved, and while it would determine water rights, would not provide for enforcement of those water rights, or settle allocation issues.

Anderson does not feel an adjudication would be permitted to happen under the current Governor and his administration. A different mind-set in the legislature and Governor's office with a change at election time, might make this more of a possibility. The Steering Committee feels that no matter what course of action is finally taken, the State should assist with funding for the solution.

Anderson said that the Nooksack Steering Committee is committed to participating in a forum that seeks to include all the local interests and the Tribes. The Lummi Tribe has so far refused to attend. Currently, the best forum for the purpose, he said, is the Nooksack Initiative, led by the Dept. of Ecology. Most of the Steering Committee members are also on the Nooksack Initiative, representing their constituency.

Anderson encouraged anyone who does not feel represented on water issues to contact the Nooksack Initiative and get involved.

Another issue Anderson touched on was the In-Stream Flows set by the State as a way to protect in-stream resources and that are based on optimum flow rates for fish. The Steering Committee believes they should be re-evaluated and set for minimum flow rates for fish. He said this process would be lengthy and costly as well.

An item of interest regarding the Tribes was about the Tenaska co-gen plant, wherein Tenaska asked for water from the PUD. In order to build, Tenaska had to go through the SEPA process. They did and were approved to build. The Tribes appealed the decision. The Tribes withdrew their objections and the plant was allowed to proceed after Tenaska purchased property on the Tribes behalf in the South Fork Valley that came with water rights. The water rights were dedicated to the Tribes and the property was put in Trust for Fish Mitigation efforts to an amount of about $1 million. No new industry has built in Whatcom County since then.

Some reactions to Anderson's presentation follow:

IS IT REALLY ABOUT SAVING WATER AND FISH? OR A MEANS TO GAINING POWER, WEALTH, AND RESOURCES?

During Council questioning for clarification, Councilmember Kathy Sutter termed the $1 million transfer "blackmail".

During the question and answer period after the presentation, Jeff McKay, President of the Neptune Beach Water Association noted that he believes that the Nooksack fish issue is a very red herring -- that the tribe really wants to sell the water.

McKay also disagreed with Anderson as to whether the County should forget adjudication as a solution. He said that while it may be expensive and time consuming, the adjudication on the Yakima did bring everyone to the table. They were forced to come (including tribes), and stay, or they would be left out and not get anything.

Skip Richards, consultant to Washington Associated Water Systems (WAWS), suggested that if there truly is a water shortage, exploring and investing in long term solutions, such as a dam, or large lowland reservoirs or lagoons to expand storage and alleviate floods would be a more practical use of funds, and eliminate a lot of the disagreement over what is available now.

Overall, it was a very informative presentation to the County Council, and an enlightening evening!

(Ed Note: while adjudications bring all users with water permits to the table, many current agricultural users, including many represented by the aforementioned Agricultural Preservation Committee, do not have water permits and would not be allowed at the table in an adjudication. The State Dept. of Ecology has generally not been processing water permits in the Nooksack basin for over two years.)

(Editor's Note. FLOA had asked repeatedly to become a member of the Dept. of Ecology's Nooksack Basin Initiative group at its inception nearly two years ago, and was rebuffed several times. Now our water associations, who do have permits and water rights, are currently involved in negotiations (at our own expense) with the Lummis, State, and Feds. Ironically, our negotiations have been referred to as a "model," to be used by the DOE and the same groups who denied us!

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P O 1

WATER RESOURCES INVENTORY: PHASE III

DISCUSSION OF ALTERNATIVES

Preparation of this report was financed in part by funds provided by the U.S. Department of Interior Bureau of Indian Affairs

Prepared by:

Jean E. Caldwell
Water Resource Planner
Lummi Indian Business Council

SUMMARY

It is recommended that the Tribe seek funding for the engineering and design of a reservation-wide water system; to be under tribal control. This option will only be effective providing the tribal government takes appropriate steps to fully and competently control land use and growth decisions within the entire reservation area.

While designing the future water system, particular attention should be paid to:

- further determination of the quantity and reliability of groundwater resources;
- upgrading of tribally-owned water systems as a priority over non-tribally owned systems;
- phasing contruction of the water system so that community-owned water systems can be acquired when possible;
- maintenance of tribal control over water development on all levels, including groundwater withdrawal.

If tribal control over water development does not look like it can be so maintained, then:

- serious discussion should be undertaken as to the Tribe's abilities and options for tribal control over development;
- the aquaculture water system should be upgraded independently from the domestic water system;
- the negative option of limiting housing development and industrial growth on the reservation through lack of water facilities should be discussed.

The question is not whether the Tribe should develop a water supply and delivery system, but whether the Tribe can maintain its chosen goals of tribal sovereignty and self-determination with a highly developed utility infrastructure.

As long as the tribal government is committed to enforcement of tribal (as opposed to county) land use codes, zoning, and planning, the water system development is a possibility. If the Tribe feels that operation and maintenance of this system is impossible, or that the side effects of increased real estate speculation on the reservation are too severe, or uncontrollable, then the negative alternative (neglect of water development) should be explored. However, if the Tribe neglects water development, it is very possible that a non-tribal water district will form, or continue to plan for such development anyway.

INTRODUCTION

As part of an ongoing effort to secure tribal water rights and to plan for water resource development, the Bureau of Indian Affairs has been funding a water resources inventory program for the past several years. Funding and implementation of this program have been phased:

Phase I: Identification of the surface and ground water resource base for the reservation. A Groundwater Investigation of the Lummi Indian Reservation Area, Washington, USGS 1974. Surface Water Investigations of the Lummi Indian Reservation, USGS 1974.

Phase II: Identification of the water resource demand on the Lummi Reservation, both now and for the future. Water Resource Inventory Phase II: Projected Water Demand and Existing Facilities, Lummi Planning Office, 1980.

Phase III: The discussion of alternative plans and programs to satisfy the anticipated water resource demand as identified in Phase II.

This report represents a completion of Phase III of the water resources inventory program. It is intended to facilitate discussion of, and decision-making about, alternative plans to supply the water needs on the Lummi Indian Reservation. The estimation of quantities of water by use in this document in no way limits any further appropriation of water or water rights by the Lummi Indian Business Council.

The Lummi Planning Office respectfully submits this Water Resources Phase III Report to the Lummi Indian Business Council.

POLICY QUESTIONS

There is a policy conflict in the development of a water system that the Tribe will have to address directly. There are two stated tribal goals that could come into conflict. One goal is to supply water to the reservation in order to encourage and enable Indian families and businesses to flourish there. Another goal is to minimize the growth of non-Indian land ownership and residence on the reservation. In theory, utility extensions can be used as a method of growth control. If a municipality decides that an area should not be developed, a decision limiting utility extensions in an area will partially limit development, even if it will not stop it. Similarly, if a municipality desires an area to be fully "built-up" before extensions to more rural areas are granted, utility service hook-ups can be used to enforce this.

Continued reliance on groundwater for domestic use may be a partial answer to growth control on the reservation. Presently, much of the groundwater is supplying community water systems that are not under tribal control. One of the problems with the current water situation is that some effective non-Indian water systems, such as the Sandy Point Improvement Company System, is using groundwater, while the Lummi Water District pays for imported water from Bellinham.

Aquisition of these community water system's assets, while appropriate and fair, would be a great expense for the Tribe. While this may eventually have to happen as the comprehensive water system is developed, the benefits of acquiring water systems that do not serve Indian homes are questionable in the short term.

The tribal planning process is in the unique position of trying to maximize water available to tribal members (especially for new construction), design a fair and impartial water supply system, and not encourage large non-Indian housing developments.

The pressure exists on the reservation to develop the water delivery system. Indian and white property owners, and potential property developers, are aware of the need for water. Whatcom County Water District #15 and #11, in spite of complex litigation about their rights to exist at all, are developing plans to bring more water (and thus more non-Indian development), to the reservation. The Tribe, also, with common sense and good planning, has based a good portion of its case in the sewer lawsuit, Lummi Indian Tribe v. Hallauer, on the fact that the Tribe plans to serve all homes, Indian and non-Indian, with sewer service, to the limits of the reservation sewer system as it is designed. This makes it difficult, but not impossible, for the Tribe to limit certain kinds of development by limiting other utility extensions. Like all planning or zoning restrictions, water service restrictions will be effective only if parties affacted know of them in advance, and all parties are treated fairly.

The Tribe may have to take steps to control growth on the reservation directly, and be prepared for the inevitable legal conflict. One possible limiting

factor could be the presently designed sewer capacity. The Tribe could define a maximum number of homes per year to be built on the sewer lines.

Within this limit, a preference schedule could be developed enforcing that Indian housing, or low-income Indian housing, be the first priority for building permits. Any kind of development limit means that the tribal government would have to be prepared for the inevitable legal test cases of the Tribe's ability to enforce it.

Another method to control development would be to enforce the need for a tribal building permit, as well as a county building permit. Possibly, under the Lummi Land Use Codes, building permits could be granted on an Indian preference schedule. This process would also take considerable enforcement efforts, and could result in lawsuits with the County and with developers.

It is important that the reservation continue as a primarily Indian-owned land base. The Tribe can and must tolerate non-Indian presence on the reservation. However, it is crucial that in the provision of all these comprehensiv services, Indians and tribal members be the primary parties that benefit. If the comprehensive services that are being provided do not benefit these groups, the Tribe would do well to not implement its comprehensive water development and let partial growth control be a secondary effect of lack of water service, low water pressure, and lack of fire protection.

Indian development does not have to look like, or be like, the same development controlled by non-Indians. The problem is how to enforce it. Economic development, and fishing opportunities are increasing the number of Indian facilies wishing to move onto the reservation. Pressure is increasing on the Tribe to allow more development of Indian homes and businesses, which need bett water service. On the other hand, in the past, the heirship situation and lack of sewer and water services have determined many of the land values and land use patterns on the reservation. As sewer and water services are provided two of three former controls which have limited non-Indian land aquisitions are removed. The most open way to encourage Indian preference development is to pass and enforce laws in the Land Use Code which encourage land development along the patterns that suit the needs of the Tribe; and not to develop the water system until the other protections exist to keep the reservation primarily Indian-owned.

DEPARTMENT OF HEALTH & HUMAN SERVICES

cc: Skip summer attorney
Marc

Memorandum

Date May 17, 1989

From Ernest J. Ishem, Jr.
Assistant Regional Counsel

Subject Lumi Payroll Tax Ordinance

To William Picotte, Service Unit Director
Northwest Washington Service Unit

You advised us that the Lumi Indian Business Council, by Resolution No. 89-56, has adopted a Payroll Tax Ordinance requiring individuals employed on the reservation to pay 2% of their gross pay to the Tribe. The ordinance which is effective June 1, 1989, requires employers (business or governmental entities) operating on the reservation, to withhold the 2% tax from their employees' pay. You have asked whether the Tribe can enforce this ordinance against IHS employees. In our opinion they cannot.

DISCUSSION

Article VI, Section 1 of the Constitution and By-Laws of the Lumi Tribe provides in pertinent part as follows:

> Section 1. The Lumi Business Council shall have the following powers, subject to any limitation imposed by Federal statutes or by the Constitution of the United States.
>
> * * * * *
>
> (1) To safeguard and promote the peace, safety, morals, and general welfare of the Lumi Reservation by regulating the conduct of trade and the use and disposition of property upon the reservation, provided that ordinances directly affecting nonmembers of the tribe shall be subject to the approval of the Commissioner of Indian Affairs, ...
> (emphasis added)

You have advised us that the Payroll Tax Ordinance has not been submitted to the Department of the Interior for approval.

In Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894, 903; 455 U.S. 130, 141 (1982), the Supreme Court, while upholding a tribe's right to tax nonmembers generally, noted that, "the Tribe's authority to tax nonmembers is subject to constraints not imposed on other governmental entities: the Federal

Government can take away this power, and the Tribe must obtain the approval of the Secretary [of the Interior] before any tax on nonmembers can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent wit national policies."

In light of the court's holding in Merrion v. Jicarilla Apache Tribe, supra, and Article VI Section 1(l) of the Tribe's Constitution and By-Laws, it is our opinion that the tribe's tax ordinance may not be enforced against nonmembers of the tribe unless and until the ordinance is approved by the Department of the Interior.

With respect to Commissioned Officers (except members of the Lumi Tribe), it is our opinion that they cannot be taxed even if the ordinance is approved. The Soldiers and Sailors Civil Relief Act of 1940, 50 U.S.C. App. § 504, et seq. and § 574 protects members of the armed forces from imposition of any form of income tax when imposed by other than their state of domicile while they are on active duty. Those provisions are made applicable to commissioned officers of the Public Health Service by 42 U.S.C. § 213 (e).

You may share this opinion with the Tribe. If a representative of the Tribe cares to discuss the contents of this opinion I can be reached at (206) 442-7309.

dummi Tribe is ignoring their legal counsel's advice

FLOA FLYER

MEMBERSHIP FEE. $20.00
Concerned? Send contributions to the
Fee Land Owners Association,
177 Telegraph Road, Suite 64",
Bellingham, WA 98226

NOOKSACK RIVER WATER RIGHTS

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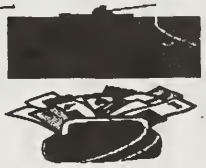


IS IT REALLY ABOUT SAVING WATER AND FISH?
OR A MEANS TO GAINING POWER, WEALTH, AND RESOURCES?

During Council questioning for clarification, Councilmember Kathy Sutter termed the $1 million transfer "blackmail".

During the question and answer period after the presentation, Jeff McKay, President of the Neptune Beach Water Association noted that he believes that the Nooksack fish issue is a very red herring -- that the tribe really wants to sell the water.

McKay also disagreed with Anderson as to whether the County should forget adjudication as a solution. He said that while it may be expensive and time consuming, the adjudication on the Yakima did bring everyone to the table. They were forced to come (including tribes), and stay, or they would be left out and not get anything

Skip Richards consultant to Washington Associated Water Systems (WAWS), suggested that if there truly is a water shortage, exploring and investing in long term solutions, such as a dam, or large lowland reservoirs or lagoons to expand storage and alleviate floods would be a more practical use of funds, and eliminate a lot of the disagreement over what is available now

Overall, it was a very informative presentation to the County Council, and an enlightening evening!

(Ed Note: while adjudications bring all users with water permits to the table, many current agricultural users, including many represented by the aforementioned Agricultural Preservation Committee, do not have water permits and would not be allowed at the table in an adjudication. The State Dept. of Ecology has generally not been processing water permits in the Nooksack basin for over two years.)

(Editor's Note FLOA had asked repeatedly to become a member of the Dept. of Ecology's Nooksack Basin Initiative group at its inception nearly two years ago, and was rebuffed several times. Now our water associations, who do have permits and water rights, are currently involved in negotiations (at our own expense) with the Lummis, State, and Feds. Ironically, our negotiations have been referred to as a "model," to be used by the DOE and the same groups who denied us!

Important dates:

September 14, 1996(SAT) - Lummi Consititutional Amendment Election
September 17, 1996(TUE) - National/State/Local Primary Elections:

Tribal Endorsements for the 42nd legislative & 2nd congressional seats:

U.S. Congress, 2nd District	Joe Bowen
Legislative Position 1	Jim Cozad
Legislative Position 2	Kelli Linville
State, Governor	Jay Inslee
State, Lieutenant Governor	Paull H. Shinn
Commissioner of Public Land	Jennifer M. Belcher
Superintenent of Public Instruction	Raul De La Rosa
Insurance Commissioner	Debra Senn
Attorney General	Christine Gregroire
State Auditor	Brian Sonntag

Use this list when voting by either Absentee or going to the polls. ✓

Vote ✓

Call Jim Lafferty
758 3737

Sept. 14th

Lummi Tribal Constitutional Amendment

Election 96

Lummi People

WE, the Lummi People, have succeeded in gaining control of our Constitution, by voting the past January to remove the BIA from our constitution amendment process. NOW, for the first time, we are able to amend our constitution without BIA control.

THESE NEXT AMENDMENTS continue the process of eliminating the need for BIA approval of your government authority. They are a vital step toward exerting our sovereign right to self governance. A "YES" VOTE on each of these five amendments will allow the Lummi People to develop laws and regulations to regain control over our lands and resources. Amendment #5 is the most important one in this regard.

REMEMBER TO VOTE on Saturday, September 14th, from 8AM to 8PM, in the Council Chambers.

Friends and Relatives,

I encourage all registered voters to get out and vote on Saturday, September 14th. It's a Tribal election, making our own government regulations.

If we don not vote yes and make this constitutional change, we could be putting ourselves in danger or open to possible danger of outside skeptics.

We need 30 percent of registered voters to turn out for this election otherwise it is no good. We need at least 67 percent "Yes" votes in order for the amendment to pass. If we do not succeed in this election, we will be doing this same election again in the very near future.

The cost of an election is tremendous. The time consumed to prepare for a hearing and informational flyers will be a duplication.

Please get our and "VOTE" on Saturday, September 14th or vote absentee by going to the election office by Friday at 4:30PM (Sept.13th). If you cannot come in and vote call the elections office for a home visit by the election staff and certifying committee. Thank You.

Vela Julius

Lummi Constitution

The following amendments are proposed to Article VI, Section 1 of the Lummi Constitution. (Words crossed out are to be deleted, and words underlined are being added).

Amendment #1:

(f) (1) To levy assessments or licensed fees on nonmembers doing business or obtaining special privileges within the reservation, ~~subject to the approval of the Commissioner of Indian Affairs.~~

Amendment #2:

(h) To employ legal counsel~~, the choice of counsel and fixing of fees to be subject to the approval of the Commissioner of Indian Affairs;~~

Amendment #3:

(j) To exclude from the restricted land of the Lummi Reservation persons not legally entitled to reside therein, ~~under ordinances which shall be subject to the approval of the Commissioner of Indian Affairs;~~

Amendment #4

(k) To promulgate and enforce ordinances, ~~which shall be subject to the approval of the Commissioner of Indian Affairs,~~ governing the conduct of members of the Lummi Tribe, and providing for the maintenance of law and order and the administration of justice by establishing a reservation court and defining its duties and powers;

Amendment #5

(l) To safeguard and promote the peace, safety, morals, and general welfare of the Lummi Reservation by regulating the conduct of trade and the use and disposition of property upon the reservation, including promulgating ~~provided that~~ ordinances that ~~directly~~ affecting nonmembers of the tribe ~~shall be subject to approval of the Commissioner of Indian Affairs;~~

This gentlemen was on his own private beach when Lummi Law and Order accosted him. They said he was trespassing. He has since gotten his property surveyed. A group of tribal members removed his stakes.

This last January, Lummi Law & Order told three tribal members they could cut a cedar boom log on the property of this man's father. The log was secured to protect his bank.

STATEMENT OF JENNIFER A. COLEMAN, ESQ.
September 24, 1996

At English common law, the doctrine of Sovereign Immunity derived from the idea that the "king can do no wrong." Because the acts of the sovereign were the law of the land, it stood to reason that the sovereign could not be made to answer for its acts in court. In our democracy, it has long been believed that the people are sovereign and the government answerable to the people. Thus the individual states and the United States must answer to myriad actions in state and federal courts for violations of law, enforcement of agreements, civil rights violations, infliction of personal injury, etc. Not so Indian Tribes. Somehow, Indian governments have been permitted by Congress to claim a degree of sovereign immunity from suit which grossly exceeds that of the state or federal governments and which defies the rights of non-Indians affected by the acts of Indian governments.

Indian Sovereign Immunity -- the inability to sue Indian tribes -- denies due process to non-Indian U.S. citizens. This is dramatically demonstrated in the case of non-Indians residing on the Allegany reservation of the Seneca Nation of Indians in New York State. Several non-Indian, U.S. citizens, presently face eviction by the U.S. government, from homes they bought and paid for, because Indian Sovereign Immunity has barred them from enforcing land leases and federal statutes securing their property rights.

In a rush to assuage guilt over past inequitable dealings with Native peoples, the U.S. has ignored and trampled on the rights of individuals whose interests are unavoidably intertwined with those of tribal

governments. Individual states do not enjoy the degree of immunity from suit that Indian Nations possess. The United States does not possess the degree of immunity from suit that Indian Nations claim.

Indian Sovereignty and Indian Sovereign Immunity are not the same thing. The right of Indian Nations to self-determination, to self-government, to establish membership criteria, to regulate the use of land and resources, to establish courts, to exercise police powers, etc. would survive even if tribal contracts, or leases, or other legal relationships were judicially enforceable. The United States is no less a sovereign nation because it can be sued.

The gross inequity of Indian Sovereign Immunity is clearly demonstrated by the situation in Salamanca, New York. It is a small city, built mostly on the Allegany Reservation of the Seneca Nation. Federal statutes created 99-year, renewable, leases which permitted and induced non-Indians to build and improve homes and businesses in Salamanca while leasing the underlying land from the Seneca Nation.

By late 1990, approximately 3,300 individual leases had transferred by purchase and assumption to the then occupants. Most were elderly, retired on fixed incomes, and barely middle class. Most had paid-off mortgages. Most counted their homes as their only significant asset. Many were veterans.

Their leases all expired on February 19, 1991. Everyone, including the Nation and the U.S., expected the leases would be renewed pursuant to procedures contained in the leases and enabling statutes.

Instead, in late 1990 Congress forced lessees to either take a lease they did not want or approve, or lose their homes if they refused. Most signed this new lease but only after four separate signing periods, and only after the courts of the United States, including the Supreme Court, refused to hear claims that the new leases violated property rights and subverted renewal expectations of all parties. Most wanted to sign the lease "under protest;" the Seneca Nation said it would treat such as a rejection of the lease. Some, however, refused to sign. They are now being evicted - not by the Seneca Nation - but by the United States Department of Justice. They are being evicted with the assistance of the same courts that refused to hear their claims.

Two acts of Congress created the landlord-tenant relationship between the Salamanca lessees ("Lessees") and the Seneca Nation: the Act of February 19, 1875, ch. 90, 18 stat. 330 ("Act of 1875") and the Act of September 30, 1890, ch. 1132, 26 stat. 558 ("Act of 1890"). [Attachments 1 and 2]

The Act of 1875 provided:

> Section 3. That all leases of land situate within the limits of said villages when established as hereinbefore provided *** shall be valid and binding upon the parties thereto, and upon said Seneca Nation for a period of five years from and after the passage of this act, except such as by their terms may expire at an earlier date; and at the end of said period, or at the expiration of such leases as terminate within that time, said nation through its counselors shall be entitled to the possession of the said lands, and shall have the power to lease the same: ***Provided, however, that at the expiration of said period, or the termination of said leases, as hereinbefore provided, said leases shall be renewable for periods not exceeding 12 years, and the persons who may be at such time the owner or owners of improvements erected upon such lands,***

> ***shall be entitled to such renewed leases, and to continue in possession of such lands, on such conditions as they be agreed upon by him or them and such counselors;*** and in case they cannot agree upon the conditions of such leases, or the amount of annual rents to be paid, then the said counselors shall appoint one person and the other party or parties shall choose one person, as referees to fix and determine the terms of said lease and the amount of annual rent to be paid; and if the two so appointed and chosen cannot agree, they shall choose a third person to act with them, the award of whom, or the major part of whom, shall be final and binding upon the parties; and ***the person or persons owning said improvements shall be entitled to a lease of said land and to occupy and improve the same according to the terms of said award,*** he or they paying rent and otherwise complying with the said lease or said award; ***and whenever any lease shall expire after its renewal as aforesaid, it may, at the option of the lessee, his heirs or assigns, be renewed in the manner hereinbefore provided.***
>
> Section 7. That the courts of the State of New York within and for the County of Cattaraugus, having jurisdiction in real actions, ***and the circuit and district courts of the United States in and for the Northern District [now Western District] of said state, shall have jurisdiction*** of all actions for the recovery of rents and ***for the recovery of possession of any real property within the limits of said villages,*** whether actions of debt, ejectment, or ***other forms of action,*** according to the practice in said court; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions. App. at 119a-122a (emphasis added).

Subsequent to the Act of 1875, the Act of 1890 was passed; it extended the term of the leases and renewals authorized by the Act of 1875 from 12 years to 99 years. It expressly did not amend the Act of 1875 in any

other respect. Two essential elements are expressly established by these statutes: (1) the **right** to renew leases in an equitable manner through negotiation or arbitration and (2) that the lessees **owned the improvements** on the leased land.

For more than a century the lessees, the Seneca Nation, the State of New York and the United States relied on the Acts of 1875 and 1890. The leases granted pursuant to those Acts were repeatedly enforced by the Seneca Nation in the Federal Courts. *See eg. U.S. v. Forness,* 125 F.2d 928 (CA2), cert. denied, 316 U.S. 694 (1942). Congress itself relied on the renewal provisions in the Acts of 1875 and 1890 and the 99-year leases when it enacted special legislation to permit HUD to insure mortgages in the City and Villages: "A mortgage on a leasehold estate covering a one to four-family residence located on the Allegany Reservation . . . is eligible for insurance if the mortgage meets the requirements of this subpart. . . . This section applies only to a mortgage which: Is on a leasehold under a lease with a termination date in February, 1991, which provides for renewal in accordance with the Acts of February 19, 1875 (19 Stat. 330) and the Act of September 30, 1890 (26 Stat. 558)." 24 CFR, ch. 11, §203.43j(a)(2). *See also,* 12 U.S.C. §1709(q). In fact, Congress stated that a mortgagor's failure to take steps to renew his or her lease was "an event of default under the mortgage." 24 CFR §203.43j(b)(2).

In *The Seneca People,* George H.J. Abrams, an enrolled member of the Seneca Nation and an historian and instructor of courses in American Indian History, wrote:

> Two separate pieces of congressional legislation were signed into law on September 30,1890. One sold the remaining Kansas lands of the New York Indians. The second provided for a 99-year lease, beginning in 1892 when the leases were to expire,

> *and an additional renewal period of another 99-years.*

Abrams, *The Seneca People*, Indian Tribal Series/Phoenix (1976) (Library of Congress Catalogue No. 76-19827) (emphasis added).

In 1990, Congress destroyed the renewal rights that all parties had relied upon and instead imposed a new lease on the non-Indian lessees by enactment of the Seneca Nation Settlement Act of 1990, Pub. L. 101-503, 104 Stat. 1292 ("Settlement Act of 1990"). [Attachment 3] That statute was signed by President Bush on November 3, 1990. Pursuant to the Settlement Act, the Seneca Nation has asserted ownership of the improvements on the leased land. [Attachment 7]

The Settlement Act of 1990 authorized payment of $60 million to the Seneca Nation to adjust "past inequities" arising from nominal rents paid to the Seneca Nation pursuant to the leases authorized by the Acts of 1875 and 1890. The Settlement Act was strongly opposed by the Department of the Interior which questioned U.S. liability for past inequities and which did not believe Congress had authority to fix new lease terms. [See, testimony of Walter Mills. [Attachment 4] The Department of the Interior knew that the 1990 Act upset century old expectations and property interests. [See letter dated July 26, 1985 from the Department of the Interior. [Attachment 5] [See also Attachments 6-8] The 1990 Act also ratified and thereby established the terms of new leases. *Fluent v. Salamanca Indian Lease Authority*, 928 F.2d 542 (CA2), cert. denied 502 U.S. 818 (1991). [Attachment 11]

The 1990 Act was pushed through Congress before the individual lessees had even seen the documents it purported to ratify. This expedient legislation, at least, contained a presumed safety valve. Congress expressly provided at 25 U.S.C. §1774g that the Settlement Act of 1990 could be challenged on constitutional grounds:

> Notwithstanding any other provision of law, any action to contest the constitutionality or validity under law of this Act shall be barred unless the action is filed on or before the date which is 180 days after the date of enactment of this Act. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the Western District of New York. App. at 139a.

Prior to expiration of the leases, and within a month of the effective date of the 1990 Act., several hundred lessees commenced a lawsuit in the United States District Court for the Western District of New York to compel arbitration for the terms and conditions of new leases (as required by the 1875 statute) and to declare the 1990 Settlement Act unconstitutional. These claims were dismissed because of Indian Sovereign Immunity.

Notwithstanding explicit language in the 1875 and 1890 statutes, the federal courts held that the lessees had no remedy for the unilateral imposition of leases by the 1990 Act. Further, even though Congress anticipated a Constitution challenge by including §1774g, the Court held that the language of that section was insufficient to waive Indian sovereign immunity. Indian Sovereign Immunity thus prevented U.S. citizens from litigating claims profoundly affecting the ownership, use and occupancy of their homes and businesses.

The courts ruled that the language in the statutes was not clear enough to constitute a waiver of Indian Sovereign Immunity and that the claims could not proceed without the Seneca Nation as a party. The Court of Appeals for the Second Circuit stated: "[Indian] Sovereign immunity may leave a party with no forum for that party's claims. . . . The only branch with authority to provide a forum for resolution of the issues involved here is Congress." *Fluent v. Salamanca Indian Lease Authority, supra* 928 F.2d 542, 547.

Although the courts are closed to suits by lessees against the Nation, they are wide open for the Nation, or the U.S. on behalf of the Nation, to sue lessees. [For eg. see Attachments 9-10] Indian Nations frequently avail themselves of the federal courts to enforce statutory and contractual rights against non-Indians. No court is available to lessees. New York State courts are incompetent to adjudicate Indian land claims, *see, e.g., New York Indians*, 5 Wall. (72 U.S.) 761 (1866). *See also,* Indians, 25 U.S.C. §233 (1983). The Seneca Nation's Peacekeeper Courts do not have jurisdiction over disputes between Indians and non-Indians. New York Indian Law, §46 (McKinney's 1991 Supp.).

The Courts, including the Supreme Court, have held that Indian Sovereign Immunity, unless overtly waived by Congress, may deprive individuals of constitutionally protected property and due process rights. *Santa Pueblo v. Martinez,* 436 U.S. 49 (1978). Power over Indian affairs is committed exclusively to the U.S. Congress. U.S. Const. Art. 1, §8. Congress has plenary power of Indian matters. *Santa Clara Pueblo, supra,* 436 U.S. at 56.

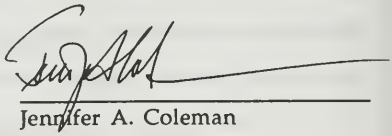
Chief Justice John Marshall, first and most completely announced the doctrine of Indian sovereignty in *Worcester v. Georgia*, 6 U.S. (Peters) 515 (1832). It was also Justice Marshall who expounded the doctrine of judicial review in *Marbury v. Madison*, 5 U.S. (Cranch) 137 (1813). Judicial review, deemed essential to our government's system of checks and balances, ensures that Acts of Congress comport with the Constitution.

Surely Justice Marshall never contemplated the expansion of Indian Sovereignty to an immunity which prevented judicial review of Acts of Congress. But that is the current state of the matter. Effectively, unless Congress explicitly waives Indian Sovereign Immunity, Indian legislation is immune from judicial scrutiny and enforceable only by Indians, regardless of the impact of such legislation on non-Indians.

This result destroys the supremacy of the United States Constitution. U.S. Const. Art. VI, cl. 2. If an Act of Congress is unconstitutional, the race or ancestry of a litigant should not decide whether a court can intervene. It is manifestly unjust and uniquely destructive of the supremacy clause, judicial review, and due process that non-Indians are barred by Indian sovereign immunity from seeking judicial review and construction of Acts of Congress intimately related to their property interests.

As the Court of Appeals, in apparent frustration, recently held: "[T]here is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to those communities whose distinctive 'sovereignty' our country has long recognized and sustained." *Poodry v. Tonawanda Board of Seneca Indians*, 1996 U.S. App. LEXIS 11407, 11487-88 (CA 2 1996). Yet, until Congress acts affirmatively

and explicitly to alter the status quo, this intolerable circumstance will persist. Indian Nations will continue to "use their connection with federal authorities as a sword, while employing notions of cultural relativism as a shield from federal court jurisdiction." *Id.*



Jennifer A. Coleman

Attachment 1

[330] APPENDIX D(1)

United States Statute (Forty-Third Congress, Sess. II, Ch. 90, Act of February 19, 1875)

Feb. 19, 1875

CHAP. 90.—An act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany reservations, and to confirm existing leases.

Leases of lands by Seneca Nation of New York Indians, for railroad purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all leases of land within the Cattaraugus and Allegany reservations in the State of New York, heretofore made by or with the authority of the Seneca Nation of New York Indians, to railroad-corporations, are hereby ratified and confirmed; and said Seneca Nation may, in accordance with their laws a form of government, lease lands within said reservations for railroad-purposes.

Boundaries of certain villages in Allegany reservation.

SEC. 2. That the President of the United States shall appoint three commissioners, whose duty it shall be, as soon as may be, to survey, locate, and establish proper boundaries and limits of the villages of Vandalia, Carrolton, Great Valley, *Salamanca*, West Salamanca, and Red House, within said *Allegany reservation*, including therein, as far as practicable, all lands now occupied by white settlers and such other lands as, in their opinion, may be reasonably required for the purposes of such villages; and they shall cause a return of their doings in writing,

Maps of survey.

together with maps of such surveys and

locations duly certified by them, to be filed in the office of the county clerk of the county of Cattaraugus, in said State, there to be recorded and preserved. The boundaries of said villages so surveyed, located, and established shall be the limits of said villages for all the purposes of this act.

Leases in said villages by Indians, to be valid for five years, &c.

SEC. 3. That all leases of land situate within the limits of said villages when established as hereinbefore provided, except those provided for in the second section of this act, in which Indians or said Seneca Nation, or persons claiming under them are lessors, shall be valid and binding upon the parties thereto, and upon said Seneca Nation for a period of five years from and after the passage of this act, except such as by their terms may expire at an earlier date; and at the end of said period, or at the expiration of such leases as terminate within that time, said nation through its councillors shall be entitled to the possession of the said lands, and shall have the power to lease the same: *Provided, however*, That at the expiration of said period, or the termination of said leases, as hereinbefore provided, said leases shall be renewable for periods not exceeding twelve years, and the persons who may be at such time the owner or owners of improvements erected upon such lands, shall be entitled to such renewed leases, and to continue in possession of such lands, on such conditions as may be agreed upon by him or them and such councillors; and in case they cannot

Renewal of leases.

agree upon the conditions of such leases, or the amount of annual rents to be paid, then the said councillors shall appoint one person, and the other party or parties shall choose one person, as referees to fix and determine the terms of said lease and the amount of annual rent to be paid; and if the two so appointed and chosen cannot agree, they shall choose a third person to act with them, the award of whom, or the major part of whom, shall be final and binding upon the parties; and the person or persons owning said improvements shall be entitled to a lease of said land and to occupy and improve the same according to the terms of said award, he or they paying rent and otherwise complying with the said lease or said award; and whenever any lease shall expire after its [331] renewal as aforesaid, it may, at the option of the lessee, his heirs or assigns, be renewed in the manner hereinbefore provided.

Power of Seneca Nation to lease lands not owned by individuals.

SEC. 4. That said Seneca Nation is hereby authorized, by resolution of its councillors, duly elected according to the laws and system of government of said nation, or in such other manner as said nation in council may determine, to lease lands within said villages to which, by the laws or customs of said nation, no individual Indian or Indians or other person claiming under him or them, has or is entitled to the rightful possession.

Survey of village lands now leased.

SEC. 5. That it shall be the further duty of the said commissioners to cause all lands within such villages now leased, as

hereinbefore mentioned, to be surveyed and defined as near as may be, and to cause the same to be designated upon the maps of such villages hereinbefore mentioned and provided for. All leases of lands within said villages, whether now existing or hereafter to be made under the provisions of this act, shall be recorded in the office of the clerk of said county of Cattaraugus in the same manner and with like effect as similar instruments relating to lands lying in said county outside of said reservations are recorded by the laws of said State of New York. All leases herein mentioned or provided for shall pass by assignment in writing, will, descent, or otherwise in the manner provided by the laws of said State: *Provided, however*, That the rights of Indians in such leases shall descend as provided by the laws of said Seneca Nation.

Recording of leases.

Assignment, devise, descent of leases.

SEC. 6. That all moneys arising from rents under the provisions of this act which shall belong to said Seneca Nation shall be paid to and recoverable by the treasurer of said Seneca Nation, and expended in the same manner and for the same purposes as are other revenues or moneys belonging to said Seneca Nation.

Rents due Seneca Nation, how recovered and applied.

SEC. 7. That the courts of the State of New York within and for the county of Cattaraugus, having jurisdiction in real actions, and the circuit and district courts of the United States in and for the northern district of said State, shall have jurisdiction

Jurisdiction of courts.

Laws of New York.

of all actions for the recovery of rents and for the recovery of possession of any real property within the limits of said villages, whether actions of debt, ejectment, or other forms of action, according to the practice in said courts; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions.

SEC. 8. That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and *bridges* shall be in force within said *villages*, and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them; and all municipal laws and regulations of said State may extend over and be in force within said villages: *Provided, nevertheless,* That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States.

Taxation of Indians.

Approved, February 19, 1875.

Attachment 2

123a

APPENDIX D(2)

United States Statute (Fifty-First Congress, Sess. I, Ch. 1132, Act of September 30, 1890)

CHAP. 1132.—An act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases. September 30, 1890.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever the leases of land situate within the limits of the villages mentioned in the act of Congress entitled '*An* act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases," approved February nineteenth, eighteen hundred and seventy-five, except leases to railroad, shall by the terms of said act be renewable, the same shall; be renewable for a term not exceeding ninety-nine years, instead of the term of twelve years, as therein provided, subject to all other terms and conditions of said act.

Leases of lands by Seneca Nation of New York Indians, to be renewable. Vol. 18, p. 330.

Excepted leases.

Term of renewal. Conditions, etc.

Approved, September 30, 1890.

Attachment 3

(1) the term "1873 Survey Area" means the area which is within the area demarked by the high water line as meandered and the upland boundaries, as shown on the plat map of the 1873 Survey of the Puyallup Indian Reservation, conducted by the United States General Land Office, and filed in 1874;

(2) the term "Secretary" means the Secretary of the Interior;

(3) the term "Settlement Agreement" means the document entitled "Agreement between the Puyallup Tribe of Indians, Local Governments in Pierce County, the State of Washington, the United States of America, and certain private property owners", dated August 27, 1988;

(4) the term "State" means the State of Washington;

(5) the term "Technical Documents" means the 7 documents which comprise the technical appendix to the Settlement Agreement and are dated August 27, 1988;

(6) the term "Tribe" means the Puyallup Tribe of Indians, a tribe of Indians recognized by the United States;

(7) the term "below the mean high water line" in reference to the submerged lands of the Puyallup Riverbed means "below the ordinary high water mark" in that portion of the river not subject to tidal influence and "below the mean high water line" in that portion of the river which is subject to tidal influence; and

(8) the term "on-reservation status" means a status under which Federal laws and regulations, treaty rights, and rights of sovereignty, which define the rights and responsibilities on trust or restricted lands (including rights-of-way and easements running through such lands within a Federal Indian reservation) apply: *Provided*, That such application is not inconsistent with any provision of the Settlement Agreement.

(Pub.L. 101-41, § 12, June 21, 1989, 103 Stat. 89.)

LIBRARY REFERENCES

Indians ⇐9 et seq.
C.J.S. Indians § 67 et seq.
WESTLAW Topic No. 209.

SUBCHAPTER VIII—SENECA NATION (NEW YORK) LAND CLAIMS SETTLEMENT

§ 1774. Findings and purposes

(a) City of Salamanca and Congressional Villages

The Congress finds and declares that:

(1) Disputes concerning leases of tribal lands within the city of Salamanca and the Congressional Villages, New York, have strained relations between the Indian and non-Indian communities and have resulted in adverse economic impacts affecting both communities.

(2) Some of the significant historical events which have led to the present situation include—

(A) beginning in the mid-nineteenth century, several railroads obtained grants or leases of rights of way through the Allegany Reservation without Federal authorization or approval and on terms which did not adequately protect the interests of the Seneca Nation;

(B) after construction of these railroads, Allegany Reservation lands were leased to railroad employees, persons associated with the railroads, residents of the city and farmers without Federal authorization or approval and on terms which did not adequately protect the interests of the Seneca Nation;

(C) none of these leases had Federal authorization or approval and, after the courts ruled these leases invalid, Congress enacted the Act of February 19, 1875 (18 Stat. 330), confirming existing leases of Allegany Reservation lands, authorizing further leasing by the Seneca Nation, and making the confirmed leases renewable for a twelve year period;

(D) the Act of September 30, 1890 (26 Stat. 558), amended the 1875 Act by substituting a renewal term of "not exceeding ninety-nine years" for the original renewal term of twelve years, and

(E) in 1962 the Seneca Nation filed a claim with the Indian Claims Commission against the United States for use of improper lease fees, and in 1977 a settlement was reached regarding such claim, providing for the payment of $600,000 to the Seneca Nation covering the period beginning in 1870 to the end of 1946.

(3) An analysis of historic land values indicates that the payments made under the original lease agreement and under the settlement described in paragraph (2)(E) were well below the actual lease value of the property.

(4) The approaching expiration of the Salamanca and congressional village leases on February 19, 1991, has created significant uncertainty and concern on the part of the city of Salamanca and Salamanca residents, and among the residents of the congressional villages, many of whose families have resided on leased lands for generations.

(5) The future economic success of the Seneca Nation, city, and congressional villages is tied to the securing of a future lease agreement.

(6) The Federal and State governments have agreed that there is a moral responsibility on the part of both governments to help secure a fair and equitable settlement for past inequities.

(b) Purpose

It is the purpose of this subchapter

(1) to effectuate and support the Agreement between the city and the Seneca Nation, and facilitate the negotiation of new leases with lessees in the congressional villages;

(2) to assist in resolving the past inequities involving the 1890 leases and to secure fair and equitable compensation for the Seneca Nation based on the impact of these leases on the economy and culture of the Seneca Nation;

(3) to provide a productive environment between the Seneca Nation and lessees for negotiating the leases provided for under the Agreement;

(4) to provide stability and security to the city and the congressional villages, their residents, and businesses;

(5) to promote the economic growth of the city and the congressional villages;

(6) to promote economic self-sufficiency for the Seneca Nation and its members;

(7) to promote cooperative economic and community development efforts on the part of the Seneca Nation and the city; and

(8) to avoid the potential legal liability on the part of the United States that could be a direct consequence of not reaching a settlement.

(Pub.L. 101-503, § 2, Nov. 3, 1990, 104 Stat. 1292.)

HISTORICAL AND STATUTORY NOTES

Short Title

Section 1 of Pub.L. 101-503 provided that: "This Act [enacting this subchapter] may be cited as the 'Seneca Nation Settlement Act of 1990'."

LIBRARY REFERENCES

Indians ⇐16(3).
C.J.S. Indians § 67 et seq.
WESTLAW Topic No. 209.

§ 1774a. Definitions

For the purposes of this subchapter—

(1) the term "1890 lease" means a lease made by the Seneca Nation which is subject to—

(A) the Act entitled "An Act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and to confirm existing leases" approved February 19, 1875 (chap. 90, 18 Stat. 330); and

(B) the Act entitled to "An Act to authorize the Seneca Nation of New York Indians to lease lands within the Cattaraugus and Allegany Reservations, and

to confirm existing leases" approved September 30, 1890 (chap. 1132, 26 Stat. 558);

(2) the term "Agreement" means the document executed by the Seneca Nation and the city entitled "Agreement between the Seneca Nation of Indians and the City of Salamanca", including the appendix to the Agreement;

(3) the term "city" means the city of Salamanca, New York;

(4) the term "lessee" means the holder of an 1890 lease which either expires in 1991 or is one of the leases listed in document 1 of the Technical Documents, including any lessee who holds an 1890 lease by reason of assignment, inheritance, or other manner as provided by the Act referred to in paragraph (1)(A);

(5) the term "memorandum of understanding" means an agreement between the State and the Seneca Nation pertaining to the payment of the funds to be provided pursuant to this subchapter, which memorandum of understanding reflects an agreement between the Seneca Nation and the State concerning a mechanism and schedule of payments for the funds described in section 1774d(c) of this title;

(6) the term "Secretary" means the Secretary of the Interior;

(7) the term "Seneca Nation" means the Seneca Nation of Indians of the Allegany, Cattaraugus, and Oil Spring Reservations;

(8) the term "State" means the State of New York;

(9) the term "Technical Documents" means the documents which comprise the appendix to the Agreement; and

(10) the term "congressional villages" means the villages of Carrollton, Great Valley, and Vandalia in the State of New York.

(Pub.L. 101-503, § 3, Nov. 3, 1990, 104 Stat. 1293.)

§ 1774b. New leases and extinguishment of claims

(a) New leases

If the Seneca Nation offers new leases in accordance with the Agreement, this subchapter shall apply with respect to the Seneca Nation. The Seneca Nation shall supply copies of such leases to the Secretary and shall certify in writing that it has supplied the Secretary with copies of written offers to all lessees entitled to an offer

(b) Extinguishment of claims

The Seneca Nation shall execute appropriate documents relinquishment all claims against the United States, the State, the city, the congressional villages, and all prior lessees for payment of annual rents prior to February 20, 1991, with respect to all prior and existing leases.

(c) Effective date of leases and relinquishments

(1) The relinquishment of claims against the United States shall be effective upon payment by the United States to the Seneca Nation of the funds provided in section 1774d of this title.

(2) The offers, and any acceptances thereof, referred to in subsection (a) of this section, and the relinquishment of claims against the State, the city, the congressional villages, and all prior lessees for payment of annual rents referred to in subsection (b) of this section shall not be binding on the Seneca Nation until after the later of the dates on which (1) Congress, or (2) the legislature of the State appropriates the amount of funds set forth in section 1774d of this title or the Seneca Nation and the State agree upon a schedule and mechanism for payments for funds pursuant to section 1774d(c) of this title. Such agreement shall render the offers, acceptances and the relinquishment effective so long as the payments are made as agreed upon by the Seneca Nation and the State.

(Pub.L. 101-503, § 4, Nov. 3, 1990, 104 Stat. 1294.)

LIBRARY REFERENCES

Indians ⇐16(3).

C.J.S. Indians § 98.

WESTLAW Topic No. 209.

§ 1774c. Responsibilities and restrictions

(a) Seneca Nation

The Congress finds that the Seneca Nation is solely responsible for negotiation of the leases under the Agreement in its own interest and approval of any such lease by the United States is not required.

(b) Lessees

The Congress finds that—

(1) the lessees of leases with the Seneca Nation are responsible for representing their own interest in lease negotiations with the Seneca Nation; and

(2) nothing in this subchapter shall be construed to prevent the lessees from collectively negotiating with the Seneca Nation regarding such leases, whether through informal groups or as delegations formally sanctioned by either the State or local governments.

(c) United States

(1) The United States shall not serve in a capacity to approve leases of the Seneca Nation.

(2) Federal funds may not be obligated or expended, directly or indirectly, for annual payments under any such lease, except for funds that may be available under a conventional, nationwide program.

(d) State

(1) The State shall not serve in a capacity to approve leases of the Seneca Nation.

(2) State funds may not be obligated or expended, directly or indirectly, for annual payments under any such lease.

(Pub.L. 101-508, § 5, Nov. 5, 1990, 104 Stat. 1296.)

LIBRARY REFERENCES

Indians ⇐16(3).
C.J.S. Indians § 67 et seq.
WESTLAW Topic No. 209.

NOTES OF DECISIONS

Lease renewal 1

1. Lease renewal

Federal enactment of 1990 recognizing validity of agreement between Seneca Nation and city for leasing of Indian land did not require the Nation to negotiate new or renewed lease terms with individual lessees other than with respect to the specific lease referred to in the agreement between the city and the Nation. Fluent v. Salamanca Indian Lease Authority, W.D.N.Y. 1994, 847 F.Supp. 1046.

§ 1774d. Settlement funds

(a) In general

In recognition of the findings and purposes specified in section 1774 of this title, the settlement funds provided pursuant to this subchapter shall be provided by the United States and the State. The Secretary may not obligate or expend funds provided under subsection (b) of this section until the Secretary determines that there is an agreed upon and signed memorandum of understanding.

(b) Funds provided by United States

(1) Cash payment

The Secretary shall pay to the Seneca Nation the amount of $30,000,000, which is the Federal share of the cash payment to be managed, invested, and used by the Nation to further specific objectives of the Nation and its members, all as determined by the Nation in accordance with the Constitution and laws of the Nation.

(2) Economic development

(A) In addition to the amount provided under paragraph (1), the Secretary shall pay to the Seneca Nation the amount of $5,000,000 to be used for the economic and community development of the Seneca Nation, including the city of Salamanca, which is an integral part of the Seneca Nation's Allegany Reservation. Such amount shall be deposited by the Secretary, administered, and disbursed in accordance with subparagraph (B).

(B)(i) The sum of $2,000,000 shall be deposited in a separate interest bearing account of the Seneca Nation. The account shall be administered, and the principal and interest thereon disbursed, by the Seneca Nation in accordance with a plan approved by the Council of the Seneca Nation to promote the economic and community development of the Seneca Nation. Until the principal is expended pursuant to such plan, the income accruing from such sum shall be disbursed to the treasurer of the Seneca Nation on a quarterly basis to fund tribal government operations and to provide for the general welfare of the Seneca Nation and its members. The Seneca Nation may in its discretion add the accrued income to the principal.

(ii) The sum of $3,000,000 shall be deposited in an escrow account which shall be owned by the Seneca Nation. The escrow agent shall be selected by agreement of the Seneca Nation and the city. The escrow account shall remain in existence for a period of ten years from the date on which the principal is deposited or until all payments provided for under section V.D. of the Agreement have been made. The escrow account shall be held and disbursed for economic and community development as set forth in section V.D. of the Agreement. Upon the expiration of the ten-year period, the $3,000,000 principal shall be disbursed in accordance with a plan approved by the Council of the Seneca Nation to promote the economic and community development of the Seneca Nation.

(c) Funds to be provided by the State

The State, in accordance with its laws and regulations shall provide the sum of $16,000,000 in cash payments and $9,000,000 for economic or community development subject to the provisions of the memorandum of understanding.

(d) Time of payments

The payments required by this section on the part of the United States shall be made within 30 days of the Secretary's determination that the Seneca Nation has complied with section 1774b of this title, or upon the availability of the amounts necessary to carry out this subchapter, if such determination has previously been made. If the Secretary determines that the Seneca Nation has not complied with section 1774b of this title, he shall advise the Seneca Nation in writing of all steps it must take to comply.

(e) Limitation

The only amounts available to carry out this subchapter shall be those amounts specifically appropriated by the Congress or the legislature of the State to carry out this subchapter.

(Pub.L. 101-602, § 6, Nov. 3, 1990, 104 Stat. 1296.)

LIBRARY REFERENCES

United States ⇐105.
C.J.S. United States §§ 143, 155.
WESTLAW Topic No. 393.

§ 1774e. Conditions precedent to payment of United States and State funds

Amounts may not be expended from—

(1) the $30,000,000 and the $5,000,000 provided by the United States under section 1774d(b) of this title, and

(2) the $16,000,000 and $9,000,000 provided by the State under section 1774d(c) of this title,

until after the authorized officials of the Seneca Nation execute new leases with all lessees who accept the Seneca Nation's offer of a new lease, as filed with the Secretary

under section 1774b(a) of this title, and execute appropriate documents relinquishing all claims for payment of annual rents prior to February 20, 1991, with respect to such leases.

(Pub.L. 101-503, § 7, Nov. 3, 1990, 104 Stat. 1296.)

LIBRARY REFERENCES

United States ⇐105.
C.J.C. United States §§ 143, 155.
WESTLAW Topic No. 393.

§ 1774f. Miscellaneous provisions

(a) Liens and forfeitures, etc.

Subject to subsection (b) of this section, the provisions of section 1407 of this title shall apply to any payment of funds authorized to be appropriated under this subchapter and made to individual members of the Seneca Nation. None of the payments, funds, or distributions authorized, established, or directed by this subchapter, and none of the income derived therefrom, which may be received under this subchapter by the Seneca Nation or individual members of the Seneca Nation, shall be subject to levy, execution, forfeiture, garnishment, lien, encumbrance, seizure, or State or local taxation.

(b) Eligibility for government programs

None of the payments, funds or distributions authorized, established, or directed by this subchapter, and none of the income derived therefrom, shall affect the eligibility of the Seneca Nation or its members for, or be used as a basis for denying or reducing funds under, any Federal program.

(c) Land acquisition

Land within its aboriginal area in the State or situated within or near proximity to former reservation land may be acquired by the Seneca Nation with funds appropriated pursuant to this subchapter. State and local governments shall have a period of 30 days after notification by the Secretary or the Seneca Nation of acquisition or, or intent to acquire such lands to comment on the impact of the removal of such lands from real property tax rolls of State political subdivisions. Unless the Secretary determines within 30 days after the comment period that such lands should not be subject to the provisions of section 177 of this title, such lands shall be subject to the provisions of that section and shall be held in restricted fee status by the Seneca Nation. Based on the proximity of the land acquired to the Seneca Nation's reservations, land acquired may become a part of and expand the boundaries of the Allegany Reservation, the Cattaraugus Reservation, or the Oil Spring Reservation in accordance with the procedures established by the Secretary for this purpose.

(Pub.L. 101-503, § 8, Nov. 3, 1990, 104 Stat. 1296.)

LIBRARY REFERENCES

Indians ⇐9 et seq.
C.J.S. Indians § 67 et seq.
WESTLAW Topic No. 209.

§ 1774g. Limitation of action

Notwithstanding any other provision of law, any action to contest the constitutionality or validity under law of this subchapter shall be barred unless the action is filed on or before the date which is 180 days after November 3, 1990. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the Western District of New York.

(Pub.L. 101-503, § 9, Nov. 3, 1990, 104 Stat. 1297.)

LIBRARY REFERENCES

United States ⇐122.
C.J.S. United States § 192.
WESTLAW Topic No. 393.

§ 1774h. Authorization of appropriations

There is authorized to be appropriated such sums as may be necessary to carry out this subchapter.

(Pub.L. 101-503, § 10, Nov. 8, 1990, 104 Stat. 1297.)

SUBCHAPTER IX—MOHEGAN NATION (CONNECTICUT) LAND CLAIMS SETTLEMENT

§ 1775. Findings and purposes

(a) Findings

Congress finds the following:

(1) The Mohegan Tribe of Indians of Connecticut received recognition by the United States pursuant to the administrative process under part 83 of title 25 of the Code of Federal Regulations.

(2) The Mohegan Tribe of Indians of Connecticut is the successor in interest to the aboriginal entity known as the Mohegan Indian Tribe.

(3) The Mohegan Tribe has existed in the geographic area that is currently the State of Connecticut for a long period preceding the colonial period of the history of the United States.

(4) Certain lands were sequestered as tribal lands by the Colony of Connecticut and subsequently by the State of Connecticut.

(5) The Mohegan Tribe of Indians of Connecticut v. State of Connecticut, et al. (Civil Action No. H-77-434, pending before the United States District Court for the Southern District of Connecticut) relates to the ownership of certain lands within the State of Connecticut.

(6) Such action will likely result in economic hardships for residents of the State of Connecticut, including residents of the town of Montville, Connecticut, by encumbering the title to lands in the State, including lands that are not currently the subject of the action.

(7) The State of Connecticut and the Mohegan Tribe have executed agreements for the purposes of resolving all disputes between the State of Connecticut and the Mohegan Tribe and providing a settlement for the action referred to in paragraph (5).

(8) In order to implement the agreements referred to in paragraphs (5) and (6) of section 1775a of this title that address matters of jurisdiction with respect to certain offenses committed by and against members of the Mohegan Tribe and other Indians in Indian country and matters of gaming-related development, it is necessary for the Congress to enact legislation.

(9) The town of Montville, Connecticut, will—

(A) be affected by the loss of a tax base from, and jurisdiction over, lands that will be held in trust by the United States on behalf of the Mohegan Tribe; and

(B) serve as the host community for the gaming operations of the Mohegan Tribe.

(10) The town of Montville and the Mohegan Tribe have entered into an agreement to resolve issues extant between them and to establish the basis for a cooperative government-to-government relationship.

(b) Purposes

The purposes of this subchapter are as follows:

(1) To facilitate the settlement of claims against the State of Connecticut by the Mohegan Tribe.

(2) To facilitate the removal of any encumbrance to any title to land in the State of Connecticut that would have resulted from the action referred to in subsection (a) of this section.

(Pub.L. 103-377, § 2, Oct. 19, 1994, 108 Stat. 3501.)

Attachment 4

to negotiate new leases with leaseholders and to relinquish claims against the federal government.

Cost to State and local governments

S. 2895 would require that the State of New York pay $25 million to the Seneca Nation, $16 million as a cash payment, and $9 million for community and economic development. These payments would be subject to a memorandum of understanding to be agreed to by the state and the Seneca Nation. The bill also provides that any land subsequently acquired by the tribe may be held in restricted fee status or become part of the Nation's reservation land. If the Nation buys additional land, this could result in loss of property tax revenue to local governments, since the land would become nontaxable. The Nation currently has no plans to purchase large amounts of taxable land, and we estimate that these costs would not be significant.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Marta Morgan, who can be reached at 226–2860.

Sincerely,

ROBERT D. REISCHAUER,
Director.

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 2895 will have a minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The only communication received from the Executive Branch on S. 2895 was in the form of testimony from witnesses for the Department of the Interior. The prepared statement of Walter R. Mills, Deputy to the Assistant Secretary—Indian Affairs, Department of the Interior follows:

STATEMENT OF WALTER R. MILLS, DEPUTY TO THE ASSISTANT SECRETARY—INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Good morning, Mr. Chairman, and members of the Committee. I am pleased to be here to present the views of the Department on S. 2895, the "Seneca Nation Settlement Act of 1990".

S. 2895 seeks to address past inequities, to extinguish all prior claims of the Seneca Nation by making it whole, and to allow lease renewals. I want to commend the Seneca Nation, the City of Salamanca, and members of the New York Congressional delegation for their efforts to develop a consensus solution to the leasing of Seneca lands. While we support efforts to resolve the issues between the Seneca Nation and the City of Salamanca, New York, the Administration strongly opposes S. 2895.

Section 2 of the Act of February 19, 1875 (18 Stat. 330) authorized the leasing of certain Seneca lands within the Allegany Reservation, and an 1890 amendment to the 1875 Act (26 Stat. 558) provided that such leases could be renewed for a 99 year term.

Approximately 2,500 99-year leases of Seneca lands within the villages established under the 1875 act (primarily within the City of Salamanca, New York) will expire in February 1991. Each of the leases provides for an annual payment of three dollars or less, and lump-sum payments are now being made by the City directly to the Tribe, pursuant to the Act of August 14, 1950 (64 Stat. 442).

The purpose of the proposed Act appears to be to settle past inequities effected against the Seneca Nation resulting from the 99-year leases approved by Congress pursuant to the 1875 Act. Absent legislation, the lessor Seneca Nation and the non-Indian lessees will have to go to arbitration to try and reach an agreement for further leasing. The Seneca Nation could rightfully demand fair market rental value, and the arbitrator could not fairly allow anything less. However, due to a depressed economy in the Salamanca area, it is not expected that many of the lessees could afford to pay fair market rental.

The Administration strongly opposes S. 2895 for the following reasons:

(1) First and most fundamentally, the United States is being asked to commit $35 million as compensation to the Seneca Nation for a lease arrangement approved 100 years ago by an Act of Congress.

(2) It is not clear that the Federal government is liable under the terms of the lease arrangement. S. 2895 incorrectly states the Federal government is potentially liable for its action in this matter.

(3) There is no justification for how the $60 million in compensation was derived or the basis for the amount of the contributions by the United States and the State of New York.

(4) S. 2895 fails to adequately address the market sensitivity of future lease payments between the Seneca Nation and individual lessees. This approach could only contribute to problems in the future.

(5) The Executive Branch was not a party to the negotiations and cannot be expected to support a settlement that requires the commitment of significant federal funds. This could set an adverse precedent for addressing other Indian issues.

At the outset it should be understood that it is not clear whether the United States could be held legally liable for the low rental rates for the use of tribal property. Section 2(b)(8) of the bill incorrectly states that the U.S. risks liability if S. 2895 is not enacted.

Section 2(a)(3) makes reference to an analysis of historic land values which indicates that the Nation was paid rental that was "well below the actual lease value of the

Defendant Seneca Nation's Exhibit "9"
413

property." We are, of course, aware of the Stiglitz Report which the Nation submitted to Mr. Houghton on October 25, 1989. Professor Stiglitz provided an abundance of figures with regard to rental values. The Department has always sought to establish some concrete basis for payment such as rental or sale value per acre at a given time in order to reach a total figure for a land claims settlement. Here, we find none. This should be clarified for the record.

In addition, the bill does not establish the basis upon which the proportionate financial burdens of responsibility have been divided between the United States and New York.

We are also confused over the language of section 2(a)(2)(E) which states that the Seneca Nation filed a claim against the United States "for use of improper lease fees. . . ." We are unclear as to the purpose of this subsection. We recommend that this subsection be deleted or reworded for the sake of clarity.

Finally, S. 2895 does not provide for a conclusive settlement of the issues between the Seneca Nation and the City of Salamanca, New York. For example, the bill does not address the ownership of improvements at Salamanca.

This concludes my prepared testimony, and I will be happy to respond to any questions the Committee might have.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that enactment of S. 2895 will not result in any changes in existing law.

O

Defendant Seneca Nation's Exhibit "3".

Attachment 5

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

BIA.IA.0603 July 26, 1985

Honorable Morris K. Udall
Chairman
Committee on Interior and Insular Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is our response to your April 25, 1985 request for an opinion on the nature of the rights, if any, created by legislation authorizing the Seneca Nation to lease land in Salamanca, New York on its Allegany Reservation. There are approximately three thousand leases which come up for renewal in 1991. Our conclusion is that the Secretary of the Interior has no responsibility for approval or renewal of these leases. The pertinent legislation, however, provides a method for resolving disputes which arise over the renegotiation of the renewal terms.

The United States acknowledged certain land in New York to be the property of the Seneca Nation by the 1794 Treaty of Canandaigua. 7 Stat. 44. It also guaranteed the Senecas unrestricted "use and enjoyment" of what, through later treaties, became known as the Allegany and Cattaraugus Reservations. In the mid-nineteenth century, railroad companies and settlers leased certain parts of these reservations from the Senecas, and these leases were purportedly ratified by New York State. A New York court subsequently found them invalid.

On February 19, 1875, in response to the court decision, Congress enacted the first legislation dealing with leasing on the Allegany Reservation. 18 Stat. 330. Section 1 of the act ratified leases to railroads which had been made in accordance with Seneca law. In addition, it authorized, without conditions, further leases for "railroad purposes".

Section 2 of the act required three presidential commissioners to survey and establish boundaries for six villages within the Allegany Reservation. Leases within these villages, including Salamanca, were declared valid and binding on the parties for no more than five more years. After that time, in 1880, the leases terminated except for a right of renewal in the owner(s) of any improvements for no more than twelve years. In 1890, Congress amended the 1875 act to provide a renewal term of no more than 99 years. 26 Stat. 558.

The act provides that the owners of the improvements on the parcels, who in this case are generally the lessees, shall have the right to the renewal option. This implies that they must make it known that they desire to renew their leases. Once this occurs, the lessee and the Seneca Nation must agree on new terms for the renewal period. If the parties cannot agree, each shall appoint a referee to work together to set the terms. If the referees cannot agree, they shall choose a third referee and the three shall, by majority decision, set the terms. The act places no restrictions on the terms except that the leases shall be renewable for a period not to exceed 99 years. 26 Stat. 558

There are no provisions for Secretarial approval or involvement in the process of setting the terms for renewal leases. It is noteworthy that an amendment was offered and rejected by the Senate in 1875 which would have required that "all leases now made or hereafter to be made pursuant to this Act shall be subject for their validity to the approval of the Secretary of the Interior". 3 Cong. Rec. 919. Originally, the monies received for these leases were paid directly to the Seneca treasurer. In 1901, as a result of irregularities in the accounts of the treasurer, Congress authorized payment of the lease income to the U.S. Indian agent for the Seneca Nation. 31 Stat. 819. The agent was required to report annually to the Commissioner of Indian Affairs. In 1950 the responsibility was transferred back to the Seneca Nation treasurer. 64 Stat. 442. Consequently, it is our opinion the United States currently has no responsibility with respect to these leases.

The 1950 legislation also provided that the City of Salamanca, if authorized under New York law, could make annual payments on behalf of all lessees within the city to the Seneca Nation. This was to avoid the cancellation of individual leases for non-payment of rent. The city is continuing to make a lump-sum payment for all leases within the city each year.

With respect to the 50-year leases issued in recent years and referenced in your letter, we have no specific information about such leases. The 1950 amendment to the original legislation authorized the Seneca Nation to issue leases to all areas within their reservation even if outside the villages "for such purposes and such periods as may be permitted by the laws of the State of New York." As indicated above, however, there is no requirement for approval by the Secretary of the Interior or the Bureau of Indian Affairs.

If you have any further questions, please feel free to contact us.

Sincerely

Marian Blank Horn
Principal Deputy Solicitor

Attachment 6

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
EASTERN AREA OFFICE
1951 Constitution Avenue NW.
Washington, D.C. 20245

IN REPLY REFER TO:
BCCO #2079

JUL

Mrs. Candace M. Brown
35 Wildwood Avenue
Salamanca, New York 14779

Dear Mrs. Brown:

This office has been requested to respond to your June 12 letter to President Reagan dealing with the future of the town of Salamanca.

In attempting to respond to your concern, a brief explanation of our relationship with the Seneca Nation is needed. The United States does not hold title to the land (in trust) for the Seneca Nation. Since the United States is not the trustee of the Seneca lands, our role in their administration arises through the power of the Constitution and through general statutes such as the Non-Intercourse Act of 1834.

The Congressional Act of August 14, 1950 permitted the Seneca Nation to directly exercise certain functions including the leasing of lands. This legislation was viewed as furthering the policy of enhancing tribal control of their resources.

Further, the Act of September 14, 1961 removed federal control over rights-of-way on the Senecas' lands and removed a fiscal limitation on distribution of rental income.

The Acts of August 1950 and September 1961 have sharply reduced federal control and supervision of these leases and has placed their administration upon the Seneca Nation.

We are aware of the problem now being experienced by the Tribe and the residents of Salamanca and we sympathize with the situation that currently exists. We are confident that the Seneca Nation and the residents of Salamanca through their representatives will be able to resolve the issues before them to the best interests of all parties and to insure the continued prosperity of the Area.

Sincerely,

B. D. Ott
Area Director
Eastern Area Office

Attachment 7

The Seneca Nation of Indians

1490 Rt. 438
IRVING, NEW YORK 14081
Phone (716) 532-4900
Phone (716) 532 4907
Fax #(716) 532 9132

P.O. Box 231
SALAMANCA, NEW YORK 14779
Phone (716) 945-1790
Fax #(716) 945 3917

PRESIDENT - Calvin "Kelly" John, Rt. 417, P.O. Box 213, Steamburg, NY 14783
CLERK - Maribel Printup, P.O. Box 533, Salamanca, NY 14779
TREASURER - Dennis M. Loy, P.O. Box 26, Mile Block Road, Lawtons, NY 14091

October 21, 1991

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. and Mrs. Dayrll Wetherby
North Nine Mile Rd.
Allegany, NY 14706

RE: VANDALIA LEASE NO. VA-05002
(Old Lease No.: G 259.6)

Dear Mr. & Mrs. Wetherby:

On Monday, April 29, 1991, your present lease was signed and executed by both respective parties. The above document has since been filed and recorded also at the Office of the Secretary of the Interior in Washington, DC. We are now in the process of complying with the provisions as set forth in the Seneca Settlement Act of 1990.

In response to your removal of the house recently from the above leased premises, the Nation considers that action to be in violation of federal law, as well as in violation of your lease. Under fundamental principles of property law, improvements attached to land -- like a home -- belong to the owner of the land, unless there is an express agreement to the contrary.

We are also informed that you removed the house without securing any required permits regarding crossing bridges, electrical safety and the like. This demonstrated your disregard for the law, as well as for the safety of the community at large.

In addition, your removal of the house left a hole in Nation lands which has not been adequately filled in by you. This, too, endangers the Reservation population.

Since you are in default of the lease, you are hereby given written notice to commence within 30 days actions to cure that default by restoring the premises to their original condition, usefulness and value. Failure to commence actions to cure your default within 30 days of this notice, and to complete the cure within 90 days of this notice, will result in termination of your lease by the Nation. Until that time, no transfer of property can be made.

Sincerely,

Calvin John
President

Attachment 8

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DON NICKLES, OKLAHOMA

PATRICIA M. ZELL,
STAFF DIRECTOR/CHIEF COUNSEL
DANIEL N. LEWIS, MINORITY STAFF DIRECTOR

United States Senate
SELECT COMMITTEE ON INDIAN AFFAIRS
WASHINGTON, DC 20510-6450

February 21, 1992

The Honorable Alfonse M. D'Amato
United States Senate
Washington, D.C. 20510

Dear Al:

I am writing in response to your letter requesting that the Select Committee on Indian Affairs conduct a hearing on the rights and obligations of the parties under the Lease Agreement between the Seneca Nation and the City of Salamanca.

As you know, at the request of the parties, this Agreement was ratified by the Congress in Public Law 101-503 as a part of a settlement package involving significant payments by both the United States and the State of New York in compensation for losses sustained by the Seneca Nation over the past 100 years.

The Agreement that was entered into by the City of Salamanca and the Seneca Nation was fashioned as a result of several years of very intense and at times acrimonious negotiations. There was hard negotiating on both sides of the table, and the Agreement that was reached was regarded by both sides as the best that could be achieved. Unfortunately, not every issue between the parties could be resolved.

One issue that was left open was the question of ownership of improvements on the land. That was an intentional decision which is reflected in the Agreement and in the lease terms. In the course of the negotiations, the Seneca Nation asserted ownership of the improvements and sought a rental rate based on such ownership. The negotiators for the City would not agree to the claim of ownership. When it became clear that the rental rate sought by the Seneca Nation was beyond the capacity of the City to pay, the Nation agreed to a lease (or leases) based only on the value of land. In effect, the Nation agreed to defer its claim to ownership of the improvements during the term of the lease.

While there may be some unhappiness and unease with the terms of these leases and the Agreement entered into between the City and the Nation, it is my understanding that 96% of the former lessees have signed new leases. Transactions involving real estate are taking place; home equity loans are available; the leasehold interests have been deemed eligible for insurance

under the National Housing Act, and funds are available for the purchase and sale of these properties.

I believe that the request for a hearing is based on the notion that Congress can undo the Agreement between the City and the Nation -- that Congress can unilaterally impose its will to declare or alter property relationships or nullify contracts. Congress simply does not have such power.

The Agreement between the City of Salamanca and the Seneca Nation and the passage of Public Law 101-503 represent the beginning of a healing process that must now take place. I believe a hearing would raise false hopes and would be counter-productive to the positive steps that are currently taking place. I encourage all parties in this matter to be patient with each other, and to discuss with each other their matters of mutual concern. The recent funding of the Joint Leasing Commission is a positive step in the right direction.

For my own part, I would be pleased to work with you and other members of the New York delegation to assist in improving the economic circumstances that presently prevail in this area of your state. I believe the Settlement Act provides a basis for the Seneca Nation and the City of Salamanca to work together in economic development in this region.

Sincerely,

DANIEL K. INOUYE
Chairman

Attachment 9

Seneca Nation of Indians
JUSTICE DIVISION

Robert B. Porter
Justice Commissioner

September 3, 1994

VIA CERTIFIED MAIL

Dear Former Lessee:

On August 20, 1994, the Council of the Seneca Nation of Indians passed a resolution authorizing and directing Nation President Barry E. Snyder, Sr. to execute a new lease with any former lessee of lands within the City of Salamanca and the Congressional Villages who is currently without a valid lease ("Former Lessee"). The resolution was passed contingent upon the United States filing an action in the United States District Court for the Western District of New York against all Former Lessees for (i) ejectment from Nation territory, (ii) trespass damages based upon fair rental value and (iii) punitive damages for wilful and malicious refusal to deliver possession.

Enclosed are the following documents:

1. Policies and Procedures Governing the Fourth and Final Opportunity to Execute a New Lease with the Seneca Nation of Indians ("Policies and Procedures"); and

2. List of Former Lessees, parcel addresses and payment due.

The Nation offers you a new lease in accordance with the terms and conditions set forth in the Policies and Procedures.

In order to avail yourself of this opportunity, you must provide proof of your status as a Former Lessee. Such proof may include a deed indenture, a land contract, a mortgage document, a survey, a title opinion or any other document evidencing status as a Former Lessee. If any leasehold is subject to a mortgage, evidence of such must be provided. Corporate Former Lessees must produce a certified resolution of its board of directors authorizing its designated officer to execute a new lease.

The Nation and the City of Salamanca are taking several steps to assist Former Lessees in the process of securing a new lease. Former Lessees within the City are requested to deliver required documentation to City officials no later than September 9, 1994. Said officials shall then transmit such documentation to the Nation. Former Lessees residing within the Congressional Villages are requested to deliver required documentation to the Nation Lease Administration Department, Plummer Building, Jimersontown, Allegany Reservation, also by September 9, 1994.

Payment must be made at the time of execution of a new lease. Item number 2 above sets forth the payment due by any Former Lessee seeking to obtain a new lease.

If you have any questions regarding any aspect of this lease signing opportunity, please first consult the Policies and Procedures. Otherwise, Former Lessees within the City of Salamanca should contact the City regarding questions relating to proper documentation. All other questions by any Former Lessee may be directed to the Nation Lease Administration Department (945-1790).

Sincerely,

Robert B. Porter
Justice Commissioner and
Acting Director,
Lease Administration Department

Attachment 10

United States Department of the Interior

OFFICE OF THE SOLICITOR

SEP 1 1994

TO: ALL PERSONS ON ATTACHED DISTRIBUTION LIST

RE: Notice of Intent to File Complaint in Federal District Court

This office represents the United States Department of the Interior (Department) and its agencies, including the Bureau of Indian Affairs. The Department is charged with protecting the possessory interests of a Indian tribe in its land and ensuring that Indian lands are not conveyed without the consent of Congress. The Seneca Nation of Indians has informed the Department that you are in possession of one or more parcels land located in either the City of Salamanca, New York or the congressional villages of Carrollton, New York and Great Valley, New York, each of which are in turn principally located within the exterior boundaries of the Nation's Allegany Reservation. We are also informed that you are occupying the subject premises without a valid lease or sublease.

The City of Salamanca and the congressional villages of Carrollton and Great Valley are located on lands owned in fee by the Seneca Nation of Indians, a federally recognized Indian tribe. The Nation holds the Allegany Reservation under the Treaty of November 11, 1794. 7 Stat. 44. Under the Act of February 19, 1875, Stat. 330, as amended, Act of September 30, 1890, 26 Stat. 558, leases held by non-members of the Nation were renewed, all for a term which expired February 19, 1991. Pursuant to the Agreement between the Seneca Nation of Indians and the City of Salamanca executed on July 12-13, 1990 and federal legislation ratifying the Agreement, the Seneca Nation Settlement Act, P.L. 101-503, the Seneca Nation has offered new leases to all existing lessees of Seneca lands in the City of Salamanca and the congressional villages. The Seneca Nation of Indians has provided all affected lessees three separate opportunities to execute new leases: February 15-19, 1991; April 15-29, 1991; and December 2-6, 1991.

Records received from the Seneca Nations of Indians indicate that you have not entered into a valid lease or sublease authorizing your possession of the Seneca lands you are now holding. You have been provided ample opportunity to enter into a new lease as provided for in the Agreement and Act but have failed to do so as of this date. You are hereby advised that continued possession of Seneca lands without a valid lease or sublease is an act of trespass on tribal lands.

This is notice that you must take appropriate measures to either enter into a new lease with the Seneca Nation of Indians or vacate the premises and deliver possession to the Nation on or before September 16, 1994. If you fail to execute a new lease or deliver possession of the premises on or before September 16, 1994, we will

request that the United States Department of Justice file suit against you in federal district court for ejectment from the Seneca Nation of Indians lands you now hold and for trespass damages based on fair rental value of the subject land. We may also seek punitive damages for wilful and malicious refusal to deliver possession.

Please notify this office, Office of the Solicitor, Division of Indian Affairs (202) 208-4361 if you have executed a new lease with the Seneca Nation of Indians, or if you are no longer in possession of the premises or intend to vacate the premises on or before September 16, 1994.

Sincerely,

Michael J. Anderson
Associate Solicitor
Division of Indian Affairs

Attachment: Distribution List

Attachment II

CONCLUSION

We have reviewed appellant's remaining arguments and find them to be without merit. Based on the foregoing, the judgment of the district court is affirmed.

Joseph FLUENT, Individually and as a representative of the Class of Salamanca Lessees holding 99-year leases from Seneca Nation of Indians; James V. Mongillo, Individually and as a representative of the class of Salamanca lessees holding 50-year leases from the Seneca Nation of Indians and Keith McClain, Individually and as a representative of the class of congressional village lessees holding 99-year leases from the Seneca Nation of Indians; Robert Adamic, Individually and on behalf of the class of lessees who signed the "40/40 Lease" Tendered by the Seneca Nation of Indians on or about September 4, 1990; Marilyn Adamic, Individually and on behalf of the class of lessees who signed the "40/40 Lease" Tendered by the Seneca Nation of Indians on or about September 4, 1990; Salamanca Coalition of United Taxpayers, Inc., Individually and on behalf of its membership, Plaintiffs-Appellants,

v.

SALAMANCA INDIAN LEASE AUTHORITY; David Franz, Individually and as Attorney for the City of Salamanca Indian Lease Authority; Antonio Carbone, Individually and as Mayor of the City of Salamanca and also as member of the Salamanca Indian Lease Authority; City of Salamanca; Patrick Callaghan, Individually and as Chairman of the Salamanca Indian Lease Authority; Linda Rychcik, Individually and as a member of the Salamanca Indian Lease Authority; Henry Stefanski, Individually and as a member of the Salamanca Indian Lease Authority; Owen K. Phillips, Individually and as a member of the Salamanca Indian Lease Authority; Dann Colvin, Individually and as a member of the Salamanca Indian Lease Authority; Paul Taylor; Penny Buckley; Seneca Nation of Indians, Defendants-Appellees.

No. 1300, Docket 91-7086.

United States Court of Appeals, Second Circuit.

Argued Feb. 19, 1991.

Decided March 15, 1991.

Lessees of tribal land brought action against Seneca Nation to compel 99-year lease renewal and challenged constitutionality of Seneca Nation Settlement Act of 1990. The United States District Court for the Western District of New York, Richard J. Arcara, J., dismissed action on grounds of sovereign immunity. Appeal was taken. The Court of Appeals, Miner, Circuit Judge, held that: (1) 1875 Act validating original leases to settlors did not waive Seneca Nation's sovereign immunity, and (2) dismissal of lessee's claims that 1990 Act was unconstitutional was appropriate since Seneca Nation was indispensable party and was also immune from suit.

Affirmed.

1. Indians ⇐27(1)

Although Indian tribes have common-law immunity from suit, tribal sovereignty is subject to Congress' plenary control, and thus Congress is always at liberty to dispense with or limit that immunity. Act Feb. 19, 1875, § 3, 18 Stat. 330.

2. Indians ⇐27(1)

Waiver of tribal immunity cannot be implied but must be unequivocally expressed.

3. Indians ⇐27(1)

The 1875 Act validating tribal property leases did not unambiguously express Congress' intent to subject Seneca Nation to lawsuits concerning disputes over lease of

tribal land. Act Feb. 19, 1875, § 7, 18 Stat. 330.

4. Indians ⇐16(2), 27(1)

Overriding purpose of 1875 Act validating lease of Seneca Nation lands was to validate existing leases voluntarily entered into between Nation and settlors and did not unmistakably and clearly waive Nation's sovereign immunity from lawsuits. Act Feb. 19, 1875, § 7, 18 Stat. 330.

5. Indians ⇐16(4)

Terms of expired lease with Seneca Nation did not provide that Nation had to accede to lessees' proposals for 99-year renewal but rather allowed Nation and lessees to agree on terms of renewal. Act Feb. 19, 1875, § 3, 18 Stat. 330.

6. Indians ⇐27(1)

Tribal immunity barred lessees' lawsuit against Seneca Nation even if no other forum was available for resolution of claims; lack of forum did not automatically prevent dismissal of claims asserted.

7. Indians ⇐27(5)

Seneca Nation was indispensable party to action by lessees to declare Seneca Nation Settlement Act of 1990 approving agreement for renewal of leases unconstitutional; as party to agreement negotiated over two decades, Nation's interest in validity of lease agreement was significant. Fed.Rules Civ.Proc.Rule 19(a, b), 28 U.S.C.A.; Seneca Nation Settlement Act of 1990, § 2 et seq., 25 U.S.C.A. § 1774 et seq.

8. Indians ⇐27(1)

District court did not abuse its discretion in dismissing action by lessees to hold Seneca Nation Settlement Act of 1990 unconstitutional after concluding that Seneca Nation, which was entitled to sovereign immunity, was also indispensable party; dismissal turned on fact that society consciously opted to shield Indian tribes from suit absent congressional or tribal consent. Seneca National Settlement Act of 1990, § 2 et seq., 25 U.S.C.A. § 1774 et seq.; Fed.Rules Civ.Proc.Rule 19(a, b), 28 U.S.C.A.

Jennifer A. Coleman (Iris B. Schifeling, Damon & Morey, Buffalo, N.Y., of counsel), for plaintiffs-appellants.

Douglas B.L. Endreson, Washington, D.C. (Reid Peyton Chambers, Sonosky, Chambers, Sachse & Endreson, Washington, D.C., Michael Brady, Hagerty & Brady, Buffalo, N.Y., of counsel), for defendant-appellee Seneca Nation of Indians.

R. William Stephens (David M. Franz, Raichle, Banning, Weiss & Stephens, Buffalo, N.Y., of counsel), for defendants-appellees other than Seneca Nation of Indians.

Before FEINBERG, TIMBERS and MINER, Circuit Judges.

MINER, Circuit Judge:

Plaintiffs-Appellants Salamanca Coalition of United Taxpayers, Inc. ("SCOUT"), representing nearly 600 lessees, and five individual lessees (collectively "Appellants") commenced this action against their lessors, the Seneca Nation of Indians ("Nation"), and against the Salamanca Indian Lease Authority ("SILA"), the City of Salamanca ("City") and various City officials to compel the Nation to renew their leases for up to 99 years. Other relief was sought, including a declaration that the agreement negotiated by SILA, the City and the Nation for renewal of the leases was null and void. The Appellants also challenged the constitutionality of the Seneca Nation Settlement Act of 1990, by which Congress approved the agreement for renewal of the leases and appropriated $35 million toward the rental payments. The district court dismissed all claims against the Nation finding that the Nation was immune from suit. It also dismissed two claims against the remaining defendants on the ground that an adjudication of those claims in the absence of the Nation would impede the Nation's ability to protect its interest in the subject of those claims. We hold that the district court correctly found that the Nation was immune from suit under the doctrine of sovereign immunity and properly dismissed the other two claims against the remaining defendants under Fed.R.Civ.P. 19.

BACKGROUND

The dispute giving rise to this action involves the renewal of leases to tribal lands within the City and outlying villages, known as the Congressional Villages. The tribal lands were leased by the Nation in the mid-nineteenth century to various settlers and railroads. The leases were validated by Congress in the Act of February 19, 1875, ch. 90, 18 Stat. 330 ("1875 Act"). When they were about to expire, the leases were renewed in accordance with the terms of the 1875 Act, first in 1880 for a 12-year term, then in 1892 for a 99-year term. *See* Act of September 30, 1890, ch. 1132, 26 Stat. 558 ("1890 Act") (amending the 1875 Act and authorizing 99-year renewal term). The leases subject of this action all expired on February 19, 1991.[1]

SILA was formed in 1969 pursuant to New York legislation authorizing it to negotiate a master lease with the Nation for all reservation lands located within the City and the surrounding villages. N.Y. Pub. Auth.Law §§ 1790–99 (McKinney 1981 & Supp.1991). The Nation refused to negotiate a master lease, preferring instead to negotiate individual leases with each lessee. SILA then sought and received authorization from an overwhelming majority of lessees, whose leases were about to expire, to negotiate on their behalf. Over the course of some twenty years, SILA, the City and the Nation endeavored to negotiate an agreement to renew the leases. In mid-July, 1990, the parties signed a renewal agreement ("Agreement"). That Agreement provided for leases with a forty-year rental term and a right to renew for an additional forty years ("40/40 leases"). Rents were based on the fair market value of the land rather than on the value of the land and the improvements. The Nation originally had requested rentals based on the value of the land as improved in light of the "unconscionably" low rent it had received during the past 99 years. *See United States v. Forness*, 125 F.2d 928, 941 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942). One of the conditions of the Agreement was payment by the federal government and New York State of monies approximating the difference between the fair market rental value and the rents actually received by the Nation over the past 99 years. Congress enacted the Seneca Nation Settlement Act of 1990, Pub.L. No. 101–503, 104 Stat. 1292 ("1990 Act"), in which it agreed to pay approximately $35 million. 1990 Act, § 6, 104 Stat. at 1295–96. Apparently, New York State has agreed to pay $25 million, and, according to the Nation, legislation appropriating that amount is anticipated shortly. The total annual rental payment due from the lessees themselves on the new leases was set at $800,000, to be collected and paid by the City. That amount is subject to adjustment based on a yearly reappraisal of individual land values. Each lessee is responsible for an annual rent equal to eight percent of land value, if the property is leased for residential purposes, and ten percent of land value, if the property is leased for nonresidential purposes.

After reviewing the Agreement and the 40/40 leases, the Appellants notified the Nation that they were dissatisfied and would institute a lawsuit. On November 30, 1990, the Appellants commenced this action. In the first cause of action in their complaint, they sought a declaration that they are entitled to a renewal of up to 99 years in accordance with the Acts of 1875 and 1890 and the terms of their expired leases. They also claimed in the first cause of action that section 3 of the 1875 Act and the terms of their expired leases entitle them to arbitration for a determination of fair rent. In the eighth cause of action, asserting that SILA lacked authority to negotiate an agreement for the renewal of leases on their behalf, the Appellants sought a declaration that the Agreement was null and void. Additionally, in the tenth cause of action, the Appellants chal-

1. In 1939, many of the leases were cancelled by the Nation for failure to pay rent. *See United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942). The Nation offered new leases to the lessees whose leases were cancelled, and those leases, the longest of which had a term of forty-nine years, also expired on February 19, 1991. Some of the original leases expire at various times from about 2029 and 2034.

lenged the constitutionality of the 1990 Act. The Nation moved to dismiss all claims against it on the ground of sovereign immunity and moved to dismiss the eighth and tenth causes of action against the other defendants on the ground that it was an indispensable party as to those two causes of action. *See* Fed.R.Civ.P. 19(b). On January 25, 1991, the district court granted the motion and dismissed all claims pleaded against the Nation and also dismissed the eighth and tenth causes of action set forth in the complaint.

The district court concluded that the Nation is immune from suit under the doctrine of sovereign immunity because the 1875 Act did not waive in unequivocal terms the Nation's sovereign immunity. Finding that any declaration that the Agreement was void would greatly affect the interests of the Nation as a party to that Agreement, the court dismissed the eighth cause of action also. Finally, because the 1990 Act authorizes the payment of a substantial sum of money to the Nation, the court found that a constitutional challenge to the 1990 Act, the tenth cause of action, could not be adjudicated in the absence of the Nation without impairing the Nation's ability to protect its interest in the receipt of those funds. The court entered its order as a final judgment against the Nation under Fed.R.Civ.P. 54(b) because of the imminent expiration of the leases. This appeal followed.

DISCUSSION

The Appellants contend that the district court erred by dismissing the claims against the Nation on the ground of sovereign immunity, primarily because section 7 of the 1875 Act provides for jurisdiction over claims regarding the possession of leased property. They point to actions enumerated by the Act over which the court "shall have jurisdiction." Section 7 provides in material part

> [t]hat the ... circuit and district courts of the United States in and for the northern [now western] district of [New York], shall have jurisdiction of all actions for the recovery of rents and for the recovery of possession of any real property within the limits of said villages, whether actions of debt, ejectment, or other forms of action, according to the practice in said courts; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions.

The Appellants interpret this provision as authorizing actions by both lessors and lessees. Likewise, they point to section 3 of the 1875 Act, which provides that persons who are the "owners of improvements erected upon such lands, shall be entitled to such renewed leases, and to continue in possession of such lands," to support their contention that, since lessees are entitled to possession upon renewal, Congress intended to waive the Nation's immunity and to provide a forum for the resolution of disputes pertaining to possession. We disagree with Appellants' construction of the statute.

[1–3] "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978); *see Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, — U.S. —, 111 S.Ct. 905, 908, 112 L.Ed.2d 1112 (1991). However, tribal sovereignty is subject to Congress' plenary control, and thus "Congress [is] always ... at liberty to dispense with ... tribal immunity or to limit it." *Id.*, 111 S.Ct. at 910; *see, e.g., Martinez*, 436 U.S. at 58, 98 S.Ct. at 1677; *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940); *Turner v. United States*, 248 U.S. 354, 358, 39 S.Ct. 109, 110, 63 L.Ed. 291 (1919); *John v. City of Salamanca*, 845 F.2d 37, 40 (2d Cir.), *cert. denied*, 488 U.S. 850, 109 S.Ct. 133, 102 L.Ed.2d 106 (1988). It has long been the rule that waiver of tribal immunity cannot be implied but rather must be "unequivocally expressed." *Martinez*, 436 U.S. at 58–59, 98 S.Ct. at 1677 (citations omitted). We agree with the district court that section 7 fails to

unambiguously express Congress' intent to subject the Nation to lawsuits concerning disputes over the lease of tribal lands. *See United States v. Charles*, 23 F.Supp. 346, 348–49 (W.D.N.Y.1938) (action to set aside deed held barred by sovereign immunity of the Seneca Nation of Indians).

Section 7 enumerates actions typically brought by lessors, including actions for the recovery of rents and of possession of real property and actions for debt, ejectment, forcible entry and detainer and unlawful detainer. Each enumerated action provides a remedy for the Nation against defaulting lessees. The fact that only a strained reading of the statute might permit specific forms of actions to be brought by tenants against their landlords serves to underscore the absence of a clear expression of a waiver of the kind urged by the Appellants. *Cf. Dellmuth v. Muth*, 491 U.S. 223, 109 S.Ct. 2397, 2401, 105 L.Ed.2d 181 (1989). When Congress has chosen to limit or waive the sovereign immunity of Indian tribes, it has done so in clear language. *See, e.g.*, Act of July 22, 1958, Pub.L. No. 85–547, § 1, 72 Stat. 403, 403 (authorizing Navajo and Hopi tribes "to commence or defend ... an action against each other"); Act of December 22, 1974, Pub.L. No. 93–531, § 8(a), 88 Stat. 1712, 1715 (Either the Navajo or Hopi "tribe[ ] is ... hereby authorized to commence or defend ... an action against the other tribe."). Because a congressional waiver was not "unequivocally expressed," we may not hold that the statute relied upon by the Appellants waives the sovereign immunity of the Nation. *See Martinez*, 436 U.S. at 58–59, 98 S.Ct. at 1677.

[4] Regarding the Appellants' contention that the legislative history supports their position that Congress intended to provide a forum for all lease disputes, the need to resort to legislative history similarly highlights the deficiency of the Appellants' position. "If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile." *Dellmuth*, 109 S.Ct. at 2401. Nevertheless, we think the legislative history clearly demonstrates that Congress never intended to waive the immunity of the Nation. The following remarks of Senator Ingalls, a proponent of the bill, indicate the basic purpose of the 1875 Act: "[The 1875 Act] simply proposes that the leases which have been made by these Indians themselves, by their own consent, shall be ratified and confirmed, and held to be valid and binding upon the parties who have voluntarily made these contracts." 3 Cong.Rec. 909–10 (1875). The legislation was proposed in light of a decision by the New York State Supreme Court, in which the court found the leases to be invalid because they were executed without the authorization of the United States. *See Forness*, 125 F.2d at 930–31 & n. 1. Thus, the overriding purpose of the 1875 Act was to validate the existing leases voluntarily entered into between the Nation and the settlers.

Even assuming we were to agree with the Appellants' contention that the 1875 Act unmistakably and clearly waives the immunity of the Nation, we would affirm the district court's judgment on the ground that the renewal provisions of 1875 Act applied only to the original renewals and do not extend to the present renewals. Section 8 of the 1875 Act validated leases existing at that time for a five-year term and authorized a term of renewal "not exceeding twelve years." The 1875 Act also provided that "whenever any lease shall expire after its renewal ..., it may, at the option of the lessee, his heirs or assigns, be renewed in the manner hereinbefore provided." The 1890 Act amended the 1875 Act to allow renewal for "a term not exceeding ninety-nine years, instead of the term of twelve years." Thus, the leases that expired on February 19, 1991 are leases that previously were renewed a second time for a term of 99 years. The 1875 Act does not authorize a perpetual renewal, and without clear language to that effect, we will not construe the statute to confer such a right. *See Winslow v. Baltimore & Ohio R.R. Co.*, 188 U.S. 646, 654–55, 23 S.Ct. 443, 446, 47 L.Ed. 635 (1903) (plain language necessary to establish intent to

provide right of perpetual renewal); *McLean v. United States*, 316 F.Supp. 827, 829 (E.D.Va.1970) ("[t]he intent to create a perpetual lease must appear in clear and unequivocal language"); *McMillan v. Malvern Gravel Co.*, 136 F.Supp. 567, 574 (W.D.Ark.1955) (same); 50 Am.Jur.2d *Landlord & Tenant* § 1171 (1970).

The Appellants contend that the 1875 Act "stands ready to resolve this lease dispute in a fair and equitable way. It provides for renewal and then negotiation or binding arbitration for the rent and conditions of the renewal lease." Undoubtedly, the 1875 Act provided for the validation of leases and for arbitration in the event the parties could not agree to the terms of the renewal leases. The Appellants, however, already benefitted from the renewal and arbitration procedures set forth in the 1875 Act, first in 1880 and then in 1892. That is all the statute requires.

[5] Nor do the terms of the expired leases provide that the Nation must accede to the Appellants' proposals for renewal. The expired leases allow for the parties to agree on terms of renewal. The Nation did not agree to a 99-year term of renewal. Instead, it agreed, along with the City and SILA, which represents about two thousand lessees, to a forty-year rental term with a forty-year right to renew. The 40/40 leases provide that disputes "concerning any party's compliance with or obligations under any of the terms" of the lease can be submitted to arbitration. The new leases satisfy the requirements of the statute and the expired leases in that they represent an agreement by the parties.

[6] The Appellants' contention, that tribal immunity does not bar federal jurisdiction when no other forum is available for the resolution of claims, must fail. The lack of a forum does not automatically prevent dismissal of the claims asserted. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir.1990). "Sovereign immunity may leave a party with no forum for [that party's] claims." *Id.* (citing *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir.1975), *cert. denied*, 425 U.S. 903, 96 S.Ct. 1492, 47 L.Ed.2d 752 (1976)). The only branch with the ability to provide a forum for resolution of the issues involved here is Congress. Without a clear congressional mandate, however, we cannot grant the relief sought by Appellants.

[7] The argument that the court erred in dismissing from the complaint claims in which the Appellants sought a judicial declaration that the Agreement was null and void and that the 1990 Act was unconstitutional is without any merit. The Nation moved to dismiss these claims (the eighth and ninth causes of action) pleaded against it and the remaining defendants, pursuant to Fed.R.Civ.P. 19(b). After engaging in the analysis required by Fed.R.Civ.P. 19(a), the district court concluded that any resolution of these particular claims would, as a practical matter, both impair and impede the Nation's ability to protect its interest in the Agreement and in receipt of funds authorized by the 1990 Act.

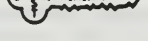
There can be no doubt that the Nation qualifies under rule 19(a) as an indispensable party to these claims. As a party to an Agreement negotiated for over two decades the Nation's interest in the validity of the lease agreement is significant. *See Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 701 (2d Cir.1980) (citing *Lomayaktewa*, 520 F.2d at 1325 ("[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable")); *McClendon v. United States*, 885 F.2d 627, 633 (9th Cir.1989) (same). Additionally, as the beneficiary of a substantial sum of money from the federal government, it is manifest that the Nation has a vital interest in the constitutionality of the 1990 Act.

[8] After determining that joinder under rule 19(a), while desirable, was not feasible because of the tribe's sovereign immunity, the district court considered the rule 19(b) factors. "[T]he [r]ule allows courts to determine the emphasis to be placed on each consideration according to 'the facts of [the] given case and in light of

the governing equity-and-good-conscience test.'" *Associated Dry Goods Corp. v. Towers Financial Corp.*, 920 F.2d 1121, 1124 (2d Cir.1990) (quoting 7 C. Wright & A. Miller, Federal Practice & Procedure § 1608, at 91–92). It has been held that when an indispensable party is "immune from suit, 'there is very little room for balancing of other factors' set out in [r]ule 19(b), because immunity '"may be viewed as one of those interests 'compelling by themselves.'"'" *Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 894 (10th Cir.1989) (quoting *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 777 n. 13 (D.C.Cir.1986) (quoting 3A Moore's Federal Practice ¶ 19.15, at 19–266 n. 6 (1984))); *see Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119, 88 S.Ct. 733, 743, 19 L.Ed.2d 936 (1968). The rationale behind the emphasis placed on immunity in the weighing of rule 19(b) factors is that the case is not one "where some procedural defect such as venue precludes litigation of the case. Rather, the dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent." *Wichita*, 788 F.2d at 777. After recognizing the "paramount importance accorded the doctrine of sovereign immunity under [r]ule 19," the district court found that the eighth and tenth causes of action should not be adjudicated in the absence of the Nation. We agree and hold that the district court did not abuse its discretion in dismissing the eighth and tenth causes of action.

CONCLUSION

The judgment of the district court dismissing the claims against the Nation and dismissing the first, eighth and tenth causes of action of the complaint is affirmed. Our order of February 14, 1991 directing that the status quo be maintained pending further order of the court is rescinded.



Lawrence P. STROUSE, Jr., Petitioner-Appellant,

v.

Arthur A. LEONARDO, as Superintendent of the Great Meadow Correctional Facility, Respondent-Appellee.

No. 608, Docket 89–2322.

United States Court of Appeals, Second Circuit.

Argued Nov. 16, 1990.

Decided March 18, 1991

Petition was filed for writ of habeas corpus. The United States District Court for the Eastern District of New York, Joseph M. McLaughlin, J., 715 F.Supp. [illegible] denied petition. Petitioner appealed. The Court of Appeals, Pierce, Senior Circuit Judge, held that: (1) petitioner was entitled to evidentiary hearing to determine whether defense counsel had actual conflict of interest, for purposes of showing ineffective assistance of counsel; (2) petitioner's counsel's performance at trial did not constitute ineffective assistance; and (3) petitioner's due process rights were not violated because of prosecutorial behavior.

Vacated in part and affirmed in part.

1. Criminal Law ⇐1166.11(7)

Mere possibility of conflict of interest is not enough to upset conviction; defendant must identify actual conflict that impeded his lawyer's representation. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐641.5

Defense counsel's prior representation of murder victim did not give rise to conflict of interest in his representation of defendant and did not constitute ineffective assistance where counsel's work for victim, in addition to drafting her will, consisted of occasional real estate work and handling

Written Testimony of Darrel Smith

Mr. Chairman and Members of the Committee, I'm Darrel Smith and I ranch near Mobridge, South Dakota on the Standing Rock and Cheyenne River Indian Reservations. I'm a third generation reservation resident and one of over three hundred and seventy thousand non-Indians that live on Indian reservations in this country. Both my Grandparents moved to the Cheyenne River Indian Reservation near Eagle Butte in the mid 1920's. Both Grandparents were farming when my parents met and were married in the early thirties. My Parents bought our present ranch in 1946. I inherited part of the ranch, bought some from other family members, and am buying the rest from my Mother.

The Dawes Act and the surplus land Acts explain why many of the hundreds of thousands of non-Indians live on reservations and what their expectations were. South Dakota became a state in 1889, two years after the Dawes Act was passed in 1887. Based on the Dawes Act, South Dakotans expected the entire reservation system to cease to exist within a short period of time. Congressional testimony for the Dawes Act said, "...by the bill we proposed to break up the reservations...." Speaking of this era the Supreme Court said in 1984, "Members of Congress voting on the surplus land Acts believed to a man that within a short time-within a generation at most-the Indian tribes would enter traditional American society and the reservation system would cease to exist." Why would the homesteaders expect less than the Members of Congress? I live in an area that was opened up to homesteading by a 1908 surplus land Act. A phrase in this opening Act refers to "the respective reservations thus diminished." Early homesteaders couldn't have anticipated or imagined that their descendants would ever be subject to tribal authority. Other non-Indians have been incorporated into reservations as these reservations have expanded or new reservations have been created.

The Indian Reorganization Act of 1934 reversed previous policies and reestablished tribal governments and the entire reservation system. Since 1934 tribal authority has grown in power and scope, slowly gaining the right to tax, license and regulate everyone and everything within reservations boundaries. A controversial Supreme Court decision put me back in the reservation in 1984. Tribal governments generally will not allow non-Indians to participate in tribal government and both Tribes and the BIA have the legal right to discriminate. Since tribes are governed by federal law, governmental powers that are granted to one tribe generally can be adopted by others.

In an article in the Rapid City Journal titled "TRIBES TOLD TO BROADEN TAXATION POWERS TO PROTECT SOVEREIGNTY" a tribal lawyer claimed that "Tribes have the power to tax income, property, sales, real estate and construction on reservations. An example is a tribal ordinance on the Standing Rock Indian Reservation that says, "All persons, except tribal members of the Standing Rock Indian Tribe, shall pay taxes for the privilege of doing business on the Standing Rock Indian Reservation by leasing or permitting of Indian lands as follows:..." This tribal tax that I pay is collected

exclusively from non-Members. What limits taxes that can be discriminately collected from people that are excluded from the political process? How does this tax differ from the British tax on tea imports prior to the Revolutionary War? Tribal taxation also results in double taxation raising business costs for non-Member reservation businesses.

Neighboring businesses are required to have tribal business licenses. Tribes are forcing non-Member applicants to agree to comply with all applicable tribal laws including tax and preference laws. Applicants also must consent to the jurisdiction of tribal courts over any business conducted on reservations. These business licenses grant tribes regulatory and legal authority over non-Members. Inherent in the power to license is the power not to license. This power can be used to intimidate or force non-Members off reservations. Few reservation businesses can afford effective legal remedies.

This situation raises the most fundamental questions about our values and our country. The Declaration of Independence listed several colonial complaints. Among them were the observation that governments derive "their just powers from the consent of the governed." It claimed that "all men are created equal" and complained that colonists were being forced to "relinquish the right of Representation in the Legislature" and that the King had "combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation." It objected to "imposing taxes on us without our consent" and warned of the negative consequences "when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism..." The Constitution guarantees "to every State in this Union a Republican Form of Government." The right to vote and participate in government is the very foundation of a republican form of government. Fundamental civil rights like the right to vote, the right to the equal protection of the laws and a practical right to a jury of peers are lacking.

Sovereign immunity also protects tribes from being sued and contracts with tribes or tribal members can only be enforced in tribal court. Recently a tribal casino was built near me. Two contracts were entered into by the tribe and unilaterally canceled after considerable money was spent by the non-tribal party before a third contract was honored. The risk that contracts might not be honored greatly reduces economic activity on reservations.

Tribal Members can rightly participate in county and local government. Meanwhile, their sovereign immunity may protect them from paying the taxes or obeying the laws they participate in making, enforcing, prosecuting or judging. Local communities and whole counties can't enforce their regulations against tribal Members. This is a significant threat in towns and counties on reservations. A recent series of incidents in a neighboring town illustrate part of the problem. According to the written testimony of a County Commissioner:

> On May 25,1991, the McLaughlin Public School was broken into and vandalized. The damage was amazing. Fire

extinguishers were discharged into the school's computers severely damaging and destroying thousands of dollars worth of hardware and software computer equipment. Virtually all breakable items in the lab rooms were broken. The chemicals from the science labs and the fire extinguishers were extensively thrown on the ceilings and walls and circulated throughout the building in the air flow system necessitating the repainting of virtually the entire interior of the building. Four Indian male juveniles were apprehended inside the building. They ranged in age from kindergarten to sixth grade. They were turned over to the BIA police for prosecution in the Standing Rock Sioux Tribal Court. The damages were estimated between twenty and fifty thousand dollars.

On July 12,1991, unencumbered by any judicial restraint and because there was no prosecution, several of the same children broke into the Thorsonsen Insurance Agency in McLaughlin and again extensively vandalized the facility. The damage included ransacking the file cabinets and destroying the contents of the office files and general breakage and other damage. However, in order that there be no question about who the vandals were, the children took pictures of each other with a polaroid camera that was available and left the photos for the investigators to find. The insurance agency incident was committed by several of the same children who vandalized the school. All of this information and the photos were turned over to the BIA police for prosecution by the Standing Rock Sioux Tribal Court. Again, there was no prosecution.

These young vandals, having successfully burglarized a school and an insurance agency and having not been prosecuted or disciplined by the tribal court system which is charged with that responsibility...struck again. On August 30, 1991, the Redeemer Lutheran Church in McLaughlin was broken into and desecrated.... The vandals defecated on the floor and rubbed it in with the floor buffer. Under the portrait of Jesus Christ the vandals left a special calling card which does require explanation. The initials NWA stand for NO WHITES ALLOWED.... The carpets were damaged by chemicals that were available. The copying machine chemicals were dumped in various places. The paints available for children's sunday school were dumped everywhere and rooms were flooded thereafter. All of the fire extinguishers were discharged into the furnace system and the organ. Then, to make sure there was no question about their identities, the children took pictures with the copying machine. They took photos of each other's faces and left those available for investigators. They also stripped naked and took pictures of their testicles and penises. All of the photos of the children were turned over to the BIA police in the vain hope that there would be some type of prosecution and some type of justice. Again, the

church to date has no word as to any prosecution. The cost of repair is not yet known but will certainly exceed $25,000. In addition, the newly appointed Lutheran minister had to receive his ordination at the Catholic Church because the Lutheran Church was unusable. This is not a case of persons stealing for food or out of need. In all three of these instances virtually nothing was taken. This is a wholesale example of destruction and desecration for no legitimate purpose.

How can city or county government function when a segment of its residents are not subject to its laws because of their tribal immunity?

Economic prosperity requires certain conditions and is difficult in rural areas in the best of circumstances. These added problems and uncertainties devastate the economies of many reservations, negatively affecting everyone. It is no accident that my county is one of the poorest in the country. In addition, many potential purchasers of reservation assets are simply not interested when they find out they will be confronted with these problems. When purchasers can be found, asset prices are regularly discounted about twenty-five percent. These facts make it difficult for non-Indians to either stay or leave.

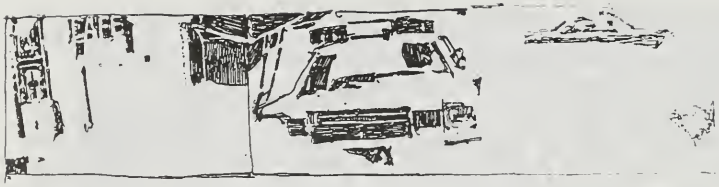
I have a beautiful ranch that is close to town and has miles of shoreline along Lake Oahe, but I have considered selling it just to avoid continuing problems for myself and my children. I heard about a potential ranch purchaser that was looking for a ranch like mine. When I contacted the realtor involved, he said that the "word was out about reservations" and that he didn't feel it would be ethical to even talk to this potential purchaser about my ranch. I estimate that if my ranch were sold, I would have to discount it at least four hundred thousand dollars, making it very difficult to replace it somewhere else.

Non-Indians on reservations are treated very much like unWanted illegitimate children. Our rights are being denied and our very existence appears to be embarrassing and inconvenient. This treatment appears to be having a dramatic impact on our choices. According to the last census, over forty-five percent of those on reservations are non-Indians. There is a vast difference between the average age of Indians and non-Indians however. The average age of Indians is very young often under nineteen. The average age of non-Indians is much older indicating that many young non-Indians are leaving reservations and not returning. Non-Members are being forced to pay taxes and obey regulations of a government that they are excluded from, while tribal Members can participate in local governments that they may not have to support or obey. This effectively puts a slowly tightening legal noose around the necks of non-Indians. Current policies are moving reservations toward more racially segregated and isolated entities. Such a trend in the face of coordinated legal discrimination smacks of genocide.

What if the position of Indians and non-Indians were exactly reversed on reservations. Suppose tribes were governed exclusively by Whites. Imagine that they excluded non-Whites from participation in their government while they taxed, licensed and regulated them,

often discriminately. Suppose these same Whites could participate in local government, while being excluded from many of the taxes and ordinances of that same government. If this were the case, how long would you tolerate the situation?

Sometimes basic, subtle, symbolic words can teach us much. You have invited me to present testimony about how tribal sovereignty impacts non-Indians. In presenting my testimony I have used that same term - non-Indians. It speaks volumes about our position on reservations. How would others like to be classified as non-Whites? The use of the term non-Indians accurately describes me as non-somebody, as non-person, and that is how I am treated on the reservation. As a "non-Indian" I thank you for finally allowing my voice to, at least, be heard.



REVOLUTION *in*

BY FERGUS M. BORDEWICH *Illustrated by* BARRON STOREY

MICKI'S CAFE IS, IN ITS MODEST WAY, A bulwark against the encroachment of modern history and a symbol, amid the declining fortunes of prairie America, of the kind of gritty (and perhaps foolhardy) determination that in more self-confident times used to be called the frontier spirit. To Micki Hutchinson, the problem in the winter of 1991 seemed as plain as the grid of streets that white homesteaders had optimistically laid out in 1910, on the naked South Dakota prairie, to create the town of Isabel in the middle of what they were told was no longer the reservation of the Cheyenne River Sioux Tribe. It was not difficult for Hutchinson to decide what to do when the leaders of the tribal government ordered her to purchase a $250 tribal liquor license: She ignored them.

"They have no right to tell me what to do. I'm not Indian!" Hutchinson told me a year and a half later. She and other white businesspeople had by then challenged the tribe's right to tax them in both tribal court and federal district court and had lost. The marks of prolonged tension showed on her tanned, angular, wary face. "If this were Indian land, it would make sense. But we're a non-Indian town. This is all homestead land, and the tribe was paid for it. I can't vote in tribal elections or on anything else that happens on the reservation. What they're talking about is taxation without representation."

When I visited, everyone in Isabel still remembered the screech of the warning siren that someone had set off on the morning of March 27, 1991, when the tribal police reached the edge of town, as if their arrival were some kind of natural disaster, like a tornado or fire. The convoy of gold-painted prowl cars rolled in from the prairie and then, when they came abreast of the café, swung sideways across the road. Thirty-eight tribal policemen surrounded the yellow brick build-

After centuries of conflict over their rights and powers, Indian tribes now increasingly make and enforce their own laws, often answerable to no one in the United States government. Is this the rebirth of their ancient independence or a new kind of legalized segregation?

Indian Country

ing. The tribe's police chief, Marvin LeCompte, told Hutchinson that she was in contempt of tribal court. Officers ordered the morning breakfast crowd away from their fried eggs and coffee. Then they went back into the pine-paneled bar and confiscated Hutchinson's stock of beer and liquor—"contraband," as LeCompte described it—and drove off with it to the tribal government's offices at Eagle Butte.

A few days before I met Hutchinson, I had interviewed Gregg J. Bourland, the youthful chairman of the Cheyenne River Sioux Tribe. Bourland is widely reckoned to be one of the most effective tribal chairmen in the region and, with a degree in business from the state college in Spearfish, also one of the best educated. "Let them talk about taxation without representation," Bourland told me dismissively. "We're not a state. We're a separate nation, and the only way you can be represented in it is to be a member of the tribe. And they can't do that. They're not Indians. These folks are trespassers. They are within reservation boundaries, and they will follow reservation law. They've now had one hundred years with no tribal authority over them out here. Well, that's over."

More than Micki Hutchinson or than any of the other angry whites in

their declining prairie hamlets, it was Bourland who understood that what was at stake was much more than small-town politics. The tax, the ostentatious convoy, and the lawsuit were part of a much larger political drama that was unfolding across the inland archipelago of reservations that make up modern Indian Country. They symbolized the reshaping of the American West, indeed of the United States itself. By the 1990s, almost unnoticed by the American public or media, a generation of legislation and court actions had profoundly remade Indian Country, canonizing ideas about tribal autonomy that would have shocked the lawmakers who a century before had seen the destruction of the reservations as the salvation of the American Indian. If Bourland was right, Micki Hutchinson and the white residents of Isabel were living in a sovereign tribal state. They were tolerated guests with an uncertain future.

Until the 1870s, reservations were established throughout the Dakota Territory and other parts of the West with the promise that they would be reserved in perpetuity for the Indians' exclusive use. Those promises were broken almost everywhere when reservations were opened to homesteading at the end of the century, usually with only perfunctory consultation with the tribes or none at all. As I listened to Gregg Bourland, it was easy to sympathize with the tribe's striving for some kind of control over forces that were felt to have invaded their land and undermined their culture. Bourland justified the tax as a means both to raise revenue for the tribe and to control alcohol consumption on a reservation where more than 60 percent of the adults were unemployed and 53 percent were active alcoholics.

But promises that had been made a century ago to the ancestors of settlers like Micki Hutchinson were now being broken too. From the 1880s until the 1930s, the cornerstone of federal Indian policy had been the popular program known as allotment, the systematic breaking up of most of the nation's reservations into private holdings. In its day allotment seemed the perfect panacea to resolve at a single stroke the perennial problems of white settlers' insatiable desire for new land and Indians' growing dependency on the federal government. Sen. Henry L. Dawes, the idealistic architect of the Allotment Act of 1881, which set the pattern for a generation of similar legislation, ringingly proclaimed that as a result of allotment, the Indian "shall be one of us, contributing his share to all that goes to make up the strength and glory of citizenship in the United States."

MICKI HUTCHINSON and her white neighbors were told they were living in a tribal state, guests with an uncertain future.

The means of the Indian's salvation was to be the family farm, which most people of the time had been taught to regard as the ultimate repository of American individualism and the democratic spirit. Each Indian allottee would receive 160 acres of land and eventual United States citizenship, along with money for seed, tools, and livestock. The "excess," or leftover, land would be offered for sale to white settlers, who would be free to form their own municipal governments. The promise of the allotment policy was twofold: that the nation would integrate Indians into white society and that non-Indian settlers would never be subject to tribal regimes.

At the time, the Commissioner of Indian Affairs dismissed notions of separate Indian nationality as mere sentimentality: "It is perfectly clear to my mind that the treaties never contemplated the un-American and absurd idea of a separate nationality in our midst, with power as they may choose to organize a government of their own." To maintain such a view, the commissioner added, was to acknowledge a foreign sovereignty upon American soil, "a theory utterly repugnant to the spirit and genius of our laws, and wholly unwarranted by the Constitution of the United States."

AS I LEFT ISABEL, I WONDERED WHO really was the victim here and who the victimizer. Behind that nagging question lurked still more difficult ones that occupied me for many months, from one end of the United States to the other, in the course of researching what was to become *Killing the White Man's Indian*, an investigation into the political and cultural transformation of modern Indian Country. Are Native Americans so fundamentally different from other Americans that they occupy a special category to which conventional American values and laws should not apply? Or are they simply

one more American group, whose special pleading is further evidence that the United States has become a balkanized tangle of ghettos and ethnic enclaves? Do we discriminate against Indians by failing to blend them more effectively into the national mainstream? Or is the very notion of "mainstreaming" Indians so inherently racist that it should not even be contemplated as a component of national policy? Are Indian reservations and the way of life they preserve a precious national resource that must be maintained without the taint of contact with white America? Or is tribal self-determination creating a new form of segregation that merely freezes decayed tribal cultures like ghettoized versions of

Colonial Williamsburg? Who, ultimately, are Indians in the 1990s? What are they to other Americans, and the others to them?

Killing the White Man's Indian represented a return to familiar country. As a youth in the 1950s and early 1960s, I often accompanied my mother, who was the executive director of the Association on American Indian Affairs, in her travels around reservations, part of her tireless effort to prod the federal government into improving tribal economies, education, health care, and law and order. Vivid experiences were plentiful: participating in a nightlong peyote rite in a tepee on the Montana prairie; a journey by pirogue deep into the Louisiana bayous to meet with a forgotten band of Houmas who wanted Washington to take notice of their existence; walking the Little Bighorn Battlefield with an aged Cheyenne who, as a small boy, had witnessed the annihilation of Custer's command. Poverty shaded almost every experience. Staying with friends often meant wind fingering its way through gaps in the walls, a cheese and bologna sandwich for dinner, sleeping three or four in a bed with broken springs. It seemed there was always someone talking about an uncle who, drunk, had frozen to death on a lonely road or about a cousin already pregnant at sixteen. More generally those years left me with a sense of the tremendous diversity of the lives and communities that lay submerged within the catchall label of "Indians" and a recognition that Native Americans were not mere vestiges of a mythic past but modern men and women struggling to solve twentieth-century problems.

In the course of four years' research on my book, I visited reservations from upstate New York to southern California and from Mississippi to Washington State, meeting with tribal leaders, ranchers, farmers, educators, and hundreds of ordinary men and women, both Indian and white. In Michigan I sailed Lake Superior with waterborne Chippewa police, searching for poachers on tribal fisheries in the lake. In Oregon I hiked the Cascades with professional foresters from the Warm Springs Tribe, which with its several hydroelectric dams and thriving timber industry is one of Indian Country's great success stories. I sweated with a group of recovering Navajo alcoholics in a traditional sweat lodge in the New Mexico desert. I also spent many a night in dust-blown reservation towns where, as an old South Dakota song puts it, "There's nothing much to do except walk up and down." In a few places, as a result of childhood connections, I was welcomed as a friend. More frequently I met with suspicion rooted in the widespread belief that curiosity like mine was just a form of exploitation and that whites are incapable of writing about Indians with objectivity and honesty.

My original intention had been to use the lives of several men and women whom I had known in the 1950s as a microcosm and through them to chart the changes that had been wrought in Indian Country during the intervening years. But I soon realized that such a focus would be far too narrow, for it had become clear to me that a virtual revolution was under way that was challenging the worn-out theology of Indians as losers and victims and was transforming tribes into powers to be reckoned with for years to come. It encompassed virtually every aspect of Indian life, from the revival of moribund tribal cultures and traditional religions to the development of aggressive tribal governments determined to remake the relationship between tribes and the United States. The ferment was not unalloyed, however. Alongside inspired idealism, I also found ethnic chauvinism, a crippling instinct to mistake isolation for independence, and a habit of interpreting present-day reality through the warping lens of the past.

In the 1970s, in a reversal of longstanding policies based on the conviction that Indians must be either persuaded or compelled to integrate themselves into mainstream America, the United States enshrined the concept of tribal sovereignty at the center of its policy toward the nation's more than three hundred tribes. In the watershed words of Richard Nixon, federal policy would henceforth be guided "by Indian acts and Indian decisions" and would be designed to "assure the In-

dian that he can assume control of his own life without being separated from the tribal group."

In 1975 the Indian Self-Determination and Education Assistance Act amplified this principle, calling for a "transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people." This has been reflected in a national commitment to the strengthening of tribal governments and to more comprehensive tribal authority over reservation lands. More ambiguously, it has also led to the increasing development of a new sphere of political power that rivals, or at least claims to rival, that of the states and the national government and for which there is no foundation in the Constitution. In the mid-1990s I found tribal officials invoking "sovereign right" in debates over everything from highway maintenance and fishing quotas to law and order, toxic-waste disposal, and the transfer of federal services to tribal administrations, not to mention the rapid proliferation of tribally run gambling operations. Reflecting the sentiments of many tribal leaders, Tim Giago, the publisher of *Indian Country Today*, the most widely read Indian newspaper in the United States, likened state legislation that affects Indians to "letting France make laws that also become law in Italy."

To people like Micki Hutchinson, it often seemed that Indians were playing an entirely new game, and that no one but the Indians understood the rules. In Connecticut, and elsewhere, tribes were exploiting a principle of sovereignty unknown to the average American in order to build casinos that sucked colossal sums of money from neighboring regions. New Mexicans found that they were equally helpless in the face of the Mescalero Apaches' determination to establish a nuclear-waste facility on their reservation outside Alamogordo. In Wisconsin and in Washington State, recurrent violence had accompanied the judicially mandated enlargement of Indian fishing rights in accordance with nineteenth-century treaties. In Nevada farmers found themselves on the brink of failure as the Paiutes of Pyramid Lake gained political leverage over the watershed of the Truckee River.

In some states Indian demands for the return of sacred lands posed significant threats to local economies, including, most prominently, the Black Hills region of South Dakota. Nor was science exempt. Tribal claims on ancestral bones and artifacts were depleting many of the most valuable anthropological collections in the country.

> TRIBES WERE INVOKING a principle of sovereignty unknown to the average American in order to set up casino operations.

Strangely enough, these conflicts—widespread, often bitter, and with profound ramifications for American institutions—seemed to be happening beyond the ken of most Americans, for whom Indians largely remain a people of myth and fantasy. Like no other inhabitants of the United States, Indians have nourished our imagination, weaving in us a complex skein of guilt, envy, and contempt; yet when we imagine we see "the Indian," we often see little more than the distorted reflection of our own fears, fancies, and unhappy longings. This was vividly brought home to me on a visit to the reservation of the two-hundred-member Campo Band of Mission Indians, in the arid hills an hour's drive east of San Diego. This reservation landscape is a profoundly discouraging one. It offers nothing to comfort the eye, produces nothing of value, and provides almost nothing to sustain life as it is enjoyed by most Americans today. The single resource that the Campos possess is wasteland. In 1987 the band learned that the city of San Diego had named the reservation as one of several potential dump sites for the city's refuse.

"We just need this one little thing to get us started," the band's chairman, Ralph Goff, told me as we walked through the redshank and yucca and ocher sand where the first trenches had been cut for the new landfill. "With it we can create our own destiny." Goff, a formidably built man with little formal education, grew up in the 1940s, when the only work available was as a cowhand or day laborer for whites. When there was no work, people went hungry. "You just had to wait until there was some more food." In the 1960s most of the unskilled jobs disappeared, and nearly every Campo family went on welfare. "We needed it, but it really wrecked

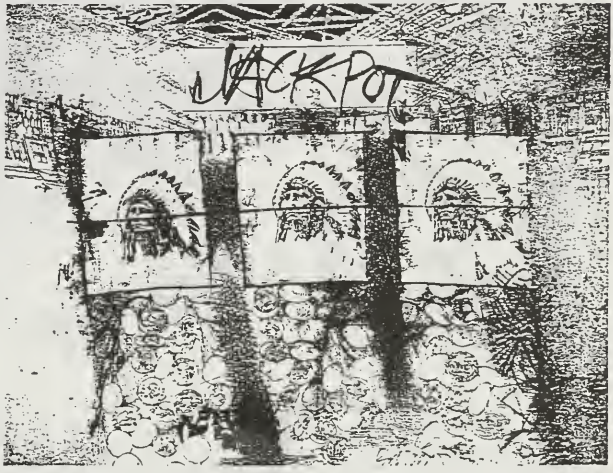
us as people. It created idleness. People didn't have to do anything in order to get money."

If the Campos have their way, by the end of the decade daily freight trains will be carrying loads of municipal waste to a three-hundred-acre site on a hilltop at the southern end of the reservation. For the privilege of leasing the band's land, a waste-management firm will pay the Campos between two and five million dollars a year. Goff argued that the dump would put an end to the band's dependence on federal largess. It would create jobs for every adult Campo who is willing to work, provide long-term investment capital for the band, supply money for full college scholarships for every school-age member of the band, and finance new homes for the families that now live in substandard housing. The dump would, in short, give the Campos financial independence for the first time in their modern history.

THE LANDFILL WOULD BE ONE of the most technically advanced in the United States; to regulate it, the Campos enacted an environmental code more stringent than the State of California's. Nevertheless, the dump generated fierce opposition in towns near the reservation, where thousands of non-Indians live. Geologists hired by the dump's opponents have suggested, but not proved, that seepage from the dump might contaminate the water supply of ranches beyond the reservation boundary. Environmentalists accused the band of irresponsibility toward the earth and charged that the Campos had been targeted in an "assault" on reservations by "renegade" waste-dumping companies. A bill was even introduced in the California legislature that would have made it a crime to deliver waste to the Campo landfill. Goff shrugged away the protests. "It's a sovereignty issue. It's our land, and we'll do what we want to with it."

"How can you say that the economic development of two hundred people is more important than the health and welfare of all the people in the surrounding area?" an angry and frustrated rancher, whose land lay just off the reservation, asked me. "It's hard making a living here. The fissures will carry that stuff right through here. We'll have all that stuff in our water and blowing down on us off the hills. If our water is spoiled, then everything's spoiled."

There were predictable elements to her rage: the instinctive resistance of most Americans to any kind of waste dump anywhere near their homes and the distress of many white Americans when they realize the implications of tribal sovereignty for the first time and find themselves subject to the will of a government in which they have no say. But there was something more, a sort of moral perplexity at Indians' having failed to behave according to expectation, an imputation that they were guilty of self-interest. Revealingly, I thought, on the wall of the rancher's trailer there was a poster decorated with Indian motifs. Entitled "Chief Seattle Speaks," it began, in words that are becoming as familiar to American schoolchildren as those of the Gettysburg Address once were: "How can you buy or sell the sky, the warmth of the land?" Here, in sight of the dump, the so-called testament of Chief Seattle was a reproach to the Campos, an argument rooted in what the rancher presumably believed to be Indians' profoundest values. "Before all this I had this ideal about Indian people and all they've been through," she told me. "I used to think they had this special feeling about the land."

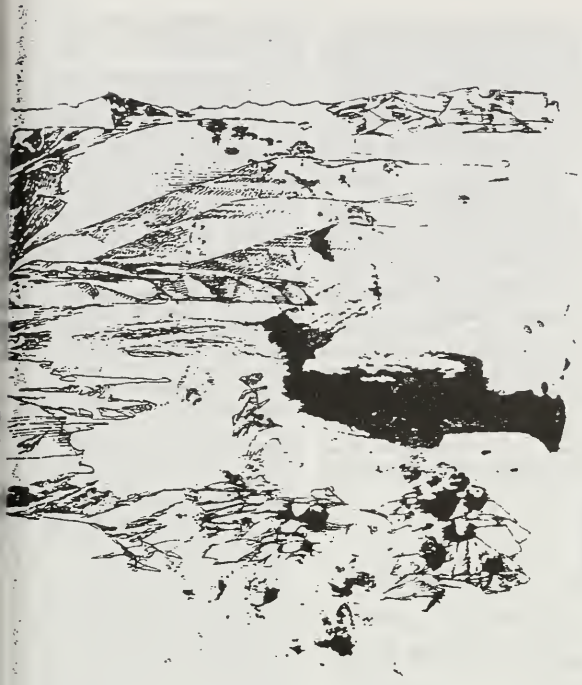


More than any other single document, Seattle's twelve-hundred-word "testament" lends support to the increasingly common belief that to "real" Indians any disruption or commercialization of the earth's natural order is a kind of sacrilege and that the most moral, the most truly "Indian" relationship with the land is a kind of poetic passivity. Having been translated into dozens of languages and widely reproduced in school texts, the "testament" has attained a prophetic stature among environmentalists. In 1976 Greenpeace used it in the introduction to a scathing report on toxic dumping, calling it "the most powerful

and profound statement on the environment ever made." Unfortunately, like much literature that purports to reveal the real nature of the Indians, the "testament" is basically a fiction. Seattle was indeed a historical figure, a slave-owning chief of the Duwamishes who sold land to the United States in the mid-1850s and welcomed the protection of the federal government against his local enemies. However, the "testament," as it is known to most Americans, was created from notes allegedly made thirty years after the fact by a white doctor who claimed to have been present when Seattle spoke, and which then were extravagantly embroidered by a well-meaning Texas scriptwriter by the name of Ted Perry as narration for a 1972 film on the environment, produced by the Southern Baptist Radio and Television Commission. How is it, I wondered, that Americans have so readily embraced such a spurious text, not only as a sacred screed of the ecology movement but also as a central document of "traditional" Native American culture?

THE SINGLE resource that the Campo Indians possess is wasteland. The dump would give them financial independence for the first time.

Increasingly it became clear to me that to be able to describe the realities of modern Indian life and politics, I would have to strip away the myths that whites have spun around Native Americans ever since Columbus arbitrarily divided the peoples he encountered into noble Arawaks and savage Caribs, conflating European fantasies with presumed native reality and initiating a tradition that would eventually include Montesquieu, Locke, Hobbes, and Rousseau, as well as a vivid popular literature stretching from



The Last of the Mohicans to *Dances With Wolves*. Untamable savage, child of nature, steward of the earth, the white man's ultimate victim: each age has imagined its own mythic version of what the historian Robert F. Berkhofer, Jr., termed the "white man's Indian."

Typically the Denver *Post* could declare, not long ago, in an editorial attacking the University of Arizona for a plan to build an observatory atop an allegedly sacred mountain: "At stake is the very survival of American Indian cultures. If these sacred places are destroyed, then the rituals unique to those places no longer will be performed and many tribes simply may cease to exist as distinct peoples." Such logic implies both that only Native Americans who profess to live like pre-Columbians are true Indians and that Indians are essentially hopeless and helpless and on the brink of extinction. Apparently it never occurred to the paper's editorialist that the religion of the great majority of Indians is not in fact some mystical form of traditionalism but a thriving Christianity.

In keeping with our essentially mythic approach to the history of Indians and whites, Americans were generally taught until a generation or so ago to view their national story as a soaring arc of unbroken successes, in which the defeat of the Indians reflected the inevitable and indeed spiritual triumph of civilization over barbarism. More recently, but not so differently, numerous revisionist works like Kirkpatrick Sale's *The Conquest of Paradise: Christopher Columbus and the Columbian Legacy* and Richard Drinnon's *Facing West: The Metaphysics of Indian-Hating and Empire Building* have tended to portray the settlement of North America as a prolonged story of unredeemed tragedy and failure, in which the destruction of the Indians stands as proof of a fundamental ruthlessness at the heart of American civilization. Such beliefs have steadily percolated into the wider culture—to be embodied in New Age Westerns like *Dances With Wolves* and popular books like the best-selling *Indian Givers: How the Indians of the Americas Transformed the World*, which purports to show how practically every aspect of modern life from potatoes to democracy derives from the generosity of American Indians—and into the consciences of journalists, clergy, and others who shape public opinion.

On the whole the complex and intricate relationship between whites and Indians has been presented as one of irreconcilable conflict between conqueror and victim, corruption and innocence, Euro-American "materialism" and native "spirituality." The real story, of course, is an often contradictory one, disfigured by periods of harsh discrimination and occasional acts of genocide but also marked by considerable Indian pragmatism and adaptability as well as by the persistent, if sometimes shortsighted, idealism of whites determined to protect Indians from annihilation and find some place for them in mainstream America.

For instance, in contradiction of the notion that Indians were innocent of even the most elementary business sense, it was clear during negotiations over the Black Hills in the 1870s that Sioux leaders had a perfectly good grasp of finance and that indeed they were determined to drive the best bargain they could. "The Black Hills are the house of Gold for our Indians," Chief Little Bear said at the time. "If a man owns anything, of course he wants to make something out of it to get rich on." Another chief, Spotted Tail, added: "I want to live on the interest of my money. The amount must

be so large as to support us." Similarly, in contrast with the popular belief that the United States government was committed to a policy of exterminating the Indian (no such policy ever existed, in fact), Senator Dawes publicly described the history of Indians in the United States as one "of spoliation, of wars, and of humiliation," and he firmly stated that the Indian should be treated "as an individual, and not as an insoluble substance that the civilization of this country has been unable, hitherto, to digest."

Indeed, the impulse behind the allotment of tribal lands and the national commitment to Indians was dramatically (and, with the benefit of hindsight, poignantly) acted out in a rite of citizenship that after 1887 was staged at Timber Lake, in the heart of the Cheyenne River Sioux country, and at many other places in the freshly allotted lands of other tribes. In the presence of representatives of the federal government, "new allottees stood resplendent in the feathers and buckskins of a bygone age. One by one, each man stepped out of a tepee and shot an arrow to symbolize the life he was leaving behind. He then put his hands on a plow and accepted a purse that indicated that he was to save what he earned. Finally, holding the American flag, the Indian repeated these words: "Forasmuch as the President has said that I am worthy to be a citizen of the United States, I now promise this flag that I will give my hands, my head, and my heart to the doing of all that will make me a true American citizen." It was the culminating, transformative moment of which Senator Dawes had dreamed.

It is true enough, however, that, as so often in Indian history, reality failed to live up to good intentions. Unscrupulous speculators soon infested the allotted reservations, offering worthless securities and credit in return for land. Within a few years it was found that of those who had received patents to their land at Cheyenne River, 95 percent had sold or mortgaged their properties. When the Allotment Act was passed in 1881, there were 155 million acres of Indian land in the United States. By the time allotment was finally brought to a halt in 1934, Indian Country had shrunk by nearly 70 percent to 48 million acres, and two-thirds of Indians either were completely landless or did not have enough land left to make a living from it. In the mid-1990s Indian Country as a whole is still a daunting and impoverished landscape whose inhabitants are twice as likely as other Americans to be murdered or commit suicide, three times as likely to die in an automobile accident, and five times as likely to die from cirrhosis of the liver. On some reservations unemployment surpasses 80 percent, and 50 percent of young Indians drop out of high school, despite progressively increased access to education.

"OUR PEOPLE LIVE IN A limbo culture that is not quite Indian and not quite white either. . . . a house without a foundation."

Is the tribal-sovereignty movement a panacea for otherwise intractable social problems? In the cultural sphere, at least, its importance cannot be underestimated. "Our people live in a limbo culture that is not quite Indian and not quite white either," said Dennis Hastings, surrounded by books, gazing out toward the Iowa plains through the window of the sky blue trailer where he lives in a cow pasture. Hastings, a burly former Marine and the tribal historian of the Omaha Nation, which is in northeastern Nebraska, has almost single-handedly led an effort to recover tribal history as a foundation for community renewal that is probably unmatched by any other small tribe in the United States. "It's like living in a house without a foundation. You can't go back to the old buffalo days, stop speaking English and just use our own language, and ignore whites and everything in white culture. If we did that, we'd become stuck in history, become dinosaurs."

Teasing small grants and the help of volunteer scholars from institutions around the country, Hastings has initiated an oral-history project to collect memories of fading tribal traditions. "We go into each family, get an anthropologist to record everything right from how you wake up in the morning," he said. Hundreds of historic photographs of early reservation life have been collected and deposited with the State Historical Society, in Lincoln. A friendly scholar from the University of Indiana recovered a trove of forgotten Omaha songs recorded in the 1920s on wax cylinders. Another at the University of New Mexico undertook a collective genealogy that would trace the lineage of more than five thousand Omahas back to the eighteenth century. Hastings explained,

"Until now everything was oral. Some people knew the names of their ancestors, and some knew nothing at all. There was a loss of connection with the past. Now people can come back and find out who their ancestors were." In sharp contrast with the combative chauvinism of some tribes, the Omahas invited scientists from the University of Nebraska and the Smithsonian Institution to examine repatriated skeletons to see what they could discover about the lives of their ancestors. In 1989, astonishing perhaps even themselves, tribal leaders brought home Waxthe'xe, the True Omaha, the sacred cottonwood pole that is the living embodiment of the Omaha people, which had lain for a hundred years in Harvard's Peabody Museum; at the July powwow that year, weeping hundreds bent to touch it as if it were the true cross or the ark of the covenant.

"We want the benefits of modern society," Hastings told me in his nasal Midwestern drawl. "But America is still dangerous for us. The question is then, How do we take the science that America used against us and make it work for us? The answer is, we try to build on the past. It's like a puzzle. First you see where the culture broke and fragmented. Then you try to build on it where people have been practicing it all along. Then people start to think in a healthy way about what they were in the past. If you can get each person to be proud of himself, little by little, you can get the whole tribe to become proud. We're going to dream big and be consistent with that dream."

In its broadest sense the tribal sovereignty movement is demonstrating that the more than three hundred Indian tribes in the lower forty-eight states (more than five hundred if you count Alaskan native groups) are distinct communities, each with its unique history, traditions, and political environment, for whom a single one-size-fits-all federal policy will no longer suffice. Greater autonomy will surely enable well-governed and economically self-sufficient tribes—mostly those located near big cities and those with valuable natural resources—to manage their own development in imaginative ways. For many others, however, far from airports and interstate highways, populated by ill-trained workers and governed, in some cases, by politicians who do not abide by the most basic democratic rules, the future is much less assured.

There is nothing abstract about such concerns in Timber Lake, South Dakota, which lies a short drive east from Isabel across the rolling plains of the Cheyenne River Sioux Reservation. Like Isabel, Timber Lake has been battered by the general decline of a region that is hemorrhaging jobs and people. Timber Lake is one of the relatively lucky places, kept alive by the presence of the Dewey County offices, the rural electric co-op, the central school, and a cheese factory. Even so, one hundred of the six hundred people who lived there a decade ago have moved away to places with better prospects and more hope. Isabel's population has dropped by half, to three hundred. Trail City has shrunk from three hundred and fifty to thirty, Firesteel to a single general store, and Landeau has disappeared completely. Entire towns have lost their doctors, banks, and schools. From a certain angle of vision, Sioux demands for the restoration of the reservation to its original nineteenth-century limits are simply an anticlimax.

The people of Timber Lake—the mechanics, the teachers, the co-op clerks, the men who work at the grain elevator, the retired farmers—are the human fruit of allotment, the flesh-and-blood culmination of the cultural blending that Senator Dawes envisioned. "Everyone here has relatives who are Indian," said Steve Aberle, a local attorney whose Russian-German father married into the Ducheneaux, a prominent clan of Cheyenne River Sioux. Aberle, who is thirty-five, is one-eighth Sioux; he is a voting member of the tribe and served for two and a half years as chairman of the tribal police commission. Nevertheless he shares the uneasiness of non-Indians who feel themselves slipping toward a kind of second-class citizenship within the reservation's boundaries. "It would be better to be in a situation where everybody works together and deals with people as people, but it's hard to do that when people know they pay taxes but are excluded from benefits and services," Aberle told me. "When my grandparents came from Russia, the United States government told them that they would be full citizens if they moved out here. Now I see people being told that they can't even take part in a government that wants to regulate them. Something is inherently wrong when you can't be a citizen where you live because of your race. It just doesn't fit with the traditional notion of being a U.S. citizen. At some point there has to be a collision between the notion of tribal sovereignty and the notion of being United States citizens. Anytime you have a group not represented in the political process they will be discriminated against. There's going to be more and more friction. It's going to hurt these communities. People start looking for jobs elsewhere."

The Sioux were the victims of nineteenth-century social engineering that decimated their reservation. But the descendants of the adventurous emigrants who settled the land are also the victims of an unexpected historical prank, the trick of the disappearing and now magically reappearing reservation. Reasonably enough, the rhetoric of tribal sovereignty asks for tribes a degree of self-government that is taken for granted by other Americans. However, the achievement of a sovereignty that drives away taxpayers, consumers, and enterprise may be at best but a Pyrrhic victory over withered communities that beg for cooperation and innovation to survive at all.

With little debate outside the parochial circles of Indian affairs, a generation of policymaking has jettisoned the long-standing American ideal of racial unity as a positive good and replaced it with a doctrine that, seen from a more critical angle, seems disturbingly like an idealized form of seg-

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regation, a fact apparently invisible to a nation that has become accustomed to looking at Indians only through the twin lenses of romance and guilt and in an era that has made a secular religion of passionate ethnicity. Much of the thinking that underlies tribal sovereignty seems to presuppose that cultural purity can and ought to be preserved, as if Indian bloodlines, economies, and histories were not already inextricably enmeshed with those of white, Hispanic, and black Americans.

Such concerns will be further exacerbated in the years to come as Indian identity grows increasingly ambiguous. Virtually all Indians are moving along a continuum of biological fusion with other American populations. "A point will be reached . . . when it will no longer make sense to define American Indians in generic terms [but] only as tribal members or as people of Indian ancestry or ethnicity," writes Russell Thornton, a Cherokee anthropologist and demographer at the University of Southern California, in *American Indian Holocaust and Survival*, a study of fluctuations in native populations. Statistically, according to Thornton, Indians are marrying outside their ethnic group at a faster rate than any other Americans. More than 50 percent of Indians are already married to non-Indians, and Congress has estimated that by the year 2080 less than 8 percent of Native Americans will have one-half or more Indian blood.

How much ethnic blending can occur before Indians finally cease to be Indians? The question is sure to loom ever larger for coming generations, as the United States increasingly finds itself in "government-to-government" relationships with tribes that are becoming less "Indian" by the decade. Within two or three generations the nation will possess hundreds of "tribes" that may consist of the great-great-grandchildren of Indians but whose native heritage consists mainly of autonomous governments and special privileges that are denied to other Americans.

> MUCH THINKING THAT underlies tribal sovereignty seems to presuppose that cultural purity can and should be preserved.

Insofar as there is a political solution to the Indian future, I have come to believe that it lies in the rejection of policies that lead to segregation and in acknowledgment of the fact that the racially and ethnically variegated peoples whom we call "Indian" share not only common blood but also a common history and a common future with other Americans. The past generation has seen the development of a national consensus on a number of aspects of the nation's history that were long obscured by racism or shame; there is, for instance, little dispute today among Americans of any ethnic background over the meaning of slavery or of the internment of Japanese-Americans during the Second World War. There is as yet no such consensus, however, with respect to the shared history of Indians and whites, who both still tend to see the past as a collision of irreconcilable opposites and competing martyrdoms.

THAT HISTORY WAS NOT only one of wars, removals, and death but also one of calculated compromises, mutual accommodation, and deliberately chosen risks, a story of Indian communities and individuals continually remaking themselves in order to survive. To see change as failure, as some kind of cultural corruption, is to condemn Indians to solitary confinement in a prison of myth that whites invented for them in the first place. Self-determination gives Indian tribes the ability to manage the speed and style of integration but not the power to stop it, at least for long. Integration may well mean the eventual diminishing of conventional notions of "tribal identity," but it must also bring many new individual opportunities, along with membership in the larger human community. "People and their cultures perish in isolation, but they are born or reborn in contact with other men and women, with man and woman of another culture, another creed, another race," the Mexican novelist Carlos Fuentes has written. Tribes will survive, if anything, as stronger entities than they have been for many generations. The question is whether they will attempt to survive as isolated islands or as vital communities that recognize a commonality of interest and destiny with other Americans. ★

Fergus M. Bordewich's book Killing the White Man's Indian *was published in February by Doubleday. He is also the author of* Cathay: A Journey in Search of Old China.

Before the
United States Senate
Committee on Indian Affairs

Statement of

JAMES M. JOHNSON

Hearing Subject: Waiver of Tribal Immunity

September 24, 1996

Thank you for the invitation to appear before you to address this very important issue. My name is James Johnson, and I am an attorney now in private practice in Olympia, Washington. I have attached a resume to my original testimony, from which you can see I previously was a Senior Assistant Attorney General for Washington and head of that State's Special Litigation Division. I represented Washington for nearly twenty years from the time I left the Army in Fort Lewis, Washington in 1973, until entering private practice in 1993.

Altogether I have participated in nearly a hundred cases in federal and state appellate courts to and including the United States Supreme Court. I also did (and do) much of the trial work for all these cases myself. Although only approximately one-third of those involved issues of tribal law, many have involved the issue before you today.

I shall briefly explain some of those cases, and the claims involved. Others testifying will give examples of abuses and the result of tribal assertion of "sovereign immunity"---often leaving an injured party with no remedy.

When Tribes act more like gangs than governments, there must be a remedy. An unexpected secondary effect is that persons and companies which could do business adding to reservation economic development choose not to do so.

A last problem is that federal agencies now use the Tribes' absence because of immunity to block review of these federal bureaucrats' actions. Several examples will be given of federal agencies' selective use of this defense in the face of explicit act of Congress providing for judicial review.

Finally, I shall briefly review the history of the issue to show that an act of Congress providing judicial remedy against Tribes is consistent with much historical precedent, as well as dictated by principles of fairness and constitutional due process.

The very short notice for this hearing has made impossible an exhaustive research project here. I largely rely below on two pre-eminent scholars in the field of Indian law history: Felix Cohen and Father Francis Paul Prucha.

TRIBAL IMMUNITY LEAVES MANY WITHOUT REMEDY

In one very recent case, I am counsel for private property owners in the state of Washington who own tidelands in that state on which clams and oysters grow (United States v. Washington, et al., Ninth Circuit Court of Appeals No. 96-35014. In 1989, 16 Washington Tribes, supported by the United States, brought a claim to the tidelands' clams and oysters, based on treaties executed in the middle 19th Century.

Note that of the over 64,000 property owners represented by the United Property Owners of Washington, most of the private property is off-reservation, often far remote from the reservations. We are largely talking about peoples' homes here which are located on the beautiful, and formerly peaceful, shores of Puget Sound.

In holding that the Tribes had a right to go on these private lands and take up to 50% of these shellfish, the federal court made a relevant observation as to the fact these private owners were totally innocent purchases in good faith:

> The . . . Private Property Owners are, effectively, innocent purchasers . . . (who) reasonably believed the land to be free of encumbrances and servitudes. Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed.

United States v. Washington, 898 F.Supp. 1453, 1457 (W.D. Wash. 1995).

The judge further noted:

> Fault for creating this controversy lies squarely with the State of Washington and the United States, for selling the tidelands and not objecting to the sale, respectively.

Supra, at 1459.

In part, in recognition that some protection should be afforded such innocent home owners, the federal court imposed conditions on tribal harvest. Those conditions included day-time only harvest, generally limited to five days per year, and required sanitary facilities and limits on the number of diggers, etc. (All found supra, at 1472-1473).

The judge also included a dispute resolution system, which included a enforcement provision that private property owners could invoke in the event of damages to their property through Tribes' commercial clam harvesting:

> If during any harvest, the Tribe damages the property of a Tideland Owner or in any way fails to harvest as stated in the notice provided to the Owner, the Owner may submit the issue to the Special Master as set forth in this Plan.

Supra, at 1473.

The most important protection to private owners was the specific inclusion of a damage remedy against the Tribes.

> The Special Master may, however, order that the Tribe pay damages or may implement some other appropriate remedy.

Supra, at 1476.

A provision for payment from tribal funds for damages to property of citizens was explicitly included in the treaties relied on to support the tribal claim. Notwithstanding that, the United States and Tribes brought a motion to amend the court's decision, asking the judge to delete this remedy. The United States and Tribes argued that tribal immunity barred such a

remedy, even in an action where the Tribes had brought the suit. It is worthy of note that at an early stage in the litigation not only did the Tribes and United States not name the private owners whose property they will be taking (clams) and entering, but even opposed their intervention. I had to appeal to the Ninth Circuit on behalf of the private landowners just to be allowed in the court to try to protect their interests.

The judge did amend the decision to delete the damage remedy against the Tribes. The decision, as amended is at United States v. Washington, 909 F.Supp. 787 (W.D. Wash. 1995). Note that the remedy left---actions against individual Indians---is in some regard worse than no remedy at all.

The outrage prompted by this case is more understandable if you remember that in the four treaties in question the United States and Indians agreed not only that all Indian "right, title and interest in and to the lands" were "ceded, relinquished and conveyed" but further expressly agreed:

> The said tribe and bands . . . promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. Should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. . .

Art. 9, *Treaty of Point Elliot.*

These Northwest treaties were based on model treaties the United States executed with Tribes in the Nineteenth Century. (There were 43 "Manypenny" treaties around the country.)

Such a treaty provision is common, and is one precedent for the proposition the Tribes were historically expected to be responsible, and liable for damages to citizens. Indeed, the Tribes agreed to do so. Ironically, the Tribes and United States are much less enthusiastic about enforcing treaty provisions which benefit or protect others than those which benefit Tribes.

The court's amended order requires the private owners to force a possible confrontation on their beaches if they wish to identify the Indian commercial clammers---who are damaging their property.

The removal of the remedy against the Tribes will itself increase the probability of confrontations occurring, since it reinforces the unfortunate perception of both tribal and other citizens that the Tribes are somehow above the law. That, of course, is illustrative of an important policy consideration for you in deciding if it is time the Tribes be like others in this society---fully accountable in court for their actions.

Lest this potential for confrontation on private property be argued as speculative, testimony before that same judge is instructive.

During trial, testimony was given about losses suffered on private lands on which owners had planted clams. This occurred even while the litigation was pending in the district court. One shellfish farmer heard of plans to conduct a tribal commercial clam harvest on public beaches adjoining his property and contacted the Tribes to be sure tribal enforcement would be present. He wanted to avoid confrontation over boundaries. He then made sure the boundary between the public beach and his private land was well marked. It was marked both by corner survey posts ("metal stake with plastic cap stating the company name") and then with PVC stakes at 20-25 foot intervals placed to assure there was no question of the boundary. Note this was a cultivated shellfish farm; the private tidelands had been graveled and clams seeded.

When the tribal harvest occurred, some of the boundary stakes were pulled out, and the tribal commercial diggers went from 70 to 100 feet onto the private property taking clams (which are also private property under Washington law). Over a ton of clams were taken with a wholesale value of $1.65 per pound---or thousands of dollars. Something over 50 commercial diggers were involved. Tribal enforcement officers, presumably paid with federal funding, were present when this occurred. Tribal representatives later said they would pay for his losses; but later refused to do so:

Q. Did they say they would pay you for the clams?
A. Yes.
Q. Have you been paid yet?
A. No.
Q. What concerns has this incident raised for you as a grower operating under the tribes' plan?
A. I don't know when I'm going to get paid, and I don't know how -- how to -- yeah, I have no recourse.

United States v. Washington, Transcript of Proceedings, May 10, 1995, p. 619, lines 12-19.

Adding insult to injury, the Tribe's counsel later elicited in cross-examination what was an explanation of the Tribe's nonpayment. The shellfish farmer had declined to execute an agreement that he wouldn't tell the federal court judge (the Tribe required such written agreement) as a condition of getting paid. United States v. Washington, Transcript of Proceeding, May 11, 1995, p. 649, line 21 through p. 650, line 6.

Smaller losses to home owners are cumulatively equally important, when there is no remedy. One of my witnesses was a waterfront home owner at Suquamish just down the beach from that Tribe's tribal headquarters. In the 1980s, the Tribe and United States had brought an action to claim ownership of the beach in front of her home. They lost; the case is United States and Suquamish v. Aam reported at 887 F.2d 190 (9th Cir. 1989). Adding insult to injury, the Tribe then brought the "shellfish" case to assert the Tribes could take half of any shellfish that grow there. In the interim the homeowner suffered trespass, cutting of holes in their fences to make a shortcut to the beach, firearms shot across their property. Transcript of Proceedings, Vol. 11, p. 2164, lines 10-25. The Tribe continued clamming on the beach. By the time of trial she testified: "[T]here are no longer any clams." Testimony of Cynthia Rasmussen, Transcript of Proceedings, Vol. 11, p. 2163, lines 16-17. As previously testified "there is no recourse."

Other witnesses testified as to similar problems, and futile attempts to get tribal or other assistance, *e.g.* Transcript of Proceedings, Vol 11, pages 2142-2444.

As a professional appraiser, the Suquamish owner testified the losses of property value to private owners as a result of loss of control of access and commercial clamming in front of their homes was up to 40 percent. Transcript, Vol. 11, p. 2158, lines 26 - p. 2166, l. 21. Neither the U.S. nor the Tribes can be sued nor will pay for such losses.

PRIVATE INVESTMENT AND ECONOMIC DEVELOPMENT IS DETERRED BY TRIBAL IMMUNITY

A more general point is raised by the above testimony especially that of the clam farmer who is the largest commercial shellfish grower and marketer in Washington. It is difficult or impossible to do business with someone with whom you "have no recourse" when problems arise or an agreement is not fulfilled. The fact of enforceability in a court is most often an important consideration in assuring it will not be necessary.

This observation with respect to commercial dealing with Tribes has been recently put before this committee by Professor Joseph Kalt from my alma mater who testified on September 17 of this year about problems surrounding efforts to increase economic opportunity on reservation(s). My Harvard degree was in Economics; his was in international development, but I can generally agree with his statement of the problem:

> The central problem is to create an environment in which investors---whether tribal members or outsiders---feel secure and therefore are willing to put energy, time, and capital into the tribal economy?

Testimony at 6.

We agree too, as to the need for "independent judiciaries (which) promote economic well-being." Testimony at 9.

I strongly urge the Committee to recognize that the "fundamental reform" called for is simpler than Professor Kalt's suggested reform of the judicial systems of each of the hundreds of Tribes in the United States. The lack of inter-tribal uniformity would then be a separate problem. This is "balkanization" at an extreme.

"Fundamental reform" of the system is only accomplished by making the decision-makers accountable and assuring confidence in the integrity of the process. As to economic investment decisions, at least those by what Professor Kalt calls "outsiders," the perception that the forum is unfair or biased is as bad as the fact (and other testimony both before this Committee and others have addressed the fact). Congress should act to make normal federal and state judicial forums fully available in disputes with Tribes.

The thrust of much other testimony today is that it is fundamentally unfair to deprive citizens of the United States of judicial forums---especially where those same forums are available to their adversaries.

For both reasons, the appropriate "fundamental reform" is a waiver of immunity so as to continue to allow Tribes access to all judicial forums, but also allow those contesting with them to hold the Tribes accountable in such forums.

FEDERAL AGENCIES USE OF TRIBAL IMMUNITY AS A SHIELD AGAINST COURT REVIEW

A frequently overlooked, but increasing problem is the use of tribal immunity by federal agencies to avoid judicial review of their actions. Ironically, this shield has even been used against tribal efforts to hold federal agencies accountable.

One example of the latter is Makah Indian Tribe v. Verity, 910 F.2d 555 (9th Cir. 1990). In that case an act of Congress (the Magnuson Act for management of ocean fisheries, 16 U.S.C. 1801-1882) specifically provides for judicial review of regulations by the Department of Commerce. When sued by one Tribe, the federal agency claimed that other Tribes were, or could be affected, and thus were necessary or indispensable. Since the other Tribes could not be sued or joined because of their immunity, the district court was persuaded by the United States to dismiss the case. The circuit court reversed, but only in part, holding that the relief available, even to an affected Tribe, was limited to prospective procedural remedies. (*See also* Chehalis Tribe v. Lujan, 928 F.2d 1496 (9th Cir. 1991).

A more recent example of the United States' selective use of this defense is presented by several challenges to Commerce' 1996 adoption of regulations to govern the harvest of whiting in the Pacific Ocean. (The 1996 harvest is over 450 million pounds off the Washington, Oregon, and California coasts.)

I represent the fishermen and processors of this new industry which has only developed in the last 30 years as technology was invented to process a fish which was historically viewed as useless because it deteriorated so quickly. (Now, the fish are caught using sophisticated electronics and deep water gear.) The fish are immediately nearly frozen and anti-enzymes utilized so as to process whiting into products such as surimi, from which seafood products such as artificial crab are made. This is a new industry which was developed under, and as a consequence of, the Magnuson Act provisions which removed foreign fishing from our coasts, and allowed the Pacific Council to adopt a long-term management plan.

During the 1996 season Commerce adopted a regulation overruling the Pacific Management Council, which had found there was no treaty entitlement to a special fishery since Indians had never fished whiting historically. Commerce allocated over 33 million pounds of harvest to one Tribe, prospectively promising four Tribes such an allocation. We filed suit

noting violation not only of the Magnuson Act, in refusing to follow the Pacific Council's Management Plan, but also violation of ESA. (The fear was that harvest off the Washington coast would take larger numbers of chinook, some of which are endangered. (Preliminary results have borne out this fear.)

The State of Oregon has joined our action, since the new industry is an important mainstay of the Oregon coastal economy given that many other fish stocks, such as salmon, have so declined.

The United States has moved to dismiss our lawsuit (and Oregon's), Midwater Trawlers, et al. v. Commerce, No. 96-6170 (D.C. Or.). The U.S. argued that the federal agency cannot be sued where the subject affects absent Tribe(s) (which cannot be joined because of immunity), notwithstanding the Magnuson Act provides for APA, judicial review of Commerce regulations.

The United States has not similarly moved to dismiss the separate action filed by one Tribe, which wants a higher allocation, even though three Tribes are absent (and not sued). Indeed, the United States has filed a response generally agreeing with and "joining" the tribal request.

Nor has the United States moved to dismiss the separate action filed by the State of Washington (which had supported the United States and Tribes when the issue was argued before the Pacific Council). In that case, no Tribes are present.

The argument advanced by the United States in this and many other cases is that a federal agency may not be sued over its actions if "the requested relief in (the) case would directly affect . . . Indian tribes.'" Fed. Defs. Memo in Support of Motion to Dismiss Midwater Trawlers. Note that under this theory Commerce can immunize its regulations from review by including Tribes' interests in discretionary rules.

These cases indicate the waiver of immunity is appropriate to allow adjudication not only with Tribes, but to avoid the use of the immunity by federal agencies as a shield to avoid review of their own alleged misconduct.

BACKGROUND: HISTORICAL TRIBAL STATUS

A brief discussion of history is important to rebut several myths which are oft repeated as mantras to ward off reform. The two primary sources are studies by two esteemed scholars in this area, Felix S. Cohen, Handbook of Federal Indian Law (1942) and by Francis Paul Prucha, American Indian Treaties, University of California Press (1994).

It is often claimed that Tribes are like separate or even foreign nations over which state or federal courts may not exercise jurisdiction. It is even claimed this status is conferred by treaties with the United States. Neither is historically accurate.

As an important prefatory note, the number of "Tribes" in the United States, as "recognized" by the List prepared by the present Assistant Secretary of Interior for Indian Affairs has climbed to over five hundred which she characterizes as entitled to:

> [T]he same privileges, immunities, responsibilities and obligations as other Indian tribes under the same or similar circumstances including the right, subject to general principles of Federal Indian law, to exercise the same inherent and delegated authorities available to other tribes.

60 Fed. Reg. 9250 (Feb 16, 1995)(foot note omitted)

The omitted footnote addresses the Alaska Native Villages, some 226 of which were added to this list by the Assistant Secretary. Their history and prior Congressional Acts, including ANCSA (43 U.S.C. 1601 *et seq.*) should dictate different special status.

Two important points should be noted. The list of "Tribes" has been growing---in part based on BIA determinations to add to the list of their constituencies. Also, those "Tribes" now include entities not historically recognized as "Tribes" at least through treaties.

Indeed, most of the Tribes as currently listed by the BIA are "non-treaty;" the United States government never entered into treaties recognizing such entities. There are a total of 367 ratified treaties entered into between 1778 (Delaware) and 1868 when the last with the Nez Perce was entered. Of that number, numerous were entered into with the same Tribe or Tribes. See Prucha at 448-500. In that number are not counted the treaties entered into by the Confederacy. The oft-quoted provision that Indian lands would be held in common and not be part of States "so long as grass shall grow and water run" were found only in these Confederacy treaties which

also guaranteed slavery---not in any treaty betv ɔen the United States and Tribes. See Prucha at 262.

Second, the treaties themselves generally recognized and specified that any tribal sovereignty was reduced (to control over their own members) as the Tribes all became the "dependent nations" of which Chief Justice John Marshall spoke.

Prucha notes that the assumption that the Indian Tribes were not independent sovereigns was reflected in the treaties through "some such phrases as the following:

> [T]he said Indian nations do acknowledge themselves and all their tribes to be under the protection of the United States . . . (or later) admitted that they resided within the territorial limits of the United States (and) acknowledged its supremacy."

At 5-6.

From pre-revolutionary times, the Indians were not treated as equivalent to foreign sovereign nations. Under the Articles of Confederation, Article VI provided for foreign treaties, and Article IX provided for Congress to regulate trade and manage all Indian affairs and other domestic matters. (Prucha at 39.)

Even during the Revolutionary War, Indian affairs were treated as a domestic and military matter, not as foreign or diplomatic questions. The Treaty of Paris (1783) recognized the transfer of sovereignty from Great Britain to the Colonies to western lands reaching to the Mississippi. The Tribes were not mentioned, though they had largely sided with the British in the war. (Prucha at 41.)

Later major additions of land to the United States were made by treaties with other nations, e.g., the Louisiana Purchase from France, the Treaty of Guadalupe Hidalgo from Mexico, Alaska though the Treaty of Cession from Russia. In some of these areas treaties were made with Indian Tribes. In Alaska and California, they were not.

In 1871, Congress passed an Act providing that:

> [H]ereafter no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty.

Act of March 3, 1871, ch. 120, 16 Stat 544, 25 U.S.C. § 71 (1988).

The Supreme Court jurisprudence from early on distinguished Indian Tribes from such foreign "nations."

Chief Justice John Marshall had written Johnson v. McIntosh in 1823 speaking of the Tribes rights to sovereignty as "necessarily diminished" in concluding the Indians could not even convey lands.

Marshall's Cherokee Nation v. Georgia, 30 U.S. 1 (1831), expressly held the Cherokee were not a "foreign state" and so not entitled to sue the State of Georgia for diversity jurisdiction purposes under Article III, Sec 2. He referred to them as:

> [D]omestic dependent nations (whose) relation to the United States resembles that of a ward to his guardian (and) so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands or to form a political connection with them, would be considered by all as an invasion of our territory and an act of hostility.

Supra, at 17-18.

Even these notions of limited sovereignty found in some of these early decisions were later referred to as "platonic notions of Indian sovereignty" by the Supreme Court in decisions this Century (County of Yakima v. Confederated Tribes, 112 S. Ct. 687, quoting McClanahan v. Arizona State Tax Comm'n: "modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes . . . ." 411 U.S. 164, 172 (1973).

Those treaty provisions, as noted above (citing Prucha) assumed, and often expressly provided that the Tribes were not fully "sovereign." South Dakota v. Bourland, 113 S.Ct. 2309 (1993), refers to modern "reality after Montana, tribal sovereignty over non-members cannot survive without expressed Congressional delegation (450 U.S. at 564) and is therefore not inherent." (Emphasis in original.)

Under the United States Constitution, of course, there are only two sovereigns: the United States and the States, which formed that Union. Authority over Indian affairs is vested in Congress as one of its Article 1, Section 8 powers through the Indian Commerce Clause.

Unlike the XI Amendment providing for the States' immunity from suit in federal courts, there is no such express prohibition with respect to the Tribes. Indeed, historically both in statute and treaty, there has frequently been specific provision for such actions against Tribes.

As noted in the original Handbook of Federal Indian Law, by Felix S. Cohen (1942):

> [T]here are a number of statutes which authorize suits against Indian tribes . . . (some) authorized suits against Indian Tribes and allowed, in effect the execution of judgment upon the tribal funds in the United States treasury.

(Cohen, at p. 269.) (He then refers to previous chapter, sections 1 and 3 which include numerous such statutes.) As only one example, a general provision for Court of Claims jurisdiction over "all claims for property of citizens . . . taken or destroyed by Indians belonging to any band, Tribe, or nation" he refers to as "an outgrowth of the collective responsibility imposed by early statutes and treaties for the torts of their members." (n.14 at 269.) That, and the accompanying text and footnotes recount an extensive list of cases brought against Tribes under such authorizations by Congress.

In a later section Cohen further noted Congress' historical practice of passing Acts authorizing suit which were specific to a Tribe or Tribes: "Congress has from time to time authorized various other suits against Indian Tribes by private citizens." (at 283.) Examples follow. The quoted example allowed judgments to be paid either from funds in the United States treasury for the Tribe or from any annuities.

Many of the statutes Cohen discussed are no longer in effect. They do give a more realistic idea of the historic practice which included an evolution from a treaty-period practice of providing for paying claims directly from tribal funds held by the United States to allowing suit in courts.

This moderate approach protected tribal assets, allowing recovery up to the amount of funds the United States provides the
Tribes.

Notwithstanding that the treaties limited such payments, generally to 20 years, today the United States still provides millions to the Tribes. Thus it is an added source of friction that persons harmed by Tribes feel (correctly) their own tax dollars fund the problem source, where

the actions are by tribal agents or employees.

Additionally, many Tribes are in the casino gambling business. The millions thus derived add to federal funding, making them relatively wealthy, taking away the major historic argument for shielding Tribes by immunity: the fear that Tribes would be impoverished.

CONCLUSION

The general authorization in Acts of Congress allowing Tribes to bring suit or the United States to sue on their behalf must be made reciprocal. Tribes of today should be viewed as responsible for their acts and fully subject to suit. This will also allow full consideration and resolution by the same court of counterclaim and cross-claims when Tribes bring suit.

Justice Blackmun stated over 15 years ago:

> I entertain doubts . . . about the continuing vitality in this day of the doctrine of tribal immunity. . . . I am of the view that the doctrine may well merit re-examination in an appropriate case.

Puyallup Tribe v. Department of Game 433 U.S. 165, 178-79 (1977).

An ironic postscript to this comment is that after it was written, on remand, the Puyallup Tribe asserted its immunity and refused to further participate in that case. Having litigated three times to the United States Supreme Court, the Tribe took the benefits of those issues on which it had prevailed, but left the Court rather than accept the burdens and responsibilities (which could be enforced only against individual members).

As previously noted, this practice continues to the present. It is time it be ended by Congress' adoption of a waiver of immunity for all Tribes.

James M. Johnson

Office: Capitol Court, Suite 225
1110 S. Capitol Way
Olympia, Washington 98501
(360) 357-3104

Home: 3042 Oldport Lane
Olympia, WA 98502
(360) 866-2370

1993 - Present: In private practice, I continue to apply the expertise in major litigation I developed as Chief of Special Litigation for the State of Washington. In United States v. Washington, Washington's (in)famous treaty fishing case, the tribes are attempting to extend their claim to shellfish and public and private lands. My clients are private landowners, parties only after I won a Ninth Circuit appeal of an order denying them intervention. In the Washington Supreme Court in Walker v. Munro, 124 Wn.2d 402 (1994), I successfully defended Washington's tax-limitation Initiative 601 (for the taxpayers, sponsors of the Initiative). In Mille Lacs Band of Chippewa v. Minnesota, I represent nine intervenor counties and work with the State of Minnesota to defend that Indian treaty case. In California, I represent sports and commercial fishing interests and coastal communities in Parravano v. Babbitt, challenging federal ocean regulation. I also authored an amicus brief for Wyoming and Montana counties in the United States Supreme Court in Hagen v. Utah, No. 97-6281, and participated in a NAAG moot court (as a "Justice") in preparing the Utah Attorney General for argument. On February 23, 1994, the Court ruled for us 7-2.

1983-1993: Until April of 1993, I was the Chief of the Special Litigation Division, in the Washington State Attorney General's Office, representing over twenty-five client agencies, and litigating "special" cases for the State. I enjoyed being the team leader for much of the State's important litigation at the state and federal trial and appeal levels, including the United States Supreme Court. I was also national affairs liaison to the National Association of Attorneys General (NAAG) and the Conference of Western Attorneys General (CWAG). I know personally and have worked with nearly every states' Attorney General, and top staff. I was contributing editor for the CWAG on American Indian Law Deskbook (March 1993, University of Colorado Press).

Recent major cases included the "Ninth Congressional District" litigation cases to retain Washington's 9th U.S. House seat (the last awarded after the census). This included four federal district court cases, and two United States Supreme Court cases. I also authored a brief amicus for twenty-two states in the successful effort to uphold states' election protection statutes last term in Burson v. Freeman, United States Supreme Court No. 90-1056.

I have handled nearly one hundred appellate cases in the federal courts of appeal, Washington Supreme Court and United States Supreme Court. Some of these cases are listed on the attached Appendix A.

Other Experience:

1970-71	Counsel to Washington State Legislative Joint Committee on Banking Insurance and Transportation.
1971-73	United States Army Lieutenant (Chief of Administrative Services for Ninth Infantry Division).
1973-1983	Chief Attorney for Fisheries/Game Division of Washington State.

Interests: I enjoy running (including marathons), sailing, fishing, hunting, and opera.

Education and Bar Admissions: Harvard University, B.A. 1967 (Economics); University of Washington, J.D. 1970.

Admitted to Washington Bar 1970; also admitted to practice in the Washington State Supreme Court; federal district courts of Washington and California, Eighth Circuit, Ninth Circuit and District of Columbia Circuit Federal Courts of Appeals; United States Supreme Court. I have also practiced on a pro hac vice basis in federal courts in seven other states.

Attachment A

LITIGATION EXPERIENCE/LEGAL ACCOMPLISHMENTS
JAMES M. JOHNSON

I. TRIAL AND APPELLATE EXPERIENCE

My experience includes hundreds of trials in both the federal and state systems and nearly one hundred appellate cases up to, and including, the United States Supreme Court. Most of the appellate work involved cases I personally tried.

In federal court alone, I have tried over two hundred cases. Most cases have been civil trials, but my trial experience has also included criminal trials in Washington State Superior Courts involving environmental and hunting and fishing cases.

This extensive litigation and appeal practice has extended to each of the courts of which I am a bar member. I have appeared pro hac vice in another six states' federal courts.

Some noteworthy cases--my favorites--illustrating the variety of my experience are the following:

A. United States Supreme Court

1. I personally briefed and argued Munro v. Socialist Workers, 479 U.S. 499 (1986) successfully upholding the constitutionality of Washington election ballot restrictions.

2. Hagen v. Utah, (No. 92-6281, decided February 23, 1994). I wrote the brief for similarly-situated counties in Wyoming and Montana. I helped prepare the Utah Attorney General for argument (as a "justice") in moot court sessions.

3. Montana v. U.S. Dep't of Commerce, 112 S. Ct. 1704, 503 U.S. 997 (1992). The "Equal Proportions" method of allocating U.S. House seats was upheld, saving Washington's ninth seat from one challenge. I briefed at both the three-judge district and United States Supreme Court and was a justice at the moot court preparing Solicitor General Starr who argued.

4. Franklin v. Massachusetts, 112 S. Ct. 3056, 503 U.S. 929 (1992). The Census' inclusion of U.S. military--overseas on the census day was upheld, saving Washington's ninth seat from another challenge. I briefed at both three-judge district and United States Supreme Court. At the Supreme Court level, this was coordinated with the U.S. Solicitor, whom I helped prepare for argument (again as a moot court justice).

5. Burson v. Freeman, United States Supreme court No. 90-1056. I authored a brief amicus for twenty-two states. The Tennessee law, like that of Washington, proscribes activities such as campaigning around the election polls. Our brief was especially important since one justice adopted our arguments in his concurring opinion. The case was won five to three so this vote was critical (four to four would have upheld the unfavorable lower court).

6. Idaho v. Washington, Oregon, 444 U.S. 380 (1980); 462 U.S. 1017 (1983). An original action between states, challenging regulation and harvest of fish runs in Columbia River and tributaries. I tried the case to the special master appointed by the Court and participated in briefing and argument preparation for the two United States Supreme Court hearings.

7. The treaty Indian "fish cases." Department of Game v. Puyallup, 414 U.S. 44 (1973); Puyallup Tribe v. Washington Dep't of Game, 433 U.S. 165 (1977); Washington v. Washington Comm'l

Passenger Fishing Vessel, 443 U.S. 658 (1979) involving fishing regulation and Indian treaty law. I was a participant in briefing and argument preparation.

8. Antoine v. Washington, 440 U.S. 194 (1975). This dealt with Indian reservation boundaries and hunting. I was a participant in briefing and argument preparation.

B. Washington Supreme Court and Washington Court of Appeals

I have personally handled and/or argued approximately 35 cases, more than half in the Washington Supreme Court. Some recent examples include:

1. Walker v. Munro, Washington, 124 Wn.2d 402, 879 P.2d 920 (1994), upheld an initiative limiting tax and budget increases in face of constitutional challenge.

2. Ellensburg v. Washington, 118 Wn.2d 709 (1992), held the State is not required to pay full funding for fire protection services for Central Washington University. I participated in writing the briefs and argued the case before the Supreme Court. It was decided in our favor on January 16, 1992.

3. Schrempp v. Munro, 116 Wn.2d 929 (1991), involved a challenge to the Secretary of State's acceptance of initiative. I briefed and argued this case. The court held in favor of the Secretary--allowing the voters to decide.

4. Vangor v. Munro, 115 Wn. 2d 536 (1990), involving a challenge to the Secretary of State's processing of an initiative. I briefed and argued this case, which upheld the Secretary.

5. Rains v. State, 100 Wn.2d 660 (1983), upheld the State's immunity from suit for alleged civil rights violation under 42 U.S.C. § 1983 (briefed and argued).

6. Snyder v. Munro, 106 Wn.2d 380 (1986). Washington legislative redistricting, including two "split" districts, upheld as constitutional (briefed and argued).

7. Nuxoll v. Munro, 104 Wn.2d 456 (1985). Election process for superior court judges upheld (briefed and argued).

8. Washington v. Crown Zellerbach, 92 Wn.2d 894 (1979). The stream protections of the hydraulics code and enforcement through criminal prosecution for violations was upheld (briefed, argued. and won criminal jury trial on remand).

9. The Indian Treaty Fishing Cases: Numerous cases and trials at the Superior Court (Washington's trial court) led to Washington Supreme Court cases of Puget Sound Gillnetters v. Moos, 88 Wn.2d 677 (1977); State Comm'l Passenger Ass'n v. Tollefson, 89 Wn.2d 276 (1977); Purse Seine Ass'n v. Moos, 88 Wn.2d 799 (1977). All held the state must treat citizens the same, and could not regulate for special Indian fisheries. After the United States Supreme Court review (see A-6, above), Fishing Vessel Ass'n v. Tollefson, 92 Wn.2d 939, (1980) upheld the state's authority to regulate fisheries.

C. Federal Courts of Appeal

I have personally handled and/or argued approximately 50 cases in the federal courts of appeal. Examples, indicating the breadth of experience are:

1. Federal Energy Regulation Commission appeals (FERC appeals). The Federal Power Act (16 U.S.C. 825(L)) allows appeals to either the circuit for the District of Columbia or the circuit in which the owner resides or does business. Among significant appeals, I have participated in both circuits, are:

(a) Rock Island (Confederated Tribes v. FERC, 734 F.2d 134 (9th Cir. 1983);

(b) Lewis River-Merwin Dam (relicensing). Clark-Cowlitz JOA v. FERC, 826 F.2d 1074 (D.C. Cir. 1987). (Argued)

(c) Ross Dam (Seattle Light)

2. Indian Treaty Fishing cases. United States v. Washington, 384 F. Supp. 319 (1974), is the "Boldt" case on Indian treaty fishing rights (which predates my tenure; I inherited the case one year later). Over 200 mini-trials ensued, involving implementation from one day to one week. Thirty-seven decisions (selected by the judge) are published seriatim, beginning 459 F. Supp. 1020 (1978). Dozens are separately reported. Approximately 30 appeals resulted from the first five years' implementation. One anecdotal illustration; four cases are found seriatim in 573 F.2d 1117, 1118, and 1121 (9th Cir. 1978). The latter was, itself, five separate proceedings. I argued this case and most of the others.

On November 2, 1993, I won an appeal granting private landowners party status in the Ninth Circuit (No. 93-35324) Phase III (shellfish and private beaches) case in time for the 1994 trial.

United States v. Oregon, 302 F. Supp. 899 (1969). (The Indian treaty fishing rights case on the Columbia River predated "Boldt." Washington only intervened in 1975). Here, too, there were dozens of hearings and trials (under a week). There are six separate reported appeals. Most important are: 657 F.2d 1009 (9th Cir. 1981) (our injunction against Yakima fishing, including on reservation, was upheld in face of tribal immunity argument) and 529 F.2d 570 (9th Cir. 1976) ("Boldt" 50 percent formula need not apply to Columbia). I briefed and argued both.

3. Confederated Tribes of Colville v. Washington, 649 F.2d 1274 (9th Cir. 1981). State has jurisdiction over non-Indians within boundaries of Indian reservation. (Argued)

4. Sandidge v. Washington, 813 F.2d 1025 (9th Cir. 1987). National Guard officer immune from civil rights suit by subordinate.

5. Herald v. Munro, 758 F.2d 350 (9th Cir. 1984) and 838 F.2d 380 (9th Cir. 1988). ABC, CBS, NBC, and the New York Times challenged the Washington Statute prohibiting "exit-polling" around election area. The statute was upheld--first decision, invalidated by second). (Argued both) My client did not authorize U.S. Supreme Court review, but see Burson v. Freeman, supra, p.1.

6. Williams v. Dolliver, (Our client, Justice Dolliver, was then Chief Justice of Washington's Supreme Court) 894 F.2d 321 (1988). Washington courts' practice of dividing military retirement pay in divorce proceedings upheld. (Argued)

7. Socialist Workers' v. Munro, 765 F.2d 1417 (9th Cir. 1985) challenged Washington's election restrictions on ballot access for minor parties. The unfavorable decision was reversed by the U.S. Supreme Court, supra, which upheld Washington's law. (Argued both)

8. Columbia Gorge United v. Yeutter, 960 F.2d 110 (9th Cir. 1992) upheld the constitutionality of the Gorge Act (briefing was cooperative; Oregon Attorney General Frohnmayer argued this case).

9. Broughton Lumber v. Columbia Gorge Comm'n, State of Washington, Ninth Circuit Court of Appeals No. 91-35183 (Sept. 15, 1992). State sovereign immunity was not waived by the Gorge Act; state may not be sued in federal court for actions of the Gorge Commission. (Argued)

D. Administrative Proceedings: FERC and EFSEC

Specialized practice before such agencies has included:

1. FERC (Federal Energy Regulation Commission) Hydroelectric dam cases. Trials of licensing, relicensing, jurisdiction, and sub-issues, including:

   (a) Skagit River; "High" Ross Dam (Seattle City Light)

   (b) Lewis River-Merwin Dam (Pacific Power & Light competing with Clark-Cowlitz JOA)

   (c) Elwha River, Glines & Elwha projects (Crown-Zellerbach Corporation)

   (d) Nisqually River -- proceedings involving each project
   - Yelm diversion (City of Centralia)
   - Alder Dam (City of Tacoma)
   - La Grande Dam (City of Tacoma)

   (e) Columbia River -- all five mid-Columbia projects
   - Rock Island Dam
   - Rocky Reach Dam
   - Wanapum Dam
   - Priest Rapids Dam
   - Wells Dam

   (f) White River -- (Puget Power & Light)

2. EFSEC (Washington State's Energy Facility Site Evaluation Council) provides and enforces licenses for major power facilities. I participated in trial proceedings involving:

   (a) WPPSS II (Hanford Nuclear Plant)

   (b) WPPSS 4 and 5 (Satsop Nuclear Plant)

   (c) Northern Tier Pipeline

   (d) Fish Kill supplemental proceedings in WPPSS II resulted in award of a hatchery facility

II. TEACHING CREDENTIALS AND PUBLICATIONS
(chronological listing with sponsoring organization)

A. CLE's (Continuing Legal Education courses taught to Bar members)

1. Indian Treaty Hunting and Fishing, Washington State Criminal Justice Training Commission, 1977.

2. Indian Fishing Rights, Governmental Lawyers Association, 1978.

3. Anadromous Fish Management and Protection, Environmental Law Review, Northwest School of Law, 1979.

   (1) Federal Energy Regulatory Commission Practice, Fish and Wildlife Protection; and
   (2) Indian Fishing Rights (two separate presentations), Lewis and Clark Law School, 1980.

4. Environmental Law, Current Trends in Natural Resource Law, Office of the Attorney General, 1981.

5. Attorneys' Fees Awards Under the Civil Rights Act, Office of the Attorney General, 1982.

6. Federal Trial Practice (new Rule 16), Office of the Attorney General, 1984.

7. Constitutional Law; "EXIT-POLLING" Debate, Washington Bar Association, "Today's Constitution and You" (Bicentennial Program), 1986.

8. Appellate Practice (Argument), Office of the Attorney General, 1987.

9. Columbia River Legal Issues; Fish, Water, Power and Competing Users (U.S. and international), Western
   Association of Attorneys General, 1991.

B. Publications

James M. Johnson, Indian and Aboriginal Hunting and Fishing Claims (including marine mammals), International Association of Fish and Wildlife Commissioners, Toronto, Canada, 1978 (published proceedings).

Kenneth O. Eikenberry, James M. Johnson, David M. Driesen, Enforcing Washington Judgments in Canadian Courts: Taking the Dams out of the Stream of Commerce; U.Puget Sound L. Rev. 491 (1990); Washington State Bar News 45 (1991); B.C. Sup. Ct. R. 54(2).

Conference of Western Attorneys General, (James M. Johnson, contributing author/editor) The American Indian Law Deskbook (U. Colorado press 1993).

CONFEDERATED SALISH AND KOOTENAI TRIBES
TRIBAL SOVEREIGN IMMUNITY AND CIVIL JURISDICTION
TESTIMONY BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE
SEPTEMBER 24,1996

Good morning Chairman McCain, Vice-Chairman Inouye, and Members of the Committee. I am honored to represent the Confederated Salish and Kootenai Tribes of the Flathead Reservation in Montana in presenting testimony to you today concerning Tribal sovereign immunity, how it affects the rights of non-Indians residing on and off Indian reservations, and the fair and impartial resolutions of the legal conflicts involving those individuals and Indian Tribes. I am accompanied by the Tribes' Managing Attorney, Daniel Decker and we will offer some of the many examples of how an inclusive, creative approach to Tribal protection of the rights of all citizens living on and near Indian reservations and implementation of successful dispute resolution mechanisms, offer alternatives to unnecessary legislation intended to correct a perceived problem.

Perception is one of the major limitations of all of us legislators. We focus on a complaint, dispute or problem based on our personal experiences, our knowledge, and our feelings. This Committee is attempting to deal the perception that non-tribal members living on or near reservations have no civil remedies because of tribal sovereign immunity. Nothing can be further from the truth. I will share with you our Tribes' perspective of the rights of all people living on or near an Indian reservation and the resolution of conflicts among those people and a Tribal government.

Tribal governments all over the nation, whether traditional or "reorganized" forms of government, are all too familiar with the distrust, anger, and fear associated with lost property or property rights. For example, my forefathers, by agreement made in good faith with the federal government, ceded, relinquished and conveyed to the United States, property outside an area reserved for the exclusive use and benefit of the Flathead Nation's members. As with every treaty made, the United States government broke nearly all promises made in that treaty, including the right to use the reserved area exclusively. By 1934, only 75 years after the treaty ratification, the Tribes of the Flathead Nation had lost approximately 66% of the 1,250,000 acre reserved land base. Today, while we own about 60% of the land, we represent only about 30% of the total Reservation population. Realizing that the traditional ways of protecting our property and property rights had not worked, the Flathead Nation turned to innovative, progressive means of protecting, preserving, and enhancing our homeland. Our approach benefits all the residents of the Flathead Reservation, which provides all types of civil remedies and opportunities for governmental participation by non-tribal members.

A primary responsibility of any government is to regulate the conduct and activities permitted within the government's jurisdiction. A tribal government is no different. On the Flathead Reservation we have taken steps to protect the health and safety of persons on the

reservation and to encourage productive enterprise while protecting natural resources. Such government action will necessarily impact the activities permitted on the Reservation. In recognition of the fact that many non-tribal members live on the Flathead Reservation, the Tribal government has taken many steps to ensure that non-members have an opportunity to play an active role in the promulgation and implementation of government regulations and ordinances. Let me tell you about some of the things we've done and are doing.

1. Shoreline Protection Ordinance - As environmentally sensitive Tribes we realized that then uncontrolled growth of residential and commercial developments along Flathead Lake threatened the near pristine water quality. Tribal challenge of the development of one large earth-filled commercial breakwater and dock resulted in a 9th Circuit Court decision affirming the Tribes' ownership of the beds and banks of the south half of Flathead Lake, the determination that the Flathead Reservation had not been disestablished, and the determination that the Tribes rightfully exercised regulatory authority over structures extending below the high water mark of the lake. The Tribes' regulatory authority is exercised by a seven member Board consisting of Tribal members and non-Tribal members. Board vacancies are advertised and members selected by the Tribal Council.

2. Aquatic Lands Conservation Ordinance - The Aquatic Lands Conservation Ordinance exercises regulatory authority (in conjunction with the Army Corps of Engineers/Environmental Protection Agency Dredge and Fill Permitting Program) over construction taking place in riparian and wetlands on the Reservation. The Shoreline Protection Board referenced above, containing both non-Tribal members and Tribal members, exercises the regulatory authority of the ordinance.

3. Flathead Lake Fisheries Co-Management Plan - The Tribal Fisheries Program and the Montana State Department of Fish, Wildlife and Parks co-manage Flathead Lake fisheries pursuant to a plan approved by both the State of Montana and the Confederated Salish and Kootenai Tribes.

4. Hunting and Fishing Cooperative Agreement - This litigation settlement agreement regulates non-member hunting and fishing on the Flathead Reservation. All non-member reservation residents must buy a Tribal permit to hunt and fish the Tribal resources allowed for harvest. Tribal, State and Federal officers all enforce the regulations, citing violators into courts of appropriate jurisdiction. Neither the Tribes nor the State relinquished jurisdiction by signing this agreement.

5. MVP Utility Board and Consumer Board - We manage an electric utility serving over 16,000 meters representing most Reservation homes and businesses. When taking over operation and management of the

utility from the Bureau of Indian Affairs pursuant to a Self-Determination Contract, the Tribes instituted an independent utility board to manage the utility and a consumer council to represent consumer interests. Both entities contain non-member and Tribal member representatives. The consumer council was a "first" for the utility and has equal power to the utility board in recommending rate changes to the Tribal Council for consideration in a public, federal rate making process. Local operation of the utility by the Tribes has much improved customer service and public relations.

6. Tribal Administrative Procedures Ordinance - This administrative appeals ordinance sets forth a process by which administrative decisions may be challenged by any affected party. The administrative law judge hearing most cases is a non-member attorney.

7. Criminal Misdemeanor Retrocession from Concurrent Jurisdiction and Accompanying Tribal Court Expansion - Several years ago the Confederated Salish and Kootenai Tribes withdrew from concurrent criminal misdemeanor jurisdiction with the State of Montana over tribal members committing offenses on the Reservation. The extremely high percentage of Salish Kootenai Tribal members incarcerated in the State prison prompted this action by the Council. The cooperative agreement between the Tribes and State and local governments implementing the retrocession, provides for cross-citation authority, stop-and-detain provisions and emergency powers.

8. Tribal Court Improvement and Expansion - In anticipation of the increased workload connected with exclusive criminal misdemeanor jurisdiction, the Tribes utilized Tribal funds to greatly expand and improve our court system. The improvements are outlined below:

a. Development of an independent Prosecutor's Office. All prosecutors must be licensed to practice law. Currently, all prosecutors are non-members.

b. Establishment of separate Defender's Office. This office represents all people facing a criminal charge in Tribal Court. All attorneys working in this office are non-members.

c. Expanded Legal Services Program. This program provides representation in civil cases to individuals meeting representation guidelines. Office staff currently consists of four attorneys and one advocate. Three of the attorneys are non-members.

d. Adult and Juvenile Probation Services and Community Service Placements.

9. Tribal Appellate Court Organization and Expansion - The Tribes established and then expanded an appellate court to which trial court decisions may be appealed. The full panel consists of three attorney justices and two lay justices. The three attorney justices (including the Chief Justice), have been non-members and the two lay judges Tribal members. Two attorney justices and one lay justice sit on each appeal. Reconsideration is heard en banc. Each side in the appeal has the right to recuse one justice in each appeal without stating cause. This provides additional opportunity for fair and impartial decisions.

10. Regulation Development Comment Process - Whenever regulations asserting civil jurisdiction over non-Tribal members must be adopted or updated pursuant to a Tribal Ordinance, a fully inclusive public comment process is conducted. Regulations developed pursuant to this process, which includes notice and hearing, are those such as Tribal Water Quality Standards; Hunting, Fishing and Recreation Regulations; Migratory Waterfowl Regulations; Shoreline Protection Regulations; Aquatic Lands Conservation Ordinance Regulations; Request for Class I Air Quality Redesignation and many others.

11. Environmental Initiatives - The Tribes developed many environmental initiatives over the years including: establishment of a 90,000 acre wilderness; minimum instream flow protection; establishment of water quality standards; closures for grizzly bear, bull trout, nesting waterfowl, elk, big horn sheep, and reintroduced native species protection; and redesignation of air quality to Class I status. All these initiatives protected and improved the quality of life for all Reservation residents, everyone benefited.

12. Governmental Immunity Ordinance - The Confederated Tribes adopted a Tribal Governmental Immunity Ordinance in 1995. Section 2 of the ordinance contains limited waivers of immunity for injunctive, declaratory or mandamus relief for Tribal government infringement of any civil or constitutional right of an individual arising under the Tribal Constitution, Bylaws, or the Indian Civil Rights Act; for specific waiver of sovereign immunity by resolution or ordinance, or for judicial review of governmental implementation of the resolution or ordinance; when the Council authorizes intervention as a party in a lawsuit (except for counter-claims); in the case of agreements with the United States which require the Tribes to purchase liability insurance, and thereby consent to waiver up to the policy limit; when the Council enters into an agreement expressly waiving immunity, setting out procedures for remedies in a default or breach situation; and when an officer, agent, or employee of the Tribes, acting within the scope of authority, allegedly causes serious personal injury or death through negligently breaching a duty of care owed to another. These limited waivers provide opportunity for individuals,

governments, and other parties, to obtain fair and impartial decisions. Where we have chartered tribally owned businesses, those businesses operate pursuant to direction given by an independent board of directors (including non-members). All articles of incorporation include "sue and be sued" provisions.

While there are many more stories we could share, we believe the examples given indicate that an inclusive rather than exclusive approach to Tribal civil jurisdiction works. Additionally, our experiences show that Tribal civil jurisdiction is not something that needs to be fixed. More to the point, the "solution" proposed by Section 329 could virtually eliminate all these creative and inclusive methods that work. This would occur because there would be no incentive for non-tribal members to work within our administrative and judicial processes. A waiver of any government's sovereign immunity - be that government tribal, state or federal - would result in judicial chaos by authorizing any one person or entity to file frivolous lawsuits that would virtually bring justice to a standstill.

Although it is possible to find anecdotal stories that seemingly justify extreme remedial responses, we hope that through the cooperative examples cited in our testimony the Committee can see that tribal and federal laws as they presently exist already provide sufficient authority to protect the interests of all concerned parties. We appreciate the efforts of this Committee to fully examine allegations and to hear from tribal witnesses and we look forward to working with you on this and future matters.

Thank you very much for the opportunity to present these comments today. We will be submitting more detailed testimony for the record.

Respectfully Submitted,
CONFEDERATED SALISH & KOOTENAI TRIBES

Rhonda R. Swaney, Chairwoman
Tribal Council

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD • BELLINGHAM, WASHINGTON 98226-9298 • (360) 384-1489
DEPARTMENT _____ EXT _____

TESTIMONY OF THE LUMMI INDIAN NATION
at the Senate Committee Hearing on
"Tribal Sovereign Immunity"
Tuesday, September 24, 1996
Submitted by Henry Cagey, Chairman

Good Morning Vice Chairman Inouye and Honorable Members of the Committee.

My name is Henry Cagey and I am Chairman of the Lummi Nation I am here to address the concerns expressed by this Committee regarding procedures available to individual Indians and non-Indians to be heard in a tribal form on the Lummi reservation.

This hearing is more than a simple question on due process It is a much older question of whether Indian People and Nations can be considered "competent" enough to govern themselves, their territory, and all who access their borders We can trace this conflict over Indian capacity and competency to the Pope's legal opinion of 1537. The non-Indian accusation that Indians lack self-governing capacity is 460 years old. This whole problem is based on the government's reliance on the doctrines of conquest and discovery, which are legal fictions created for the benefit of the non-Indians.

Speaking in a more contemporary vein, we would like to submit for the record four key points on the legal and historical foundations for jurisdiction on and off reservation. First, our rights began, not with the treaties, but with the historical fact that the Lummi people have never been conquered nor have they even relinquished their inherent sovereignty Second, the treaties are bilateral agreements between Indian Nations and the United States and cannot be unilaterally altered Third, the government-to-government relationship between the Indian tribes and the United States is embedded in the United States Constitution. Permit me to refer to Senate Concurrent Resolution #76, in which it states, *"the Congress...hereby affirms the constitutionally recognized government-to-government relationship with Indian tribes which has historically been the cornerstone of this Nation's official Indian policy".* Lastly, I would like to quote from the Treaty of Point Elliot that *"the reservations were set apart...for the exclusive use of the Indians"... "nor shall any white man be permitted to reside upon the same without permission of the said tribes and the Superintendent or his agent."*

The Lummi Nation is not insensitive to, nor unaware of, the needs of non-tribal members on the reservation. The Nation has put in place mechanisms which ensure due process in tribal forums for non-tribal members on the Lummi reservation. A good example of this is

the Lummi Water and Sewer Boards The five-member Lummi Sewer Board has ***two non-Indian*** members elected by ***all State registered voters on the reservation***. The appeal process for the Lummi Water and Sewer Boards includes:

- formal hearings before the Boards and the right of legal counsel
- formal findings of fact, with any appeal to LIBC limited to issues of fairness
- further appeal to tribal court
- appeal to an arbitrator
- a waiver of sovereign immunity to enforce any final decision

There have been only two appeals to the Boards in the last fourteen years on our Water and Sewer Ordinance. In both cases, including one brought forward by Marlene Dawson, a non-Indian resident and Member of the Whatcom County Council, the appellant stipulated that the hearings were fair and in accordance with due process.

I would also like to cite procedures now in place in the area of natural resources where the process includes:

- permitting procedures and licensing
- a hearing in tribal court for citations
- availability of the Tribal Court of Appeals for a *de novo* trial

In the area of zoning on the reservation, we have in place comprehensive procedures that include a permitting process, open public hearings, and a process of review and appeal based on the written record.

In contrast we can cite examples of the failure by County, State, and Federal authorities to enforce laws and regulations on the reservation. A case in point occurred on the reservation in 1995. A non-Indian fee landowner cleared his land, cutting down trees without a permit, destroying known bald eagle roost and nesting trees, devastating a fish-bearing stream, and disrupting a registered archaeological site. To date, no criminal prosecution has been pursued and no civil penalties have been levied as provided by law, and, as have been assessed in similar cases in adjacent jurisdictions by Federal or State authorities.

Of course, no system is perfect. The Lummi Nation has, however, made great strides, especially with the advent of self-governance, in updating and improving our codes and ordinances. It is, in fact, a major goal of the Lummi Nation to revise our codes and ordinances to be more responsive to the needs of tribal and non-tribal members on the reservation.

We understand the significance of this hearings on due process for non-Indians in tribal forums. We too, have concerns for due process. In the past year, we have witnessed Congressional legislation that directly and adversely affects our ability to exercise treaty rights on the reservation. We were never consulted nor were any public hearings held on this matter. We view such unilateral actions as a violation of the principle of due process and an abrogation of the multilateral agreements set forth in the Treaty of Point Elliot.

We feel it is vitally important that this esteemed Body be provided the facts and legal background that will truthfully explain the roots of sovereignty, the rights of the Indian Nations, and the treaty obligations of the United States We look forward to the day that we can work together in an atmosphere of mutual trust and respect.

I would like to close my testimony on an historical note with the words--and the promises--of Isaac Stevens, the Governor of Washington Territory, as recorded in the minutes of the signing of the Treaty of Point Elliot of 1855:

> *"There will be witnesses. These witnesses will be tides. You Indians know that the tide goes out and comes in, that it never fails to go in or out; you people know that streams that flow from the mountains never cease flowing, flow forever; you people know the sun rises and sets and never fails to do so. Those are my witnesses and you Indians, your witnesses, and these promises will be carried out, and your promises to me and the promises the Great Father made to you will be carried out as long as these three witnesses continue..."*

May the sun never set on this Body and the promises be kept, now and into the future.

Hys>qa. Thank you.

EVOLUTION OF CLAIMS TO JURISDICTION OVER INDIAN AFFAIRS

by J.P.W. James, LTPTF Coordinator, 1996

STATEMENT OF CONCERN OVER CURRENT CIVIL JURISDICTION HEARINGS

We, as Indian Nations, do not accept the doctrine which states that our nations and people lack the capacity to govern ourselves and all who enter our territory. We do not accept the "legal fictions" that have been created to deprive us of jurisdiction over all transactions transpiring inside our exterior boundaries. We see current attempts to remove civil jurisdiction and deprive our nations of sovereign immunity as a direct attack upon our capacity to self-govern. The United States should not vacate its commitments to Indian self-determination and self-government and should not allow piece-meal legislation to erode the "trust responsibility" owed to the tribes.

The Indian Nations of the United States have witnessed a constant erosion of their powers of self-government over their territories, natural resources, and people. In place of self-government, it has been claimed that Indians are a part of the United States, as citizens with special rights and status beyond the average citizen. Of course, these "super-citizen" claims always arise amongst those who are after Indian lands and resources or seek to develop properties located inside reservation boundaries.

However, behind this stated concern for the "poor non-Indian inside Indian Country" are centuries of erosion of Indian sovereignty primarily through subtle acts of foreign governments (external to the Indian tribes). And, the average citizen rarely understands the unique government-to-government relationship between the tribes and the United States. In addition, the national government, with state support or initiatives, have been constantly cutting back Indian sovereignty. This implicit divestiture (so named by the Rehnquist Court) has been accomplished not on a government-to-government basis, in which Indian nations sought to unambiguously become a political subdivision of the republican governmental system of the United States; but, rather, it has been implemented by unilateral acts of legislature or court decrees, or because Indian nations entered treaties of peace and friendship with the United States- who sought to avoid war (See: U.S. v. Wheeler, 435 U.S. 313(1978).

Today, the anti-Indian elements present Indians, and the tribal governments, as part of the political subdivisions of the state, subjected to overview by local non-Indian counties and municipalities. This "incorporation" into the local political fabric is not legal under canons of construction of written constitutions of the state or nation, and most definitely cannot be justified at the local level. One nation cannot simply pass an act

of legislature and disband a foreign (Indian) nation. One nation cannot enter peaceful relationships with another nation, by treaty, and then declare the treaty had destroyed the inherent sovereignty of the other nation and subject them to the complete authority (plenary power) of the first nation. And, nine supreme court justices cannot conquer several hundred Indian nations by judicial decree. These are legal fictions drafted for the convenience of the non-Indian governments.

If this is true, then, why is it that Indian Affairs is subjected to the "plenary power" of the United States to the extend that congressmen (Senators/Representatives) feel free to introduce legislative acts to deprive the tribes of the sovereign immunity so needed to prevent an onslaught of frivolous lawsuits waged by individuals and citizens groups to the complete financial ruin of Indian country, or to remove the civil authority of the tribes over interior matters and business practices. We know the current demands for this legislative solution are based on the non-Indians inability to capitalize and speculate on land and natural resource development within Indian Country, due to the inherent authority of the tribal governments. They see Indian governance rights as a impediment to progress and development, on and off-reservation.

But, this is a historical ploy. There have been more laws passed about the American Indians than any other politically and racially identifiable group in the United States (See: Kapplers, Indian Affairs, Laws, and Treaties, Volumes I-VII, 1904). There is a saying that goes, "the road to hell is paved with good intentions." There is an American Indian legal hell currently operating as the death knell of Indian governance nationwide; and, most of the laws were secured for the "best interests" of the Indians- who are viewed as lacking the capacity for self-governance. Removal of our civil jurisdiction or sovereign immunity is not for "our" best interests. The proposal is submitted for the enrichment of the non-Indian special interests.

Indian governments are constantly sued, for everything possible, in city, county, state, and federal district courts. In these lawsuits the non-Indians always claim the Indian courts are inferior and do not provide due process (again, a "capacity" argument). Often the lawsuits against Indians are multiparty, complex litigation that could take years to work through the court systems (e.g., Winters v. United States, 207 U.S. 564, 1908, per Indian water rights). The costs in time and finances are tremendous. The cause is always tied to some non-Indian who has entered Indian Country of his own free will, and then decides he does not want Indians to govern over his behaviors while he is in Indian Country. Most often he represents a special interest after natural resources, land speculation and development rights and takes offense with Indian zoning and civil jurisdiction.

Our Nation believes that the U.S. Congress owes a duty to the

Indian Nations to not further erode Indian self-governance by the removal of sovereign immunity or civil jurisdiction. In fact, the United States should begin a deep analysis of the many legal fictions that have been created, by the congress or court, to continue to hold that Indians, and their native governments, do not have the legal and intellectual capacity to govern over actions of non-Indians entering Indian Country, criminally or civilly.

Indian nations have ceded 3,787,425 square miles of land and natural resources to the United States, through more then seven hundred treaties, of which 367 were ratified by the Senate (Indian Affairs, Laws, Treaties, by Kappler, Vol.II, 1904). This land has been the foundation to the success of the most powerful constitutionally defined democratic, representative, republic in the world. From this, the individual states received governmental jurisdiction over portions of the ceded Indian territory, minus the lands reserved to the Indians or federal government, issued to settlers under federal homestead laws, or set-aside to finance public education and local government. The wealth derived from the lands, more often than not, have been used to sue Indians for more natural resources or to remove them from impeding non-Indian expansion. It would be a continuation of this gross injustice to allow this wealth to buy the influence needed to secure a federal enactment for removing tribal sovereign immunity or civil jurisdiction, simply to enrich local political subdivisions of the state(s) and land speculators.

It is crucial to review the historical development of the legal fictions that are frequently resorted to for justifying another congressional enactment to weaken Indian self-determination and hinder self-governance. The formation of this legal fiction foundation is reviewed below- from discovery, to creation of the United States, to regulation of Indian Affairs within the Union, conflicts with the states, and their citizenry.

GOD BLESS AMERICA- A FICTION OF HISTORY

We have witnessed, in the past couple of centuries, and especially in the last couple of decades, a development of great credibility given to the fabricated doctrines of "Conquest and Discovery." In God's Name whole nations have been destroyed, their populations enslaved, and their natural resources converted into personalized wealth of citizens, "colonial" states, and enriched the church treasury.

The Church, in its early formation, learned quickly to "bless" the emperor- if it expected a share of the wealth. The "Donation of Constantine" (by Constantine the Great of Rome, 306 to 337 AD) was the first endowment of land and territory made for the enrichment of the church. Constantine bestowed the known Roman Empire to the jurisdiction of the Church, as well as "*our bounty.... in India,*

Greece, Asia, Thrace, Africa, Italy, and divers islands." This laid the foundations for the Church's claim to jurisdiction over discovered lands, in the name of God. Since then, the Church has always been well-endowed by the conquering Christian sovereigns in exchange for receiving the sanctions of God (through Papal Bulls).

This "Donation of Constantine" was the foundation for the authorization and sanction of the Church given to Henry the II of England- who could, thereafter, invade and conquer Ireland. Under Pope Adrian's Papal Bull ("*Laudiabiliter*"), Henry II was given hereditary right to Ireland, and could legally overcome all perceived powers secured by his vassal Strongbow- who conquered the Irish in the King's name (See: A History of Ireland, P.Sommerset Fry, 1988, at 69).

This same type of "sanctions of God" were received by Portugal when she successfully sailed around the Southern Cape of Africa. By Papal legal opinion (Papal Bull), Portugal had the right to discover, invade, conquer, and enslave the pagans, heathens, and infidels of Africa, with the blessings of the Christian Church. Then, when Columbus discovered the New World, Pope Alexander VI issued the Papal Bull "*Inter Caetera*" (May 1493), securing rights to all the lands in the New World to Spain. In resolution of the conflicting claims of Portugal and Spain, the Pope mediated the Treaty of Tordesillas (June, 1494) dividing the sovereigns conflicting claims, effectively giving Brazil to Portugal and the rest of the western hemisphere to Spain. (See: Documents of American History by H.S. Commager, 1963).

The utilization of Papal Bulls to support discovery claims by Christian Kings combined to eventually justify the wars against the Indians; who were considered heathens, pagans, not humans, not of the family of Adam & Eve. The wars waged by the Conquistadors were savage, brutal, and uncivilized actions of such unchristian magnitude that it forced the Church, through Pope Paul III, in 1537, to issue the Papal Bull "*Sublimis Deus*" in defense of the Indians. Thus began the debates over the power of God (through the Church) and King (through discovery) to develop and implement laws to the defense or destruction of the subjected Indians.

Needless to say, the development of modern American Indian law, within the United States, is tied to the very debates associated with the "*justness of war against the Indians*" versus peaceful resolution through negotiated treaties, as governed by the laws of nations, guided by international standards. The U.S. Supreme Court, today, continues to base its legal reasoning, in questions of Indian law, founded upon the doctrines of Conquest and Discovery by Christian Nations.

In Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1823), the Court found Indians to be savage occupants dependent upon the forest and warfare, and gave legal credence to the "discovery

doctrine" in U.S. law. This legal fiction was a subject of convenience, a matter that U.S. Supreme Court Chief Justice Marshall makes a remarkable confession to at 591-92, as follows:

> *Every rule which can be suggested will be found to be attended with great difficulty. However extravagant the* ***pretension of converting the discovery of an inhabited country into conquest*** *may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So too, with respect to the concomitant principle, that the* ***Indian inhabitants*** *are to be considered merely as occupants, to be protected, indeed, while in peace, in the possession of their lands, but to be deemed incapable of transferring the* ***absolute title*** *to others. However this restriction may be opposed to natural right, and to the usages of* ***civilized nations***, *yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by courts of justice.*

Marshall continued to address the substance of "discovery" by the European powers, and their relationships to the natives, in Johnson as follows:

> *In the establishment of [the relations of discovery], the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but* ***their rights to complete sovereignty, as independent nations, were necessarily diminished***, *and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that* ***discovery gave exclusive title to those who made it.*** *While the different nations of Europe respected the rights of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the* ***Indian right of occupancy.***

The fiction of discovery, and rights secured under the sanctions of the Christian God, has worked to justify the early

development of legal fictions in the deliverance of "justice" to the Indians. With the successful Revolution (1776), the new United States would continue, in place of the King, to enter relationships with the Indian tribes, by treaties. But, it was the regulation of the "citizens" of the states and nation that would lay foundations for the evolution of the "trust responsibility" owed to the Indians. In the beginning, it was the subject matter of regulating trade and commerce between the nations, as F.P. Prucha, in The Great White Father, at 92 (1984) stated:

> *The trade and intercourse laws were necessary to provide a framework for the trade and to establish a licensing system that would permit some control and regulation, but this was merely a restatement of old procedures. The vital sections of the laws were in answer to the crisis of the day on the frontier, and the provision is pertained to* ***the tribes of Indians with whom the nation dealt as independent bodies.*** *Neither president Washington nor Congress was concerned with the remnants of tribes that had been absorbed by the states and had come under their direction and control. The laws sought to provide an answer to the charge that the treaties made with the tribes on the frontiers, which guaranteed their rights to the territory behind the boundary lines, were not respected by the United States.* ***The laws were not primarily "Indian" laws, for they touched the Indians only indirectly. The legislation, rather, was directed against lawless whites and sought to restrain them from violating the sacred treaties.***

In the beginning, the discovering foreign sovereigns respected each others claims to first Christian discovery, as required in the laws of nations, and supported by the Papal Bulls. A violation of such first claim could, after all, lead to "excommunication" by the Pope. These were the days when kingly men feared God and the loss of heaven. However, within the United States, it was soon realized that the laws of God were not enough to restrain unscrupulous whites from doing wrong to the Indians, and in consequence laws were enacted to place limits upon the actions of the whites themselves, as noted by Prucha.

But, over time, we will find that the enactment of laws are only tools of greedy speculators and private enterprises, just as the enslavement of the Indians by the Conquistadors for the encomienda system was essential to its success. Just as the discovery and conquest doctrines led to legal impediments to Indian tribal self-government, we witness "trade and intercourse" laws creating legal impediments to the individual Indian's natural rights of reason and self-determination. In their place was the "trust responsibility" (guardianship) doctrine, as devised by Marshall in the Cherokee Nation v. Georgia, 30 U.S. (5 Pet) 1 at 17 (1831).

It has been presented that the Indians were subject to the laws of the United States as a result of "conquest" which went hand-in-hand with discovery. But, conquest of the Indians was a recent legal fiction created by the Court in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1954). Marshall, in Cherokee Nation (1835) and Worcester (1832), confirmed the independence of the Indian Nations, he did not find they were conquered by or incorporated into the United States. The Indian nations were self-governing over their lands and people, without permission or supervision of the United States or other foreign nations.

The Marshall Court, in Worcester, at 553-554, addressed the Treaty of Hopewell with the Cherokee Nation, in which a treaty provision (Article 9) was alleged to have surrendered tribal control over its internal affairs. The court rejected this pretention as follows:

> *"To construe the expression "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade; the influence it gave, made it desirable that congress should possess it.... Is it credible, that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should be made or to compel their submission to the violence of disorderly and licentious intruders? **It is equally inconceivable, that they could have supposed themselves, by a phrase thus slipped into an article, on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade.** Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and all subsequent treaties; especially those which recognize the rights of the Cherokees to declare hostilities, and to make war. **It would convert a treaty of peace, covertly, into an act annihilating the political existence of one of the parties.** Had such a result been intended, it would have been openly avowed."*

We witness the transition from "conquest and discovery" in the name of god, to the development of judicial lies for the convenience of the nation, to the evolution of arguments that the Indians had given up their "self-governance" by treaty provision. The Marshall Court developed the foundations for the "trust doctrine" but did note that the Indians never gave up "self-government" and to use deception through a treaty, claiming this to have happened, was not justifiable in law.

HISTORICAL FOUNDATIONS TO THE QUESTION OF INDIAN SELF-GOVERNMENT

The question of Indian capacity, otherwise referenced as self-governance, is not a new construct invented by American Indian jurisprudence. The question extends as far back as first contact in 1492 and the subsequent Papal Bulls, and has gradually found precedence built up to justify its (the challenge or our capacity) acceptance. However, it is a question that has not been answered fully. But, recent Congresses have attempted to enact government-to-government relationships with the Indian tribes that reinstates their self-governance (See: P.L.93-638, Title I, of 1975; P.L. 100-472, Titles II & III, of 1988; P.L. 102-184 of 1991; P.L. 103-413 of 1994), as founded upon the U.S. Constitution itself. Still, during this transition in federal legal relations with the Indian tribes, there are congressmen who would rather exterminate the Indian from American history, law, and politics. They, of course, are self-serving with vested interests beyond simple loyalty to a constituency or duty under the constitutional republican government.

Today, we hear debates, still, on the capacity of the American Indians to be self-governing, to self-determine their own destines. Within the U.S. Congress we see the reflections of the noble Bartolome' de Las Casas (In Defense of the Indians)- who defended the rights of the Indians and the ignoble Juan Gines de Sepulveda (On the Just Causes of War)- who slanderously attacked the human qualities of the Indians and denied their capacity to exercise self-governance and to competently assume jurisdiction over their own destinies, both as individuals and in society. Today, we hear congressmen argue that there still exists an incapacity of Indian tribes to be self-governing, let alone having the capacity to rule over non-Indians who enter Indian Country.

Bartolome' de Las Casas wrote his historical treatise in reaction to the slanderous attacks perpetrated against the Indians by Juan Gines de Sepulveda before Charles the V of Spain (1550). Las Casas came to the New World as a "Conquistador" (conqueror), on the third voyage of Columbus (1502). He converted to become the first born-again Christian in the New World (1514), and became the ultimate protector of the Indians rights for the next several decades, until his death, 1474-1566.(See: The Discoverers, by Boorstin, pp.631-35, 647 and Las Casas by G. Gutierrez, 1993).

Sepulveda, who never came to the New World, argued that the Indians were pagans, savage, apelike, only worthy of death and hell. Las Casas, in return, held the Indians to be citizens, capable of nobility, admired and never to be killed or enslaved. Sepulveda sought to justify the enslavement of the Indians for the Conquistadors' enrichment (through the Encomienda slave system), based on Aristotelian grounds (theory of natural born slaves), and held that a war against the Indians was "just" in the eyes of God. Las Casas completely defended the Indians based on natural law and

biblical foundations (See: also, All Mankind is One, by L. Hanke, 1974). He argued that the Indians were totally capable of "self-government" and that they had the natural capacity of reason as citizens of their own societies (See: In Defense of the Indians, by Las Casas, 1552).

Chief Justice Marshall had to address this transition in the status of the Indian "Nations" in one of the first cases with Indians as party to the action, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, at 17 (1835). Therein, he proclaimed that:

> *Indian nations may more correctly, perhaps, be denominated* ***domestic dependent nations.*** *They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile, they are in a state of pupilage.* ***Their relation to the United States resembles that of a ward to his guardian.*** *They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.*

Herein, we find the complete shift of the paradigm, in that Indians are finally, in U.S. jurisprudence, legally transformed into the "incapacitated" Indians. Thus, defeating Las Casas' defense that Indians have complete capacity of reason to self-govern themselves within the laws of Christian nations. We find, instead, the arguments of Juan Gines de Sepulveda carrying the day, nearly three centuries after his death; federal laws that allege Indians to be legally incapacitated to govern their own affairs, and denied self-government without federal permission.

We, the Indian Tribes, as noted in the modern day constitution of the United States, as addressed in various legal opinions of the U.S. Supreme Court, as treatied with by the joint powers of the President(s) and Senate(s), and who have maintained commercial relationships with the various states and national governments in compliance with trade laws enacted by the Congress, recognize that the question of our inherent sovereignty has been clouded by those who believe they have a natural, God-given right to enslave us, to deprive us of our inherent rights to self-government, and who justified the taking of our lands and natural resources under the Doctrines of Discovery and Conquest (See: Johnson v. McIntosh, 21 U.S. 573), disguised today as the "Plenary Power" (See: U.S. v. Kagama, 118 U.S. 375) of the United States over Indian Affairs. We find this totally unacceptable, since it is founded on legal fictions rather than truth and justice.

It is our legal belief and political position that the American Indians, in tribal societies, have as much right to exercise inherent sovereignty, and the maintenance of immunity from

frivolous lawsuits by foreign citizens as do any other qualified, representative government. We have the same endowed, inherent rights to establish our governments based on popular sovereignty just as the citizens of the various individual states and the Union have. This is not a new concept. Indian tribal leadership has always been associated with qualified leadership based on the laws, customs, and traditions of the tribal societies, with the right of the tribal people to not follow leadership if it was not in the peoples' best interests. Tribal governance is derived from the willingness of the tribal community to follow, it is the people that power is derived from. The Iroquois Confederacy, as was the Choctaw Confederacy, were great examples of democratic, representative, and republican governance subjected to checks and balances for cause (See: The Iroquois, by D.R. Snow, 1994 at Ch.4 and The League of the Iroquois, by L.H. Morgan, 1851, at 71).

FOUNDATIONS TO THE MODERN NATIONAL POWERS OVER INDIAN AFFAIRS

In the Albany Plan of Union (1754), drafted by Benjamin Franklin, as pertained to the intended powers of the proposed Grand Council chosen by the People of the several colonies, control over Indian Affairs was addressed in Articles 11 and 12, as follows:

> *11. That they make such laws as they judge necessary for regulating all Indian trade.*
> *12. That they make all purchases from Indians, for the crown, of lands not now within the bounds of particular Colonies, or that shall not be within their bounds when some of them are reduced to more convenient dimensions.*

Of course, this was in line with the Proclamation of King George- which declared it a matter of the king's sovereignty to regulate Indian Affairs, to the exclusion of the individual colonies. Franklin, in his plan of union, was attempting to address how the united colonies could avoid having one colony endanger all others by acting inappropriately toward the Indians, who were, then, capable of warring upon the colonies.

In 1776 the Colonies secured their liberty from the oppressive tyranny of the British Monarchy. By November, 1777, as ratified in March, 1781, the Articles of Confederation were entered into by the individual colonies; which transformed into the thirteen sovereign states of the United States of America. Under Article II "*Each state retains its sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.*" Each of these "sovereign" states saw the necessity of union and enumerated powers to the federation, with a retention of those not delegated. It is noteworthy that a majority of the new states believed they inherited sovereignty directly from the king's charters, now that the king was forced out of America. In their

minds popular sovereignty was not the foundation of their (state) powers. However, these sovereignties were plagued with interstate problems of currency, trade, land speculation, a multitude of citizen lawsuits, revolutionary debts and many other conflicts leading toward a disruption of the Union, and very likely war.

Under Article IX, it was provided, "*The united states in congress assembled shall also have the sole and exclusive right and power of.... regulating the trade and managing all affairs with the Indians, not members of any of the states, provided that the legislative right of any state within its owns limits be not infringed or violated-....*", reserving Indian Affairs as a national concern was a crucial belief of the Confederation.

By the 1787, the concept that "Indian Affairs" shall be a power of the national government was completely realized by the Framers of the Constitution. The Founding Fathers were very much aware of the Indian question, during the Convention. The pacification of the Indians, through peaceful means, was the key to stability of the new Nation. The United States was still threatened by powerful foreign sovereigns seeking to maintain their foothold in America, in competition with the Union; and, alliances with the Indian tribes were beneficial to all concerned, even though the revolutionary crisis was over.

In reflection upon the era, two hundred years after the Constitutional Convention, the 100th Congresses enacted Senate Con. Res. #76 (1987), and its counter-part House Con. Res. #331 (1988), which were congressional declarations in celebration of the Constitution. The resolutions proclaimed the intent "*To acknowledge the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution and to reaffirm the continuing government-to-government relationship between the Indian tribes and the United States established in the Constitution.*"

In history, we know that the King of Great Britain believed Indian Affairs was a power of the Sovereign. We know the emerging colonies recognized the threat the powerful Indian Nations posed to the individual colonies and the need, in the Plan of Union, to assure the Grand Council (as a national governmental structure acting with delegated powers) exercised jurisdiction over Indian Affairs. We know that this was incorporated in the Articles of Confederation as a national power of the new United States in federation. Finally, we know the control of Indian Affairs was most definitely incorporated as a national power under the 1787 Constitution, contrary to the special interests of a few individual state designs at the Convention.

With the developing Constitution, it was important for all the "states" to devise a plan to govern the territory of the United States northwest of the Ohio River, during westward expansion. This plan came in the form of the Northwest Ordinance (July, 1787).

It designed the "territorial" government that would model for the new territories that formed prior to statehood, from thereafter. The policy guaranteed freedom of religion. It guaranteed the admission of new states, provided they were structured as "republican" (i.e., power derived from the people) in form. In addition, as pertains to the Indians, it provided:

> *"The **utmost good faith** shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and **for preserving peace and friendship with them.**"*

This policy was carried forward with the new 1787 U.S. Constitution (See: The Great Father- the U.S. Government and the American Indians, by F.P. Prucha, Volumes I and II, 1984, p.47). It was enacted during the transitional period between the Articles of Confederation and the Constitutional Convention. What is ironic, is that there were those "Founding Fathers" at the Convention that hoped to secure "treaty powers for the states" with the consent of the Congress (See: The Foundation of the Constitution, by D. Hutchison, 1975, p.153). But, this proposal was absolutely rejected, because Indian Affairs, and the treaty power, were national powers, not belonging to the individual states.

It is not surprising, then, for us to find that the Northwest Ordinance was not only important to the original states, and their land speculations, but to the emerging states- who would all equally find themselves limited in their ability to exercise jurisdiction over Indian Territory. Treaties with the tribes would be negotiated before enough settlers ever entered the lands ceded and reached a number in population to qualify as a territorial government, which was the step prior to statehood.

After the ratification of the national constitution, the various individual territories that formed and moved to statehood, were limited by congressional and judicial interpretations of the relationship with the Indian tribes. The Congress ratified and the President proclaimed the transition from territorial government to statehood, indicating the qualifying new state had successfully complied with the constitutional requirements for a republican form of government. It was during the drafting of these state constitutions that each new state had to proclaim it, like its older peers, did not have jurisdiction over Indian Affairs (in their organic documents or constitution).

It is extremely difficult to explain the government to government relationship that exists between the Indian Tribes and the United States, if the reader does not have a general knowledge of the U.S. constitutional government. So, before reviewing this relationship, we will address the general constitutional construct.

The Constitution is intended to prevent "tyranny" like that of the monarchy from ever re-surfacing in the United States. In pursuit of democracy and representative government, the republic was created by breaking up the King's sovereign powers (which originally derived from the people, until it became a hereditary position). The power to make laws were enumerated to the Congress (Senate & House of Representatives, Article I). The power to enforce the laws were enumerated to the Chief Executive (Presidency, Article II). The power to interpret the laws were enumerated to the judiciary (Judiciary, Article III). Included in the constitution were the noted Separation of Powers and the Checks & Balances. Each branch of government became the peoples' insurance that neither of the other two, individually or jointly, could conspire to dominate the people and their government in tyranny.

During the earlier federation of sovereign, individual states, under the Articles of Confederation, we witnessed sovereignty based upon the state sovereignty that emerged in lieu of the king, whose powers were originally delegated through charters of colonial incorporation. This type of sovereignty was primarily discarded and replaced by the popular sovereignty found in the Preamble of the Constitution, "*We the People of the United States.*" As a part of their inherent powers and interests in maintaining their union, the "People" assured that new states would be admitted into the Union. This was secured under Article IV of the Constitution. However, it is important to note that the source of sovereignty and powers of governance derived from the people and not some foreign king; thus, those persons that argue state sovereignty as superior to popular sovereign do not understand the transitional history between the 1776 Revolution and the Constitution Convention of 1787.

This is especially important in light of the constitutional amendments that made the republican form of governance ever more popular; in that the amendment guaranteed greater equality or modified the system to assure it was the people who chose their leadership (Amendments IX, X, XII, XIV, XV, XVII, XIX, XXIV, XXVI) in state and national government. Of course, Senators still represent "state sovereignty" but the state sovereignty is popular based by constitutional mandate (the conservatives of 1787 checkmated the radicals that favored state sovereignty over popular will of the people).

"We the People of the United States" recognized that there are times that the government may not reflect the best interests of the governed. Thus, in order to secure popular sovereignty indefinitely, it was provided that the constitution can be amended,

to assure that tyranny does not resurface in the new United States. The Amendment provision is a primary distinguishing feature between the Articles of Confederation (which could not be amended) and the Constitution (which could be amended).

Article V (Amendment power) of the Constitution was, and is today, the peoples guarantee against such tyranny. This power has been exercised successfully twenty-six times since 1787. The first ten amendments were immediately added in 1791 in order to secure the Bill of Rights to the People. The first eight amendments set out or enumerate the substantive and procedural individual rights, and the 9th and 10th are general rules of interpretation of the relationships between the people, the State governments, and the Federal Government.

Article VI is important as a matter of "popular sovereignty" in that it makes the U.S. Constitution the supreme law of the land. State constitutions, as a source of state sovereignty based on the original concept of it deriving from the King's delegation, has taken a back seat in importance, since it applies to only those states that had charters before 1787. The State Constitutions, since 1789, have been primarily in light of the U.S. Constitutional scheme, with the separation of powers (Governors, Legislatures, and Judiciaries) and Checks & Balances systems. Common to all are the guarantees secured to the people (the power of amendment) to check tyranny. But, essential to all is the power of government originating from the "People" (Popular Sovereignty- the Republican form of governance). It is the people who delegate powers of government to both the state and national governments. All people of all newly admitted states have acknowledged the U.S. Constitution as the supreme law of the land, withstanding anything in state constitutions to the contrary.

In summary, "the Framers of the Constitution agreed to some basic constitutional principles: 1) That all States would be equal. The National Government cannot give special privileges to one State; 2) That there would be three branches of Government- one to make the laws, another to execute them, and a third to interpret them; 3) That the Government is a government of laws, not of men. No one is above the law. No officer of the Government can use authority unless and except as the Constitution or public law permits; 4) That all men are created equal before the law and that anyone, rich or poor, can demand the protection of the laws; 5) That the people can change the authority of the Government by changing (amending) the Constitution; and, 6) That the Constitution, Acts of Congress, and the treaties of the United States are the highest law in the land (Our American Government, H.Doc. 102-192, 1993).

CONSTITUTIONAL RELATIONSHIPS WITH THE INDIAN TRIBES

Before we can understand the application of the U.S. Constitution to the relationship with the Indian tribes, we need to understand the significance of Marshall's opinion in Johnson v. McIntosh, 21 U.S. at 573, in that the "Discovery" doctrine was reviewed and upheld, as relates to the rights of the United States in place of Great Britain, after the Revolution. The doctrine governed the competing relationships between the foreign sovereigns, with superior rights belonging to the first in time to discover the "non-christian" lands. While the doctrine limited the competition rights of foreign sovereigns between each other, it had a spill-over effect in that the Indians could only sell their lands lawfully to the foreign nation first discovering them.

Thus, the United States assumed this right to first purchase, as a part of their claim to absolute title (Id. at 590, 591, 592). Marshall recognized that the Indians were formidable enemies, too powerful and brave to not be dreaded, and this meant the necessity of preservation of the peace, a security of friendship that rested the Indians concerns for their lands. So, restraining claims by the whites, or their governments, as through national treaty-making or development of laws applicable thereto, was an absolute necessity of the day (Id. at 594). Marshall believed the Indians could not be incorporated into the U.S. political fabric, but that non-Indians could be incorporated into the Indian Nations (Id. at 593).

Marshall ruled that the lands and territory of the Cherokee (Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) at 542-561, were extraterritorial to the state of Georgia. It was true, in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1835), Marshall would rule that the Indian nations were not constitutionally covered the same as foreign nations but were more appropriately termed "domestic dependent nations" (at 17). This gave room for Marshall to rationalize in jurisprudence the "discovery" doctrine, and still recognize Indian nations were not incorporated into the U.S. political fabric, and maintain the separation of states and Indian nations within the constitutional framework, as shall be noted below.

The U.S. Constitution is famous for its Separation of Powers and Checks & Balances system. "We the People" delegate our "self-governing" inherent rights to a system of government that will not be oppressive. We hold the government to be one of laws and not of men. In this light, the government acts in our place, on our behalf. However, very rare indeed is the individual citizen that understands the application of the constitution to the government-to-government relationship between the Indian tribes, the individual states, and the national government. Our goal, here, is simply to explain that relationship as concisely as possible.

Article I of the Constitution establishes the Congress, divided into the Senate and House of Representatives. The House of Representatives reflects "popular sovereignty." Excluded from those who the "House" represents are "excluding Indians not taxed"

(Article I, Section 2, Clause 3). The Senate reflects "state sovereignty" and represents the state through two senators (Article I, Section 3, Clause 1), and such representation was never intended to extent to the Indian tribes. Through the joint passage of legislation, the Congress can regulate trade & commerce between the Indian tribes and the citizens of the United States (Article I, Section 8, Clause 3- "Indian commerce clause"). The states do not have this legal capacity to regulate trade and commerce with the Indians, except through Congress Assembled. And, the individual states could not directly treaty with the tribes, for that was a power enumerated to the national government (Art.II, Sec.2, Cl.2 treaty-making powers, forbidden to the states by Art. I, Sec. 10).

Neither the Senate or House are representative of the Indian tribes and people. Indians were considered separate from the United States, "although born within the boundaries of the United States, it is as if they were born outside the boundaries, the same as ambassadors or ambassadors children." (See: Reconstruction Debates, 39th & 40th Congresses, 1866-1868). This is why Section 1 (by the words "subject to the jurisdiction thereof") and Section 2 (by the words "excluding Indians not taxed") of the 14th Amendment were written in that manner- to assure that Indians were not citizens of the United States or the individual states, respectively. Thus, the original constitutional language was kept intact after the civil war, and did not include Indians as many lawyers have alleged.

The President (as Chief Executive, Commander in Chief, etc.) shares the "treaty-making powers" with the Senate (Art. II, Sec. 2, Cl. 2). The Presidents have exercised this power, from 1787 to 1871, several hundred times, with at least three hundred and sixty-seven (367) treaties being ratified with the "advise and consent" of the Senate. The treaties reflect a sovereign to sovereign exchange of governments. Almost every one of the treaties were treaties of peace and friendship, rather than treaties of surrender after conquest (See: American Indian Treaties, by F.P. Prucha, 1994; and, Indian Affairs, Laws, and Treaties, by Kappler, Vol. II, 1904).

Like the Congress and President, the Judiciary has a function in the question of Indian Affairs. Under Article III, Section 2, Clause 1, the Judiciary can address laws of the United States, and treaties-made, or which shall be made, under their Authority;...". The Supreme Court, theoretically, has the power to check the other branches of government through its interpretation of legal federal (treaty) questions. However, as Milner Ball has elaborated in his 1986 article Constitution, Court, Indian Tribes (ABF Research Journal, Vol. 1987, Winter, No.1), the Supreme Court has created "legal fictions" to justify the taking of Indian rights, lands, and resources, in violation of the treatied word of the United States and the constitution. At times, the Court does what is right and occasionally returns a fair decision in resolution of Indian claims of wrong done to them. More often, though, the Indians are further

victimized in the Courts by being depicted as the "bad Indian" who demands to have his stolen property returned from the unscrupulous whites who held it under color of state law for two or more generations (U.S. v. Dan, 470 U.S. 39 (1985), Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1975)), or his treaty rights reinstated (e.g., fishing rights in the U.S. v. Washington, 95 S.Ct. 513 (1974), Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 99 S.Ct. 3055 (1979)).

Article III, Section 2, clause 1 must be understood in the light of Article VI, Clause 2, which holds that "*the judges in every state shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.*" This means the state courts are bound by the decisions on "treaties" and other federal questions once decided by the Supreme Court. This is especially true under the power of Article VI, Clause 2, which holds "treaties" are one of three sources of supreme law of the land, the other two being the constitution and national statutes.

Popular sovereignty prevailed over state sovereignty at the Constitutional Convention of 1787 (See: The Federalist Papers No.9, No. 31, No. 62, No.63). The most important change in the new constitution was the additional precaution reserved to the people through the power of "Amendment" under Article V (The Federalist Papers, No.43, No.49, No.85). More than two dozen amendments have been added to the Constitution since 1787. The Fourteenth Amendment covered all races, but excluded the Indians in its assumption of jurisdiction, through the guaranteed equal citizenship, created by the amendment (See above). The 1924 Indian Citizenship Act (8 U.S.C.A. Sec. 1401(a)(2)) did not properly amend the U.S. Constitution (Art. I, Sec. 2, Cl.3 and 14th Amendment, Sec. 1 & Sec. 2). It was nothing more than political psychology to pacify the demands for Indian religious freedom under the First Amendment (to overrule Department of Interior Circular #1665- Religious Crimes Code). This generic Indian citizenship, in light of constitutional language to the contrary, is another legal fiction.

Article IV, Sections 3 and 4 are important in the understanding of the constitutional relationships between the Indian tribes, the states (starting with Manifest Destiny, and during the Colonialization of the American Indian Era implemented by the Department of Interior, 1848-1871), and the United States. One of the great compromises of 1787 was for the large states, with Charter Grants from the King that extended their western boundaries to the South Seas (as discovered and named by Balboa in 1513, now the Pacific Ocean) to surrender their claims to the undefined western lands. Virginia was one of the large states that surrendered her claims, provided the lands would be used for the creation of new states. This plan resolved many of the large state versus small state conflicts existing in the debates over (re)structuring the Confederated government.

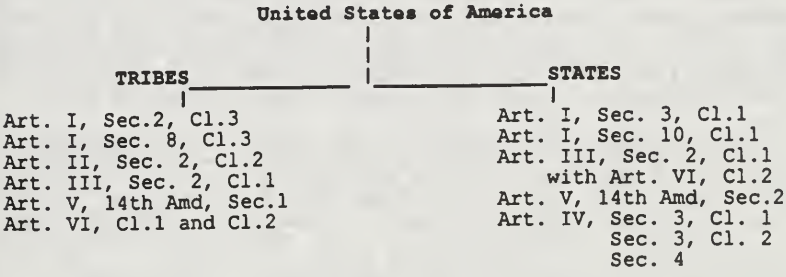
Article IV, Section 3, Clause 1 provided for the admission of new states, as was previously guaranteed under the 1787 N.W. Ordinance. Section 3, Clause 2 gave the congress power to rule over and regulate the (ceded) lands, as secured by treaty with the Indian tribes. However, before the new state could be admitted into the Union it had to have an acceptable "republican" form of government. Thus, the President and Congress reviewed and finalized the admission of new states based on their successful development of republican state constitutions, with the separation of powers, checks & balances, and reservations for amendments by the people when needed. For examples of Admission Proclamations of the states of North Dakota (at 20-21), South Dakota (at 22-24) see Messages and Papers of the Presidents, Vol. IX, 1889-1897, by J.D. Richardson, 1897.

Included in many of the states constitutions west of the Mississippi and Missouri Rivers were "Compacts with the United States" disclaiming jurisdiction over the Indian tribes, rights, and resources. This assured the Union that the new states would not try to claim jurisdiction over Indian Affairs, for that would contravene the enumerated powers delegated and reserved to the national government. Entering the Union with a claim of jurisdiction over Indians Affairs, a type of jurisdiction enumerated to the nation and not reserved to the individual states, would have resulted in some of the new states being more than equal to their older peers, and that was constitutionally unacceptable.

We must note that Indian Affairs has always been a subject of national power; but, much of the powers enumerated to the President, the Congress, and the Courts have been (ab)used to the detriment of the Indians rather than used toward the protection and enrichment of the Indian tribes. The United States is composed of nearly 3,787,425 square miles, secured by treaties with the Indian Tribes. Even with all the modified treaties, the Indians still held 138 million acres in protected status by 1887. However, under the Dawes Act (1887-1934) ninety million of these remaining acres were legislatively alienated from Indian ownership for the enrichment of, once again, the new settlers moving into Indian territory. These lands have never been returned, even though there are legitimate treaties protecting and reserving the lands for the Indians exclusive use.

The United States is supposed to be a government of laws and not of men, under the written Constitution. However, the laws have been changed by statute or court decision to the deprivation of the Indian tribes, regardless of canons of construction of written constitutions and treaties. We can only say that the best review article written on the legal fictions created by the Supreme Court, to justify this illegal taking, is that written by Constitutional lawyer Milner Ball (ABF Research Journal, Constitution, Court, Indian Tribes, Winter 1986).

If there was a simple method to depict the constitutional provisions balancing the relationships between the Indian Tribes and the individual States, with the United States in pivotal control of Indian Affairs, then the following diagram would be appropriate:



What we must understand is that the tribes and the states were separate sovereign jurisdictions under the U.S. constitutional plan, each deriving their governmental powers from the inherent rights of their citizens/members. The tribes were not incorporated into the political fabric of the individual states. This is why the original state constitutions kept "Indians not taxed" separate from the qualified citizens. The U.S. Constitution, still, mandates keeping the Indian tribes, and excluding Indians not taxed (tribal Indians), separate from citizens, contrary to legislative acts.

In the diagram, the United States is the balancing sovereign that is bound, by canons of construction of treaties and constitutions, to assure that this separation of states from tribes is not violated. However, in the review of court cases we find that violations were believed to be justifiable in the states' legal defense in the first Indian cases to reach the Marshall Court in the 1830s. This reasoning has continued ever since. But, the erosion of tribal governance has been supplemented by the erosion of tribal membership by granting Indian citizenship. Contrary to legislative intent, this status has simply became another means to deprive Indians of more rights or resources, to the enrichment of local governments and special interests. Citizenship has led to the incorporation of the individual Indian into the national political fabric, and has resulted in the application of the Internal Revenue Code to almost all income entering Indian Country today. But citizenship has not been the only vehicle used to take powers from Indians and their native governments.

In United States v. Kagama, 118 U.S. 375, 155 (1886), the Court found that there was no constitutional basis for Congress to

enact a code of criminal law for Indian country. The Court reasoned that neither the language of Article I, Section 2, Clause 3, "excluding Indians not taxed" (as addressed in the drafting of the Fourteenth Amendment), or the Indian Commerce Clause (Art. I, Sec. 8, Clause 3) were foundations for the exercise of "plenary power" over Indian Affairs. Neither clause could uphold the application of a criminal code of jurisdiction over Indian Country; although the commerce clause could be the foundation for a code related to trade and commerce (Id. at 378-79). This legal fiction on criminal jurisdiction was given evev greater credibility by the ruling of Oliphant (1978) that held that Indian governments do not have the (legal) capacity to criminally prosecute non-Indians, as well.

While attempting to understand this maze that has been written into the national laws governing Indian Affairs, we should remember the words of Felix Cohen: *"Like the Miner's Canary, the American Indian marks the shift from fresh air to poison gas in our political atmosphere; our treatment of the Indian, even more than our treatment of other minorities, marks the rise and fall in our democratic faith."* There must be a lesson inherent here for the United States as pertains to its constitution. In this light we can reflect on Milner Balls words (Id. at 61):

> *"Because we say we have a government of laws and not men, we hold our government to be limited and to have no unlimited power. If the federal government nevertheless exercises unrestrained power over Indian nations, then what we say is not true, and we have a different kind of government than we think we have. And if our government is different in fact in relation to Native Americans, perhaps it is not what we believe it is in relation to other Americans, including ourselves. The Court is regarded as the institution of restraint and a protector of rights. If the Court restrains neither Congress nor itself in taking away tribal rights, then we are confronted by a fundamental contradiction between our political rhetoric and our political realities."*

WASHINGTON STATE GOVERNMENT- EXAMPLE OF A CONSTITUTIONAL ENIGMA

Washington State has been allowed to violate its constitution just as the United States has in regards to Indians. This should not be surprising for in doing so both governments secure great contributions to their treasuries through the application of tax codes to income or lands and natural resources. Both governments have supreme courts that were willing to classify the matter as a "political question" and ignore its implications to the canons of construction of constitutions nationwide. This section will address those errors.

To understand the relationships of states to the national government we need to reach a concise understanding of "Our

American Government" (93d Cong., 2d Session, House Document No.93-341, p.1), as follows: ... *we have at the local, state, and national levels a democratic, representative, republican form of government. It is "democratic" because the people govern themselves; "representative" because they do so through elected representatives chosen by ballot; and "republican" because the government derives its powers from the people.*

All new states, admitted to the Union after 1787, were secured this guarantee by the N.W. Ordinance of 1787 and Article IV of the Constitution, provided their choice of government was "republican" in form. Thus, a new state derived its governmental power from the people- founded on popular sovereignty first and foremost. Yes, there were constitutional radicals of 1787 that held that "state sovereignty" was in place of the king, who previously delegated his authority through the colonial charters. This was acceptable under the Articles of Confederation but did not survive the constitutional rewrite. Now state sovereignty was popular in its originating source (U.S. Constitutional Preamble & Article IV).

We will review the relationship between the United States and the Indian tribes, as relates to the qualifications for statehood and membership of emerging territorial governments. Our example, herein, is primarily the State of Washington. But, its history is fairly generic to many of the new states (at least 12) west of the Mississippi and Missouri Rivers. What is conclusive is that Indian Country (reservations within the borders of the State) is still extraterritorial to the state; based on canons of construction of written constitutions, although ignored due to the use of legal fictions to justify state jurisdictional expansions in the Rehnquist Court (See: U.S. v. Wheeler, 435 U.S. 313 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

The State of Washington joined the United States in 1889, more than one hundred years after the formation of the Union. The State Constitution begins with the Preamble: *"We, the People of the State of Washington, Grateful to the Supreme Ruler of the Universe for Our Liberties, Do Ordain this Constitution."* This is an important source directly confirming "popular sovereignty" as the foundation to state governance. State governance did not derive from replacement of the "King's sovereignty" as was the case with some of the first of the thirteen original states (those with Charters of Incorporation). Under the "Articles of Confederation" individual state sovereignty was believed to be in lieu of the King versus the "social compact" theory of popular sovereignty. Instead, we find a direct modeling on the "We, the People of the United States" popular sovereignty.

This is confirmed in the Washington State Constitution, Article I- Declaration of Rights, in Section 1, which provides: *"All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are*

established to protect and maintain individual rights." Here, it is evident, the same popular sovereignty that was held supreme to individual state sovereignty in the 1787 U.S. Constitutional Convention, as incorporated in the ratified constitution, is found instituted at the state governance level.

The U.S. constitutional model famously separated the sovereignty exercised by the King into its logical segments: 1) the legislative powers were vested in the Congress (Article I), to make the laws; 2) the Executive powers were vested in the President (Article II), to enforce the laws; 3) the Judicial powers were vested in the Supreme Court (Article III), to interpret the laws; 4) the new states could be admitted into the Union (Article IV), with a guarantee of a republican form of government; 5) the People, as the source of governmental powers, had powers to secure Amendments (Article V), to prevent tyranny from over-coming government and people; and, 6) the constitution, treaties-made, and acts of Congress are supreme law of the land.

We find direct parallels in the Washington State constitution, which had followed the recommended structure of republican governance. Article I - Declaration of Rights assured inherent rights of the people would not be trampled by over-zealous government. Article II vested the "legislative powers" in the state Senate and House of Representatives, to make the laws. Article III vested the "executive powers" in the Governor, and his various subparts, to enforce the laws. Article IV vested the Judicial powers into a State Supreme Court and various lesser judicial forums, to interpret the laws. The power to amend the constitution, in order to assure that tyranny does not prevail over the democratic populace, was secured as well in Article XXIII- Amendments.

Like other new states, Washington had to recognize the U.S. Constitution was supreme; thus, under Article I- Declaration of Rights, in Section 2, it was provided: "*The Constitution of the United States is the supreme law of the land.*" This important statement was only second to the declaration on popular sovereignty found in Section 1 (noted above). It, also, was in line with the U.S. constitutional requirements found under Article VI.

Like the United States, Washington simultaneously had, and continues to have, a separate population of inhabitants that are different politically and legally from "state citizens" and are called "tribal Indians." In respect to the original, unamended language of the Washington State Constitution, under Article VI- Elections and Elective Rights, Section 1 provides:

> *[All male persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections. They shall be* ***citizens*** *of the United States; they shall have lived in the state one year; and in*

the county ninety days, and in the city, town, ward, or precinct thirty days immediately preceding the election at which they offer to vote: Provided, That ***Indians not taxed*** *shall never be allowed the elective franchise;..."*

The State of Washington did amend this section (Amendment 2) of its constitution in November of 1896; but, still, the language dealing with the "Provided, That Indians not taxed shall never be allowed the elective franchise.." was retained. Nor was it changed by the subsequent enactment of the female franchise qualification (Amendment 5), or age quantification. It must be noted that the definition of "excluding Indians not taxed" in the U.S. Congress Reconstruction Debates specifically addressed the fact that "taxing" an Indian does not change his constitutional status. An Indian qualifying to exercise the franchise, state or national, was not a simple matter of taxation or wealth. The reference to the phrase in the state constitution is a confirmation of the national constitutional standard. In conclusion, the Indians were not state or U.S. "citizens" based on the 14th Amendment.

We must remember, that the State of Washington (1889) came into the Union after the Civil War. The Fourteenth Amendment was already a part of the U.S. Constitution. Section 1 of the U.S. Constitution provided that Indians not taxed were not "*subject to the jurisdiction*" of the United States, that is why the U.S. entered treaties with the tribes or regulated commerce with them; nor, in Section 2 were Indians subject to individual state jurisdiction, as exemplified by reiteration of the words "*Excluding Indians not taxed*" in the section (See: Minutes of the Reconstruction Debates, 39th & 40th U.S. Congresses, 1866-1868).

Thus, the Washington State Constitution, in Article II-Legislative Department, restricted the ability to count the "tribal Indians" living within the exterior boundaries of the states as amongst those represented by State government. It provided, therein, as follows:

> *Section 3. The legislature shall provide by laws for an enumeration of the inhabitants of the state in the year one thousand eight hundred and ninety-five, and every ten years thereafter; and at the first session after such enumeration, and also after each enumeration made by the authority of the United States, the legislature shall apportion and district the anew the members of the senate and house of representatives according to the number of inhabitants,* ***excluding Indians not taxed,....".***

The United States, during the "Colonialization of the American Indians," from 1848 to 1871 (See: Federal Indian Policy, by F.P. Prucha), was simultaneously expanding ever westward, west of the

Mississippi and Missouri Rivers, formerly the exclusive Indian Territory. The U.S. federal Indian treaty policy shifted under the Administration of George Manypenny, Commissioner of Indian Affairs, then located inside the Department of Interior (as transferred from the War Department, 1848). Indians, by treaty, were to be relocated to the new "Indian Reservations." In return for treaty commitments from the United States, to guarantee retention of inherent and "reserved rights" of the tribal people and their governments (See: U.S. v. Winans, 198 U.S. 371, at 381 1905), the U.S. secured millions of square miles of ceded lands from the tribes by treaties. The tribes never gave up their rights to self-determination and self-government or jurisdiction over their interior affairs under those treaties.

The newly emerging states (after 1848, more or less) were obliged to develop state constitutions under the requirements imposed by the U.S. Constitution (Article IV, Section 4); that is a "republican form of government." At the same time, the United States, based on the treaty cessions of land, and under the powers to rule & regulate such lands, issued territorial entitlements to the new states under authority of Article IV, Section 3.

The United States continued to exercise the national powers over the control and regulation of "Indian Affairs" above and beyond the powers of the individual states. The State of Washington, like many of its peers, was required to acknowledge this restriction in its constitution. Thus, Article XXVI- Compact With The United States provides, still, today:

> *The following ordinance shall be irrevocable without the consent of the United States and the people of this state: First .....*
> *Second, That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any* ***Indian or Indian tribes****; and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said* ***Indian lands*** *shall remain under the absolute jurisdiction and control of the congress of the United States, and that the lands belonging to citizens of the United States residing without the limits of this state shall never be taxed at a higher rate than the lands belonging to residents thereof, and that no taxes shall be imposed by the state on lands or property therein belonging to or which may be hereafter purchased by the United States or reserved for use: Provided, That nothing in this ordinance shall preclude the state from taxing, as other lands are taxed, any lands owned or held by* ***any Indian who has severed his tribal relation****, and has obtained from the United States or from*

any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any ***Indian or Indians*** *under any act of congress containing a provision exempting the lands thus granted from taxation, which exemption shall continue so long as and to such an extent as such act of congress may prescribe."*

It is important to take historical note of the two important sources of information available to define "excluding Indians not taxed" and "tribal Indians" at the time this constitutional compact was drafted. The first source was found in the U.S. Constitutional Debates on Reconstruction, during the 39th and 40th Reconstruction Congresses (1866-1868). It was made very clear the Indians who have maintained their "tribal relations" were otherwise known constitutionally as "excluding Indians not taxed." And, they were not "subject to the jurisdiction" of the United States (Section 1, 14th Amendment), nor were they subject to the jurisdiction of the State(s) (Section 2, 14th Amendment).

This whole constitutional construct of the language was reviewed in the case of Elk v. Wilkins (112 U.S. 94, 1884), which confirmed this constitutional separation of tribal Indians from the general citizenship and the jurisdiction of both state and national governments. This case was five years old when the State of Washington was admitted into the Union. Tribal Indians were separate and had their own governance over tribal internal affairs, and external government-to-government relationships (as in treaty relations). Another case, Won Kim Ark preceded this definition, *in dicta*, but indicated its correctness of interpretation at the time. For a more indepth review of the status of the Indians (as "excluding Indians not taxed") the reader should see the Department of Interior Solicitors Opinions (November 7, 1940 and November 22, 1940. pp.990-1000); however, beware, while the opinions are historically correct, the author was obviously forced to conclude the Indian Citizenship Act overrode the 14th Amendment.

It is important to take notice that, over time, there were individual Indians that had separated themselves from the tribes to become non-tribal (just as John Elk, the Omaha Indian did, per the ElK case), as anticipated in Article XXVI, Section 2 of the Washington Constitution. Such Indians were no longer considered as covered by the language of "Excluding Indians not taxed." Such individuals, when new states emerged from territorial status, could become classified as non-tribal Indians by their separation from their tribal people. They could, as delineated in Elk, become citizen Indians. Many individual Indians refused to move to the treaty-established reservations. Instead, they separated from the tribes and became owners of "Indian homesteads" under various acts of Congress (e.g., Dawes Act of 1887 and Indian Homesteads with trust periods). In the State of Washington many Indians became non-tribal and lived on such homesteads. They form the modern day

Nooksack, Stillaguamish, Upper Skagit, and other "tribes" (e.g., the Samish) most recently recognized by the Department of Interior. Today their "reservations" are actually remnants of old Indian homesteads that were secured under an Act of Congress and placed into "trust" for twenty-five years, unless extended in time.

The difficulty for state governments has been the inability to distinguish, over time, between those Indians that have always maintained their tribal relationships and identity (for example, the Lummi, Swinomish, Tulalip, Suquamish, Nisqually, and other treaty tribes of Washington State located on treaty established reservations) and non-tribal Indians that refused to relocate upon a reservation but lived on family homesteads, separate from tribal communities. This is why the State of Washington Constitution addresses "tribal Indians" and "excluding Indians not taxed" as a means to qualify those who it does not have jurisdiction over. Individual Indians with homesteads, of course, eventually qualified as U.S. Citizens and thereby became a state citizen, capable of exercising the elective franchise, once their period of trust protection expired over their homesteads (originally 25 years).

Now, today, Washington State has exercised the power to amend its constitution seventy-five times successfully, with an additional eight amendments still pending proper ratification. And, it is noteworthy, that the State never once addressed the limitations imposed by Article XXVI, as pertains to the Indians and the lack of state jurisdiction over the same.

Washington State was not the only newly emerging State to join the Union with a restriction on jurisdiction over Indian Country. Of the dozen, or more, states with constitutional disclaimers there have been different approaches to reacting to the "constitutional amendment" requirements imposed upon those states when the issue of P.L. 280 surfaced sixty-four years later. There were several new, earlier mid-western states admitted into the Union without "constitutional" disclaimers; but, their enabling legislation did disclose their legislative disclaimers of jurisdiction over Indian Affairs. However, as pressures for westward expansion increased, the restrictions upon jurisdiction became more pronounced and constitutional disclaimers were a mandated part of the legal price for Union admission.

The States of Washington, Montana, Arizona, North Dakota, Utah, Wyoming, Alaska, Idaho, South Dakota, Colorado, New Mexico, Oklahoma, and Hawaii, for example, are "constitutional disclaimer states." But, states that were admitted into the union closer in time to the federal Indian policy shift that transpired in the late 1840's, at the beginning of the colonialization of the American Indian, ended up with enabling act (legislative) limitations and not constitutional prohibitions.

Washington, Montana, Arizona, Idaho, North Dakota, Utah, and

South Dakota all represent the conflict over whether or not state constitutional amendments were mandatory for these states to assume jurisdiction over the Indian reserves under authority of Public Law 280. These states had/have constitutional disclaimers. The people of Wyoming voted down the proposed constitutional amendment to remove the disclaimer. The State of North Dakota was sued and forced to submit the question as a matter of amendment to the people. South Dakota, like the State of Washington, simply sought to ignore canons of construction of written constitutions and superimposed their claims to jurisdiction by legislation. The South Dakota Supreme Court inviolated the state's legislative assumption of partial jurisdiction. The Supreme Courts of Arizona, Washington, and Montana upheld the legislative assumption, even though it was contrary to the state constitutions. These states manifest a dangerous cancer growing in the U.S. constitutional republic.

For those without the background on Public Law 280, a review may be appropriate. From 1948 to 1974, the United States shifted its federal Indian policy and began to "terminate tribal Indians." There was popular support, in the Terminationist Congress of 1953, to enact the proposals for state assumption of criminal (25 U.S.C.A. Section 1321, and 18 U.S.C.A. 1162) and civil jurisdiction (25 U.S.C.A. Section 1322, and 28 U.S.C.A. Section 1360) over any and all... offenses or causes of action respectively within the borders of the Indian reservations, and the mentioned states. In 1968 (See: Indian Civil Rights Act, and 25 U.S.C.A. Section 1321, 25 U.S.C.A. Section 1326), the tribes, and their allies, were able to convince the U.S. Congress to take a step backwards and to assure the tribes' "consent" would first be obtained before the non-mandatory states attempted to apply Public Law 280.

However, the consent issue aside, section six of Public Law 280 provided: "Notwithstanding the provisions of the enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to *amend, where necessary, their State constitution or existing statutes, as the case may be,* to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter *shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution* or statutes, as the case may be (25 U.S.C.A. Section 1324, originally enacted as Act of Aug. 15, 1953, Ch. 505, Section 6, 67 Stat. 590).

This section did not authorize the violations of canons of construction of written constitutions. Those states with constitutional prohibitions should have had to remove the offending language by amendment, to determine if it was the will of the people (the source of governmental power). The choice of the people of Wyoming as "No" to the amendment. South Dakota had to be sued and forced to retreat from the legislative route. But, the other

mentioned state supreme courts ignored the constitutional requirements. The U.S. Supreme looked that other way, under the claim that this was a matter of "state law" and not a federal question. But, it is a federal question under Article IV, Section 4, in that it erodes the value of the "guarantee to every State of this Union a Republican Form of Government."

In retrospect, some states began to realize, after assumption of criminal and civil jurisdiction, that there always is a cost to the tax payers whenever governmental jurisdiction is expanded. Therefore, states, like tribes that were dissatisfied with state unilaterally assuming jurisdiction over Indians, sought the establishment of federal retrocession processes to reverse the assumption. Thus, 25 U.S.C.A. Section 1323 was enacted to authorize an orderly retrocession, although not all states have been willing to retrocede some have (e.g., Arizona). Even with retrocession as a possibility, this does not excuse the violations of the republican form of government so cherished in America today (although current militias indicate a backlash).

It has not been a simple question of which state lawfully assumed jurisdiction, when addressing the differences between states that had constitutional disclaimers, like Washington for example, versus states that had organic document (legislative) disclaimers, like Minnesota. The Supreme Court had the opportunity to address and apply a uniform canon of construction of written constitutions to all states, in light of the "Amendment" powers written into the republican forms of state government mandated in the U.S. Constitution and N.W. Ordinance. One such opportune case to address this as a federal question was Washington v. Yakima Tribe (439 U.S. at 484, in 1979). The effect of the Court decree equates acts of legislature equal to constitutional amendments; which is a legal fiction that undermines the soundness of constitutional republican governance (at both the state and national levels). It makes a mockery of the retained powers of amendment belonging to the populace, a power that is the checkmate against tyranny in popular based governments.

Such a frivolous review by the Supreme Court reminds us of the Radio Address of President Roosevelt in which he stated, "*I want what all Americans want, a United States Supreme Court that shall adhere to the canons of construction of written constitutions, and not amendment by judicial sayso.*" Legal fictions that make legislative enactments the equivalent to constitutional amendments are directly manifest of the fear that confronted the President.

It must be recognized that Washington State, as an example, makes a revenue windfall by exercising illegal taxation jurisdiction inside the boundaries of the Indian Reservations. The federal court ruled that P.L. 280 gave the state this jurisdiction when in fact it definitely was silent on taxation powers. This assumption of taxation jurisdiction made a mockery of the constitutional

amendment process, nationwide. It has been implemented as a cheap means to secure state jurisdiction over Indian Affairs for the enrichment of the state treasury, contrary to national law.

In addition, the state has had the support of the Supreme Court in cases that effectively were a "looking-the-other-way" review; in order to allow the states to collect (otherwise illegal) taxes on the sales of cigarettes, alcohol, or any other commercially valued goods of commerce and trade sold in Indian Country by Indians to non-Indians. These judicial interpretations have been founded upon legal fictions- there are no federal tax enactments that extended this taxation power to the states over Indian Country. Neither of the respective provisions of delegated authority found under the criminal or civil portions of Public Law 280 authorized any type of taxation authority to the state(s) over Indian commerce; but, the Supreme Court "legalized" this exercise of jurisdiction by alleging the enactment did extend this type of jurisdiction to the state(s). The U.S. Congress did not purposely exercise the powers of the Indian Commerce Clause (Art. I, Sec. 8, Cl.3) and give the states this taxing jurisdiction under P.L. 280 (this assumes the clause reaches into Indian internal affairs). It is an established doctrine that such actions must be expressly done in clear and unambiguous terms to be legal; but, the Rehnquist Court has ignored this doctrine to the convenience of state governments.

This type of legislative power (i.e., legislation by judicial decree) is not delegated to the Supreme Court under the enumerated powers or the implied powers of the constitution. The whole construct violates the separation of powers and checks & balances doctrines of the U.S. Constitution. The Supreme Court has simply followed the popular state politics of the day and terminated an exclusive area of jurisdiction reserved by the tribes- as a natural extension of their inherent power. The Court held that such powers are secured to the United States by its exercise of the "Commerce Clause" power (Article I, Section 8, Clause 3, as its source of "plenary powers" over Indian Affairs), when the nation chose to exercise this power. Originally this clause was intended to govern the actions of non-Indian citizens and not the internal affairs of the Indian tribes; thus, another legal fiction of convenience (See: U.S. v Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L.Ed. 228 (1886) has gained ground.

There are no constitutional justifications for the U.S. Supreme Court to violate the "separation of powers" doctrine. But, whenever the court reads into the law that which is not there and never intended by the congress, then it legislates by judicial decree. The Court should leave it to the congress to exercise the "commerce clause" in its own time. We, the tribes, of course, prefer the congress to use the enumerated power to regulate their citizenry and not the internal affairs of the tribes.

Neither the language of the U.S. Constitution, or the various state constitutions, empowers or authorizes the Congress to "waiver the tribes sovereign immunity" or remove "civil jurisdiction" from the control of the tribes. Such power cannot be found in the treaty-making power, the commerce power, nor the exclusion of Indians from representation in the republican government.

We have seen that the doctrine of "discovery" had given the foreign sovereigns, in international law, the rights of first purchase to the exclusion of all others, if the Indians chose to sell. The doctrine of "conquest" is a legal fiction given great weight in the Tee-Hit-Ton Court (1954), as more then seven hundred treaties of peace and friendship attests to the contrary. The tribes were never incorporated by either the state or U.S. governments, according to Chief Justice Marshall. Justice Rehnquist had created a fictional incorporation to justify the destruction of tribal governance since 1978, and in contravention to Marshall's precedential rulings. This conflict continues to influence the underlining debates over Indian self-governance, as secured by national legislation since 1988. As noted, this self-governance issue reflects the old "capacity" debates of five hundred years ago. It is a shame after the passing of centuries, there are still ignorant politicians and special interests that perceive themselves as superior to Indian people and governments as much as the "Conquistadors" did under the "encomienda" system.

The attempts to take away tribal civil jurisdiction can only be branded as racial politics in its greatest manifestation... the abuse of the power of "We the People," in a form of governmental tyranny (plenary power) over Indian Affairs, is used like the sword of Juan Gines de Sepulveda to the detriment of all tribes.

In the beginning, the United States had used the "Indian commerce clause" to limit the actions of unscrupulous whites when they entered Indian Country. However, the protective use of this power has been used very infrequently. The most recent controversial use of the power has been the Indian Gaming Regulatory Act. The power could have been exercised to provide a strong "Indian Tribal Government Tax Status Act" that would have effectively let Indians participate in the national economy; but that dream was killed because of a few dissatisfied congressmen. The list of protective use of the power is not to great.

There are so many non-Indians that claim the reservations are not conducive to business development. Much of the confusion is the result of weak, antiquated federal laws in trade and intercourse. The Congress can easily exercise this power to mandate the development of a "Uniform Commercial Code" that would alleviate the business communities' fears of doing business in Indian Country. Remember, it took half a century, or more, for the draft UCC to be completed in a form acceptable for all the members of the Union.

The "Guardian" has not chosen to help the "Ward" develop to a level it can compete and survive on its own. If "plenary power" is based on the "Indian commerce clause" then that power should be used to the enrichment of the ward, not the guardian. Indian gaming and other commercial enterprises have always had a great "multiplier" impact upon the surrounding non-Indian communities, in increased jobs and dollar marketability, as can other ventures.

The Indian reservations have the highest infant mortality, shortest life-expectancy, poorest housing, highest poverty, lowest educational/vocational attainment, and highest unemployment and underemployment. In addition, the federal policies, over time, have destroyed the Indian family, extended family, sense of community and the correlating trational and ceremonial values & religions, as well as purposely undermined tribal self-governance. All Indian lands and natural resources had been in the complete control of the Bureau of Indian Affairs, and has resulted in a significant portion of the reserved lands being sold to non-Indians for pennies on the dollar. When the states made it illegal for Indians to hunt, fisn, or gather then starvation set in and public assistance was only available if the Indians immediately sold all interests in tribal land. Any business or industrial developments planned for Indian reservations are immediately challenged by local government and the resultant lawsuits drive away the investors. Any income entering the reservation is then taxed by the federal government based on the current application of the Internal Revenue Code to tribal Indians based on tax court decisions, not legislative enactments.

This is why the current hearing is offensive to the tribes! The United States should exercise power with honor not disgrace.

Testimony of
Bill Anoatubby, Governor of the Chickasaw Nation
Senate Committee on Indian Affairs
September 24, 1996

Mr. Chairman, on behalf of the people of the Chickasaw Nation, I extend our appreciation for being given the opportunity to provide comments before the distinguished members of this Committee.

My name is Bill Anoatubby, and I am the governor of the Chickasaw Nation. One of the Five Civilized Tribes, the Chickasaw Nation encompasses more than 7,648 square miles of south central Oklahoma. According to the 1990 Census, the Chickasaw Nation is the 13th largest Indian tribe in the United States.

We are pleased that the Senate Committee on Indian Affairs is allowing us this opportunity to provide input regarding the overall issue of tribal sovereign immunity. We are also pleased to acknowledge, with gratitude, Vice Chairman Daniel Inouye's commitment to hold this hearing regarding the concerns included at Section 329 of the Senate's Fiscal Year 1997 Interior Appropriations bill.

The Chickasaw Nation has been blessed in many ways. Among those blessings, we count the excellent working relationship that our tribal government has with many members of the Congress. It has been our honor and privilege to have also worked closely and well with numerous federal departments and agencies. That working relationship has been fostered by– and founded upon– the government-to-government dealings which have been mandated throughout the history of the United States of America.

That mandate has been contained in every single treaty between our two nations. Between 1787, the year of the first treaties between the United States and tribal governments, and 1871, the year in which treaties were no longer entered into between the federal and tribal governments, hundreds of treaties were concluded. In virtually every one of those treaties, each tribe gave up its lands in exchange for promises by the federal government. Those promises have amounted to and are considered to be the trust obligations which the United States has for the tribes and their citizens.

When considering the entire history of American-tribal relations, it is easy to see that those obligations have not always been totally and faithfully upheld by the federal government. Scrutiny of those obligations is required every day by the challenges and demands placed upon both our governments. That scrutiny often leads to the removal of more and more of the powers and authorities of the tribes, and those are powers and authorities which ought to be exercised by and reserved to *any* government. As the trustee for the tribal nations, it should be the responsibility of the federal government to make sure that the sovereign powers and authorities of the tribes are not only protected, but expanded to at least equal those of other governments insofar as regulatory powers within the tribe itself are concerned.

In the beginning of the history of the United States, treaties between America and the tribes were agreements between equals, one sovereign to another. Tribal governments were accorded the same significance and respect as any foreign nation. Because of the tenuous condition of the new United States of America, every effort was made to seek and obtain the tribes as valuable and important allies.

As one of the first tribes on this continent to befriend the fledgling Americans in their efforts to found the United States, the Chickasaw Nation has been a staunch friend and reliable ally. When the call to arms was issued by the Continental Congress, the Chickasaw Nation responded with a force under the leadership of one of our great war chiefs, Piomingo. Piomingo and his party of Chickasaw warriors walked more than one thousand miles to respond to General George Washington's call for help. Fifty years later, our tribal leaders were presented with the demand from the nation's capital that we surrender the lands our ancestors had called home for thousands of years.

And that was just the beginning of the long and convoluted evolutionary process of the United States governments' dealings with the tribes, constituting what amounted to federal Indian policy. The Chickasaw Nation was one of the subjects of a move in Congress to terminate the tribal governments of the Five Civilized Tribes and end the status of each of those as tribal nations and governments. Operating under that belief from the time of Oklahoma statehood in 1907, it was not until 1969 that we, ourselves, found out that, despite the intentions of Congress, the Chickasaw Nation and the others of the Five Civilized tribes were not terminated in law. In 1971, we reinstituted our tribal government and are now making progress like our tribe has not seen since before the American Civil War.

We have so far survived all sorts of attempts to restrict our sovereignty, attempts which amount to direct threats against the very existence of our tribal nation. Those threats have been mounted from– it seems– all directions. In the earliest days of the United States, the tribes were courted because they were powerful and because they

controlled the lands. Those lands were later desired and needed for the expansion of the United States, so they were taken. Then, when the tribes had learned to survive– if not benefit and prosper– on their "new" lands, the demands came that even those lands were needed in the national interest of expansion. Having been herded onto lesser and lesser desirable lands, the tribes made do with what they had, at least until it became time to, once again, take those remaining lands away from them. Year by year, treaty after treaty was negated, ignored or abrogated.

In the history of the United States, the Congress formulated federal Indian policy which evolved hand-in-hand with the perceived needs of the country. At first, the policy was to treat with the tribes as governmental equals. Then the policy shifted to one of removing the tribes from their lands and resettling them in areas which would not be under immediate threat or demand. The policy then changed to one of termination or, failing that, assimilation. Finding that neither one of those worked very well, the emphasis shifted to a more grandfatherly manner of dealing with the tribes, through which everything was done for the tribes by the federal government, in what was at that time determined to be the "best" method of providing for the tribes and their citizens. That period was followed by the period in which we now find ourselves, that of self-determination and self-governance.

Through the urging and strong support of the Congress, the White House and other federal agencies, the tribes have more or less accepted the challenge of devising and developing their own tribal economies, of aggressively seeking through business development, unique methods to generate their own revenues to lessen their dependence

on federal funds and to provide through their own mechanisms the services and programs needed by the Native American population. The tribes were suddenly expected, and asked, to perform and function like "normal" governments. "Normal" governments have the ability to generate the revenue they need to operate through methods such as taxation.

One of the primary considerations not often given to the development of tribal economies is that, although tribes do indeed have their own governments, their land base upon which to rely for the generation of taxation revenue for their governments (like virtually every other government in America) is practically, for taxation purposes, nonexistent. Without that source of revenue to rely on like states, counties, municipalities and even the federal government, the taxing base for most tribes is so limited as to be extremely impractical as a consideration as a primary source of governmental revenue generation.

In the last two decades, the tribes have managed to work with what they have determined to be their assets. For many tribes, that has meant taking advantage of every single opportunity to provide for their citizens. They have developed tribal enterprises to augment and supplement the dwindling federal dollars– dollars which the United States was obligated through its trust responsibility– to be used to meet the ever-growing and changing demands and basic needs of our people. They have taken advantage of the congressional mandate to practice self-governance, to determine and define their destinies as tribal nations. In accepting that challenge, the tribes have relied not only upon the "traditional" methods of generating governmental revenue (taxation, regulation, etc.), but they have responded to the challenges to provide for themselves in unique and clever ways.

The Chickasaw Nation, which only 25 years ago was totally dependent upon federal funds to provide services and programs for its people, today pays for the cost of its core government entirely from the revenues it generates through its businesses. Now, only about 40% of the annual budget of the Chickasaw Nation comes from the federal government. We have risen to Congress' challenge to be self-governing, and those efforts, now resulting in true progress for many tribes, must be protected.

Some of the tribes, through their efforts at self-governance through business development, have prospered tremendously and, in that prosperity, they have managed to somewhat unnerve the observers of Indian Country. Utilizing their remaining powers and authorities, the tribes have developed at phenomenal rates in creative ways.

Use of state-of-the-art technology in developing reservation and non-reservation tribal economies, coupled with the tribes' abilities to practice self-governance and somewhat limited self-regulation, have stirred jealousy and contempt. It is a brand of jealousy and contempt not unlike that which the early settlers had for the Indians; they merely wanted what the tribes had-- their lands. Today, the tribes have been able to take what little they have at their disposal and work with it to bring some measure of success. That success has resulted in several attempts by members of Congress to attack, limit or even remove tribal sovereign autonomy.

The language of the proposed-- and now withdrawn-- Section 329 of the Interior Appropriations bill is not as comprehensive in its effort to limit or restrict the sovereign powers of tribal governments as some attempts have been. Nevertheless, it represents

what is perceived to be a threat to remove an attribute of sovereignty which has long been reserved to non-tribal sovereign governments in this country, and that is the right to be immune from suit. It also contains a provision which would subject a tribe to the jurisdiction, orders and decrees of "the appropriate state court of general jurisdiction."

Subjecting the tribes to the jurisdiction of any state court for any reason is not only an abrogation of tribal governmental power and authority, it creates a poor precedent by forcing tribes and states into a relationship which has never before existed. No treaties have been entered into between tribes and state governments (states are forbidden from doing so by the United States Constitution), so there is no basis for any state to give any credence to tribal authority or self-governing powers. Given the treatment of tribes in state courts in other matters, and knowing that there are no trust obligations or even government-to-government relations between tribes and states, it should be clear that such a move would be disastrous.

It would challenge the very progress that tribes have been making in the last 20 years by subjecting them to the controlling authority of a state government—a government which has absolutely no obligations to a tribal government and has no history for such dealings. Such a measure will surely result in placing yet another different range of obstacles before tribal development and the practice of tribal autonomy. It would also create other problems which we believe have not been given adequate review or consideration, and for which no input from tribal governments has before now been sought.

Several federal agencies deal with tribes and treat them *as* states (the U.S. Environmental Protection Agency and the U.S. Department of Agriculture treat tribes and work with them on the same level as they do with the various state governments). The language of Section 329 would not only have made tribes subject to state government (at least in the instances included in Section 329), it could also have placed into jeopardy the relationships which tribal governments have and cultivate with federal agencies. Because tribes are, for many instances, treated the same as states, would Congress propose subjecting the control or regulatory authority of one state to another?

Another consideration is the fact that governments, ranging from municipal to county to state and federal, have the rights, powers and authorities to make decisions affecting lands over which they exercise jurisdiction. That, too, is a basic tenet and principle of sovereignty. As dependent nations, tribal governments should have the same power and authority as any other government to exercise full jurisdiction over lands within their respective purview.

One of the basic reasons that tribes have enjoyed such remarkable success in the development of their own respective tribal economies is because the states do not now have any jurisdictional authority in Indian Country, except for those distinct instances where Congress has so allowed the states to exert their jurisdiction for specific purposes. With little or no fear of state interruption or intervention in business dealings with tribes, many companies and corporations are comfortable working directly with the tribes, on their own levels, to arrive at business and industry which, in the end, helps not only the state in which a tribe is located, but all America.

Sound and growing tribal economies are beneficial to the United States in numerous ways. Lessening the tribes' dependence upon federal funding saves the U.S. government budget. Putting people to work removes them from the welfare rolls and lessens the demand on already strained tribal, state and federal programs. Those same people, as they become employed, are added to the tax rolls of their states, increasing revenue for their home state. The impact of flourishing and even developing tribal economies is felt throughout the area in which each tribe is located. It is a ripple effect which reverberates not only throughout Indian Country, but beyond the borders and jurisdiction of each tribal government.

In the Chickasaw Nation, had not our tribal government had at least its current ability to exercise its sovereign powers and authorities over the lands which are clearly within its jurisdiction, we would not be able to tell you right now that our core tribal government is 100% self-sustaining. We would be unable to provide the level of services which we provide to all of the Indian residents of the Chickasaw Nation. Our reliance and dependence upon the federal government would be total and, as a result of the diminishing amounts of federal funds upon which we can count, the services provided to Indians would be less in number, and fewer of the thousands who need those services and programs would simply be ignored and their families would remain unserved and in increasing need of assistance.

On September 17 of this year, just one week ago, Professor Joseph P. Kalt, of the John F. Kennedy School of Government at Harvard University, provided testimony before this Committee. What Professor Kalt said about *de facto* sovereignty bears repeating once

again: "We cannot find a single case of sustained economic development where the tribe is not in the driver's seat." Professor Kalt was pointing out that, despite the intentions of Congress and the dozens of federal agencies which work with tribes, unless the tribes themselves were practicing and using the attributes of sovereignty, true economic development was not possible. Without that economic development which derives from the practice of sovereign powers and authorities, the tribes will not lessen their dependence upon the federal government. Subjecting tribes to *state* authorities erodes those *tribal* sovereign powers and authorities and goes against the self-governance and self-determination initiatives created by Congress for the tribes.

We were very pleased to learn that the author of Section 329 of the Interior Appropriations bill had agreed to striking its provisions when it came before the full Senate Appropriations Committee. However, we take this opportunity to encourage the members of this Committee to practice caution and prudence in other matters addressing tribal sovereignty which are sure to arise in the months ahead.

President Lyndon Johnson, in 1968, said: "We must affirm the rights of the first Americans to remain Indians while exercising their rights as Americans. We must affirm their rights to freedom of choice and self-determination." Congress has stood firm in its resoluteness to allow tribes to relearn the principles which allow them to govern themselves. Now that we are making significant progress to that end, we find that impediments are being placed in our way. Those impediments in the form of attempts to restrict and even remove attributes of sovereignty will prevent us from accomplishing the greatness to which we aspire as American Indian nations, tribes and as individuals.

In 1970, President Richard Nixon set the goal of national Indian policy: "...to strengthen the Indian sense of autonomy without threatening his sense of community." Working with Congress since that time, we believe that a great deal of success in strengthening tribal autonomy has been achieved. While it has been achieved only through hard work and close cooperation with the federal government, we believe that the tribes themselves should be and are capable of establishing proper and just relations with the various state governments. Given that there are no treaty obligations between tribes and states, diplomacy, tact and sincere interest in meeting the needs of the two governments' constituencies must govern the careful and cautious building of such relationships. With the continued help and support of Congress to that end, we know that continued successes will be inevitable.

We ask for and we seek the continued support of Congress to make it possible for the tribes to continue their efforts to become and remain potent economic allies to the United States. All we ask is that, in the words of the late Supreme Court Justice Hugo Black, "Great nations, like great men, should keep their word."

Mr. Chairman, again I express my appreciation for being allowed this time to provide comments. We look forward to continuing our work together and to building a stronger and more compassionate America.

Amendment to the Testimony of Bill Anoatubby, Governor of the Chickasaw Nation Senate Committee on Indian Affairs September 24, 1996

Mr. Chairman, on behalf of the people of the Chickasaw Nation, I extend our appreciation for being given the opportunity to provide comments before the distinguished members of this Committee. This is an amendment and attachment to our prior submission, and we hope that this Committee will accept this amendment in light of recent developments.

There is an old saying which states that one cannot sue the government without the government's consent. That is the simplest way of putting what is a complex issue, sovereign immunity.

Tribes have sovereign immunity from suit as a logical progression of their development, recognition and existence as governmental entities. Because almost every level of government in the United States enjoys sovereign immunity from suit, it is an attribute of sovereignty which has been consistently applied by the courts. With notable exceptions in the instances where states have modified their own immunity from suit and that of their political subdivisions for what has defined to be reasonable claims, sovereign immunity has long been practiced by the tribal governments as well as by the state and federal governments.

Federal, state and most local governments are free from liability for torts committed

unless they have consented to suit for specific instances. Such freedom to press suit is granted in legislation enacted by Congress in the Federal Tort Claims Act. That federal statute established the conditions and parameters for suits and claims against the United States government "in the same manner and to the same extent as a private individual under like circumstances." The provisions of the Federal Tort Claims Act are, as we understand, routinely also applied to tribal governments.

However, local units of government– excepting tribal governments– can be sued directly under the provisions of federal statutes,* according to a ruling by the U.S. Supreme Court. The high court found that such suits may be pressed for relief where "the action which is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decisions officially adopted and promulgated by that body's officers."

Tribes are little different from the federal government in the application of sovereign immunity by the courts, based both upon federal statutes and the judicial system's application of and interpretation of those statutes. In keeping with the powers and authorities of the various state governments, however, it *should* be allowable for the individual tribal governments to adopt their own legislation, just as have states, to waive their governmental immunity to established or set degrees. Waiver of that immunity might be accomplished for specified purposes through a tribal claims court or it may be by a simple action filed in the existing tribal judicial system. The actual accomplishment should be a matter of determination for each tribal government through its internal governmental and legislative processes.

*42 USCA §1983

Through the adoption of such ***tribal*** statutes, the guarantee of due process would be virtually identical to the federal government's. In that instance, the tribes could take the initiative in providing for the ability of ***any***one to have their claims addressed in the forum provided for that purpose by the individual tribal governments. As sovereigns, the tribes should be entitled to the same or similar practices as states in such matters.

Again, thank you for allowing us to provide this amendment to our earlier testimony.

THE
NAVAJO
NATION

P.O. BOX 9000 • WINDOW ROCK, ARIZONA 86515 • (520) 871-6000

ALBERT A. HALE
PRESIDENT

THOMAS E. ATCITTY
VICE PRESIDENT

TESTIMONY OF HERB YAZZIE,
ATTORNEY GENERAL OF THE NAVAJO NATION
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
CONCERNING CIVIL JURISDICTION WITHIN INDIAN COUNTRY
SEPTEMBER 24, 1996

Mr. Chairman, members of the Committee, I would like to thank you for giving the Navajo Nation this opportunity to present testimony today on Civil Jurisdiction in Indian Country. My name is Herb Yazzie and I am the Attorney General of the Navajo Nation. I speak today on behalf of the 250,000 members of the Navajo Nation and on behalf of the several thousand non-member citizens of the Navajo Nation. As I am sure you are aware, the Navajo Nation is the largest federally recognized Indian nation in the United States.[1] The Navajo Nation provides essential governmental services within a territory of more than 25,000 square miles located within the states of Arizona, New Mexico and Utah. The territory of the Navajo Nation is larger than the states of Connecticut, Massachusetts, Delaware, Maryland and Rhode Island combined.

Mr. Chairman, these hearings have been called in part as a result of the proposed introduction of an amendment designated as section 329 of H.R. 3662. This amendment would have subjected Indian nations and Indian government officials to state and federal court jurisdiction for claims relating to actions or proposed actions of such governments or

1 "Indian Entities Recognized and Eligible to Receive Services From The United States Bureau of Indian Affairs, "60 Fed. Reg 9250, 9252 (February 16, 1995).

The relationship between the Navajo Nation and the United States is established and governed by two treaties, the Treaty of June 1, 1868, United States-Navajo Nation, 15 Stat. 667, and the Treaty of September 9, 1849, United States-Navajo Nation, 9 Stat. 974.

government officials impacting, or threatening to impact, the ownership or use of private property.

The Navajo Nation frankly is appalled by the language of section 329. That language would grossly impinge on the sovereign status of the Navajo Nation and would violate the inherent rights of self-government of the Navajo people, rights which are guaranteed to the Navajo people in the Ninth and Tenth Amendments to the United States Constitution and in the 1849 and 1868 treaties between the Navajo Nation and the United States. Section 329 would make a mockery of the Navajo Nation's sophisticated, professional court system, by subjecting the Navajo Nation to suits in traditionally hostile state forums, by Indian nation members and non-members. Proven remedies currently exist in Navajo law and Navajo legal institutions to protect all persons, whether Navajo or not, from the risk of harm intended to be addressed by section 329.

The legitimacy of the Navajo Nation government is "beyond question."[2] Nevertheless, the obvious underlying premise of section 329 is that all Indian nations are incapable of providing justice to non-members within the framework of their governments. As I will demonstrate, this view is misinformed and is without any factual foundation.

The Navajo Nation has an established civil and criminal court system which operates effectively at the trial and appellate levels as a separate branch of the Navajo Nation government.[3] The courts of the Navajo Nation have been in continuous operation since the early years of the Twentieth Century, and a system of just dispute resolution has existed under

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2 The Navajo Government has been called 'probably the most elaborate' among tribes. H.R. Rep. No. 78, 91st Cong., 1st Sess. 8 (1969). The legitimacy of the Navajo Tribal Council, the freely elected governing body of the Navajos, is beyond question.

Kerr McGee Corp. v. Navajo Tribe of Indians, 471 U.S. 195, 201 (1985). See also, Williams v. Lee, 358 U.S. 217 (1959).

3 7 Navajo Nation Code (N.N.C.) § 201 et seq. The Navajo Nation courts exercise jurisdiction within the Navajo Nation pursuant to 7 N.N.C. § 254 (territorial jurisdiction) and 7 N.N.C. § 253 (adjudicatory jurisdiction).

the Navajo common law for far longer.[4]

The Navajo Nation currently has seven general jurisdiction District Courts throughout the Navajo Nation,[5] plus a system of specialized limited jurisdiction courts such as the Family Courts and the world-renowned Peacemaker Court. The Navajo Nation Supreme Court, located in Window Rock, Navajo Nation (Arizona), exercises appellate jurisdiction over all matters arising within the Navajo Nation courts and administrative forums.[6]

The concept of justice runs deep within the culture of the Navajo people and informs all government activity. In the Navajo way, individual rights and responsibilities, as well as the rights and responsibilities of the larger community, are considered in every dispute resolution.[7] It is deeply offensive to the Navajo people to suggest that its government engages in conduct that deliberately and consistently violates the rights of persons within its jurisdiction.

Nearly thirty years ago, in 1967, the Navajo Nation Council enacted the Navajo Nation Bill of Rights[8] in order to insure that the individual liberties of all persons are secured within the Navajo Nation. The Navajo Nation guaranteed fundamental individual liberties against violation by the Navajo Nation government even before the United States Congress enacted

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4 See, e.g., Yazzie, "Life Comes from It: Navajo Justice Concepts," 24 New Mexico Law Review 175 (1994); Zion, "Aboriginal Rights: Western United States of America," 2 Law & Anthropology 195 (1987) (World survey by the International Academy of Comparative Law).

5 7 N.N.C. § 253. The District courts are located at Window Rock, Kayenta, Chinle and Tuba City, Navajo Nation (Arizona) and at Crownpoint, Shiprock and Ramah, Navajo Nation (New Mexico).

6 7 N.N.C. §§ 301 and 302.

7 Tso, "The Process of Decision Making in Tribal Courts," 31 Arizona Law Review 225 (1989); Lowery, "Developing a Tribal Common Law Jurisprudence: The Navajo Experience 1969-1992," 18 American Indian Law Review 379 (1994) (survey of Navajo Nation decisions); "Tribal Justice Systems," in D. Getches, C. Wilkinson & R. Williams, Federal Indian Law 493-550 (3d Ed. 1993) (survey of Indian nation courts with particular emphasis on the Navajo Nation judicial system).

8 Navajo Tribal Council Resolution No. CO-63-67, October 9, 1967, as amended, 1 N.N.C. §§ 1-9.

the Indian Civil Rights Act of 1968 (ICRA) the following year.[9] Nor was this the first time that the Navajo Nation Council had enacted such legislation. Due process and just compensation for interference with private property rights have been a part of Navajo statutory law since 1960 and a part of the Navajo common law for much longer.[10]

The Navajo Nation Bill of Rights is more expansive and protective of individual rights than either the ICRA or the Bill of Rights within the United States Constitution. The Navajo Nation Bill of Rights extends to freedom of speech, freedom of religious expression, freedom of the press,[11] the right to assemble peaceably and petition the government for redress,[12] the right to be free from unreasonable searches and seizures,[13] the right to keep and bear arms,[14] the right to counsel and the right to trial by jury,[15] the right to be free from double jeopardy and the right to be free from self incrimination,[16] the right to be protected from cruel and unusual punishment and excessive bail and fines,[17] and the right to due process of law and to equal rights and protection under the laws to all persons, irrespective of gender.[18] Most importantly,

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9 Act of April 11, 1968, P.L. 90-284, as amended, 25 U.S.C. § 1301 et seq..

10 Navajo Tribal Council Resolution No. CJA-18-60, January 22, 1960, as amended, 16 N.N.C. §§ 1401-1403. See also Dennison v. Tucson Gas and Electric Co., 1 Navajo Reporter 95 (Nav. Ct. App. 1974).

11 1 N.N.C. § 4.

12 1 N.N.C. § 4.

13 1 N.N.C. § 5.

14 1 N.N.C. § 6.

15 1 N.N.C. § 7.

16 1 N.N.C. § 8.

17 1 N.N.C. § 9.

18 1 N.N.C. § 3.

in the context of section 329, the Navajo Nation Bill of Rights protects private property. The Navajo Nation Bill of Rights expressly mandates that "private property [shall not] be taken nor its lawful private use be impaired for public or governmental purposes or use, without just compensation."[19] These enumerated rights, as well as other unenumerated rights retained by the people, apply to all persons, irrespective of race, Indian nation affiliation, gender or religion. As an example, non-member citizens of the Navajo Nation sit on civil juries in Navajo Nation courts along with Navajo Nation members.[20] Thus, in the Navajo Nation, all persons have every one of the rights enumerated in the United States Constitution, and more.

Section 329 apparently presumes that Indian governmental institutions, particularly Indian courts, cannot effectively protect individual private property rights. Thus, section 329 waives the sovereign immunity of all Indian nations accepting federal funds and authorizes suit in state and federal forums against Indian nations and their officials.[21]

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19 1 N.N.C. § 8.

20 George v. Navajo Tribe, 2 Navajo Reporter 1 (1979).

21 The issues of Indian nation sovereign immunity and the legitimacy of Indian nation courts have been debated for more than sixty years.

The Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984, as amended, 25 U.S.C. § 461 et seq. (IRA), which followed the 1928 Merriam Report, Institute for Government Research, Studies in Administration, The Problem of Indian Administration (1928), specifically addressed sovereign immunity and Indian nation courts. Section 16 of the IRA, 25 U.S.C. § 466, recognizes the inherent power of Indian nations to establish justice systems. However, under the IRA, only Indian nation business corporations may be sued, and liability is limited to assets pledged.

The ICRA, adopted in 1968, is a congressional decision that Indian nation governments are competent to assure civil rights for all citizens, Indian and non-Indian alike.

In the 1970's the American Indian Policy Review Commission, a congressional body which did the most extensive survey of Indian policy in this century, studied sovereign immunity and Indian judicial systems. Its Final Report concluded that sovereign immunity has a

However, the Navajo experience illustrates that this mistaken presumption is born of ignorance. For example, in a seminal case the Navajo Nation Supreme Court enforced the Navajo Takings Clause over 22 years ago.[22] The Court held that, pursuant to the Navajo Nation Bill of Rights, the right of the government to exercise the power of eminent domain may be authorized only by the legislature, that there can be no taking of private property for public use against the will of the owner without direct authority from the legislature and that a condemnation may occur only in the manner prescribed by law. The Court further held that just compensation is an essential element of a lawful condemnation and that sovereign immunity is no bar to a claim for just compensation. Thus, in the Navajo Nation, there is no need for section 329.[23] On the contrary, section 329 would only destroy an effective Navajo Nation judicial system already attuned to the individual rights of all persons, Navajo and non-

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21 (Continued....)
useful function and Indian nation courts are competent justice bodies - if only Congress would appropriate significant additional funds to operate them. 1 American Indian Policy Review Commission, Final Report 161-168, 212-214 (May 17, 1977).

Yet again, in 1990 the United States Civil Rights Commission revisited these issues. The Commission rejected federal review to guarantee civil rights and instead recommended that Congress address the issue of the ability of Indian nation courts to do their job by providing adequate funding to operate them. Congress responded by enacting the Indian Tribal Justice Act of December 3, 1993, P.L. 103-176, 107 Stat. 2004, 25 U.S.C. § 3601 et seq..

22 Dennison v. Tucson Gas and Electric Co., 1 Navajo Reporter 95 (Nav. Ct. App. 1974).

23 Of course, the Navajo Nation, like all other governments, occasionally acts in violation of the legal rights of its member and non-member citizens. The point is that the Navajo Nation has developed an effective judicial system to help prevent such violations from occurring and to remedy such violations when they do occur. Cf., Hodel v. Irving, 481 U.S. 704 (1987) (section 207 of the Indian Land Consolidation Act of 1983, P.L. 97-459, 96 Stat. 2519, 25 U.S.C. § 2206, is an unconstitutional taking of individual Indian private property interests.)

Navajo alike.[24]

We are making significant strides in making the Navajo Nation more hospitable to economic development, particularly to investment by outside business interests. For example, the Navajo Nation recently entered into a landmark Memorandum of Understanding with the Federal National Mortgage Association (Fannie Mae) clearing the way for conventional home mortgage financing by private lending institutions of new home construction within the Navajo Nation.[25] Fannie Mae is the largest purchaser of private home mortgages on the secondary market in the United States. Under this agreement, Fannie Mae-approved lenders will provide private financing within the Navajo Nation, utilizing forms of Note and Mortgage specifically developed for use within the Navajo Nation.[26] The Memorandum of Understanding and the forms of Note and Mortgage expressly provide for the application of

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24 The Navajo Nation does not suggest, nor does it believe, that section 329 should be imposed upon any Indian nation government that does not have a similar system in place. Part of the value of a federal system as exists in the United States is that the state governments are able to serve as "laboratories for democracy," where each state is able to experiment in a continuing attempt to provide better government. Indian nation governments share the same conceptual basis and serve the same purpose in the United States federal system.

For over 200 years the United States generally has upheld the principle that each Indian nation is a domestic dependant nation, free to manage its own internal affairs without state intervention. The right of self-government, which Indian people share in common with all other people within the United States, and which is a constitutionally protected right of all federal citizens, dictates that it is the prerogative of each Indian nation to determine what laws will govern its people, and what rights its members and non-members shall have while within the jurisdiction of that particular Indian nation. United States v. Wheeler, 435 U.S. 313 (1978); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). See also, R. Barsh and J. Henderson, The Road: Indian Tribes and Political Liberty (1980).

25 "Memorandum of Understanding Between the Federal National Mortgage Association and The Navajo Nation," executed June 19, 1996.

26 Fannie Mae/Navajo Nation-Single Family-Fixed Rate Note, Form 3270 4/96; Fannie Mae/Navajo Nation-Single Family-Mortgage, Form 3070 4/96. These forms also have been approved by the United States Bureau of Indian Affairs.

Navajo Nation law and for the exclusive jurisdiction of the courts of the Navajo Nation to enforce the rights created. The Memorandum of Understanding not only demonstrates the Navajo Nation's commitment of support for private capital investment within the Navajo Nation, it also demonstrates unmistakably the commercial reasonableness of Navajo Nation law and Navajo Nation courts and the resulting confidence that the financial community has in relying upon Navajo Nation laws and governmental institutions.[27]

Indian nation courts have been thoroughly studied and have been found to provide effective protection of individual civil rights.[28] One of the most important commentators who has concluded that Indian nation courts are effective guardians of justice is the Honorable Sandra Day O'Connor of the United States Supreme Court. In 1996, in a speech before the annual Sovereignty Symposium, sponsored by the Oklahoma Supreme Court and the Indian courts of Oklahoma, Justice O'Connor praised the third judicial sovereign for effectively guaranteeing the rights of all and gave special mention of Indian lessons for restorative

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27 See also, Frye, "Lender Recourse in Indian Country: A Navajo Nation Case Study", 21 New Mexico Law Review 275, 325-326 (1991) ("Favoritism based either on tribal politics or on the race of the litigants has not been experienced.... The institutional climate for lending in Navajo Indian Country is more than acceptable....")

28 A five-year survey of Indian nation court civil rights cases, which reviewed reported Indian nation court decisions in the Indian Law Reporter, including several Navajo Nation decisions, concluded that

> The cases discussed in this memorandum make clear that tribal courts are protecting the rights of tribal members and upholding important principles of judicial review. The courts are attempting to meld tribal custom and norms with applicable legal doctrines. The decisions show impartiality and careful thought. Although the courts are fledgling and require greater resources to develop in their sophistication, it is clear that people in Indian country can safely turn to the courts when they feel their rights are threatened.

Marx, "Civil Rights in Indian Country: Tribal Court Decisions 1988-92" 13 (April 30, 1993).

justice.[29] Justice O'Connor singled out Navajo peacemaking as an effective alternative to litigation.[30]

Proposed legislation like section 329 is completely unnecessary for another reason: there already are adequate remedies in federal court for alleged interference with private property rights by Indian nation governments. Under controlling United States Supreme Court precedent,[31] actions of an Indian nation government which are alleged to be in excess of its authority as defined by applicable federal statutory and common law, are redressable in federal courts. Allegations of such actions are "federal questions" over which the federal district courts have jurisdiction pursuant to 28 U.S.C. § 1331, and Indian nation sovereign immunity is not a defense. Thus, where an Indian nation government acts in excess of its authority, particularly where alleged interference with the private property rights or other individual rights of a non-member are concerned, there already is a remedy in federal court.[32]

The Navajo Nation believes that section 329 attempts to accomplish with an axe what already has been accomplished with a scalpel. There is simply no need to inflict such gross injury upon Indian governments and the rights of self-government of Indian citizens, when federal law, and in many cases Indian nation laws, already afford non-members adequate

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29 Lessons from the Third Sovereign: Indian Tribal Courts, delivered June 4, 1996. See also, National Indian Justice Center, "Tribal Court Report" (September 1996) and "O'Connor Says Tribal Courts Offer Lessons," 12 American Indian Report 10 (July 1996).

30 The President of the American Bar Association also recently praised traditional Navajo justice ways and recommended that American lawyers behave like Navajos. Ramo, "Lawyers as Peacemakers: Our Navajo Peers Could Teach Us a Thing or Two about Conflict Resolution," ABA Journal 6 (December 1995).

31 National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985); Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9 (1987).

32 See also, Arizona Public Service Co. v. Aspaas, 77 F. 3d 1128 (9th Cir. 1995). In this case, a private utility company successfully brought suit against the Navajo Nation alleging that the Navajo Nation's employment laws violated contractual rights of the company. The Arizona District Court and the Ninth Circuit Court of Appeals upheld the company's claim.

protection and effective remedies from any perceived excess of Indian nation governmental authority.

For example, apparently laboring under the falsehood that Indian nation sovereign immunity will always preclude non-members from receiving effective remedies in either federal or Indian nation forums, section 329 would waive the sovereign immunity of all Indian nations accepting federal funds, and would authorize suit in state and federal courts against Indian nations and their governmental officials. Yet Navajo Nation law[33] already specifically authorizes suit against the Navajo Nation in the Navajo Nation's courts when any person alleges a violation of the Navajo Nation Bill of Rights or of the express provisions of the laws of the United States. This authority extends to suits for damages resulting from alleged unlawful takings of property, and for necessary costs and fees associated with bringing such a claim.[34]

The Navajo Nation urges this Committee to consider the other ramifications of section 329. The language of the section would expose virtually all Indian nation property interests to suit in foreign jurisdictions, including issues of title, issues related to usufructuary rights, and disputes between Indian nation members and their own Indian nation governments over private property rights. The section does not limit itself to non-members of Indian nations, but reaches out to encompass any person with a private property interest which might be impacted by the actions of an Indian nation government. Certainly this would have a chilling effect on the ability of all Indian nation governments to provide effective government within Indian nation territories, particularly the ability of Indian nation governments to effectively regulate for the health and safety of both Indian nation member and non-member citizens alike. To analogize, if Congress were to "protect" the private property rights of state citizens in the same manner, Congress would have to authorize the citizens of one state to sue their own state government in the courts of a neighboring state whenever the state of residence took any action which might affect the property rights of its own citizens. Certainly no state would tolerate

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33 Navajo Sovereign Immunity Act, 1 N.N.C. § 551 et seq.

34 1 N.N.C. § 554.

such legislation: the United States Constitution would never permit it and Congress would never even consider it.

That Congress might even consider imposing such legislation upon Indian nations reflects a lack of appreciation of the conceptual basis of Indian peoples' right to self-government: all political power within the United States inherently resides with the people. Governments only have such powers as the people delegate to them. The Tenth Amendment to the United States Constitution teaches us that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[35] Indian people did not participate directly in the adoption of the United States Constitution.[36] Instead, the relationship of Indian people to the United States commonly is established by treaties or similar bilateral agreements between their respective Indian nation governments and the United States. Indian people generally have never delegated any of their inherent political rights to the states. Rather, Indian people have expressed their constitutionally protected retained rights through delegations to their respective Indian nation governments.

Section 329 reveals the real intent of the drafters, which is to destroy the judicial and

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35 Emphasis supplied. See also, U.S. Const., Art. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.") (Emphasis supplied.)

36 Indian people became citizens of the United States after the adoption of the United States Constitution by various means, including treaties with particular Indian nations, statutes relating to particular Indian nations or Indian individuals and other general statutes naturalizing particular classes of Indian individuals, such as allottees. The balance of non-federal citizen Indians became citizens of the United States by the Indian Citizenship Act of June 2, 1924, ch. 223, 43 Stat. 253. Current provisions are found at 8 U.S.C. § 1401 (b), which provides that:

> The following shall be nationals and citizens of the United States at birth: .... a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: Provided, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property[.]

Emphasis supplied.

political integrity of all Indian nations, in frank disregard of the covenant of trust and good faith which binds the United States and those dependent Indian nations. Section 329 simply is a bad idea and an unnecessary and unwarranted intrusion into the sovereign affairs of the Indian nations. While the Navajo Nation does not claim to know the particulars of every one of the hundreds of Indian nation governments within the United States, the Navajo Nation can say with certainty that it is not the only Indian nation to afford to all persons within its jurisdiction such basic protections as I have described. Many of our sister nations provide equal assurances, whether in the courts of the Confederated Salish and Kootenai Tribes, the courts of the Colorado River Indian Tribes or the courts of the Tohono O'odham Nation.

Much of the conflict between Indian nations and non-Indian property owners is a direct result of the checkerboard land ownership patterns which exist within many Indian nations. These land ownership patterns are a direct result of actions by the United States during the Allotment Era, where the United States carved up and distributed in severalty Indian nation lands to Indian families and sold the "surplus" lands to non-Indian settlers and speculators.[37] The United States imposed this policy in a deliberate attempt to destroy traditional Indian governments and institutions and to force Indian people to abandon their culture and to assimilate into mainstream America. After two generations the United States Congress found this policy to be a complete failure and abandoned it in 1934 in favor of "reorganizing" and promoting Indian self-government.[38] However, the damage already had been done: non-Indian people came to own land within the boundaries of many Indian nations and cultural and legal conflicts have arisen as Indian nation governments increasingly seek to fulfill their responsibilities as governments. Nevertheless, it would be both unfair and unwise to penalize Indian nations and Indian people further for the consequences of this failed federal policy. In

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37 The Allotment Era began in 1887, when Congress enacted the General Allotment Act of February 7, 1887, ch. 119, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq., and lasted until 1934. See generally, Felix S. Cohen, Handbook of Federal Indian Law 130-143 (1982 Ed.).

38 Institute for Government Research, The Problem of Indian Administration (1928); Indian Reorganization Act of June 18, 1934, ch. 576, 48 Stat. 984, as amended, 25 U.S.C. § 461 et seq.. See generally, Felix S. Cohen, Handbook of Federal Indian Law 144-151 (1982 Ed.).

addition, the Navajo Nation would consider it to be an unlawful infringement upon Indian peoples' constitutionally protected right of self-government to impose race-based restrictions upon the ability of Indian people to govern within Indian nation boundaries.

American Indian people taught the European immigrants to North America about democracy over 200 years ago, and those teachings have found their way into the United States Constitution and the constitutions of the states.[39] To suggest now that Indian nations know or practice less justice, less protection of individual liberty, or less democracy than do the states is based on ignorance, probably is rooted in racism, and therefore is immoral and contrary to the American ideals of government. Accordingly, the Navajo Nation urges this Committee to reject the concept of section 329.

Mr. Chairman, I thank you for this opportunity to present these comments regarding Civil Jurisdiction in Indian Country.

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39 See, e.g., J. Weatherford, Indian Givers: How the Indians of the Americas Transformed the World 133-150 (1988).

Chapter 3. Judicial Branch

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Subchapter 1. Generally

§ 201. Establishment; composition

A. There is established the Judicial Branch within the Navajo Nation government.

B. The Judicial Branch of the Navajo Nation government shall consist of the District Courts, the Supreme Court of the Navajo Nation, and such other Courts as may be created by the Navajo Nation Council.

HISTORY

CD-94-85, December 4, 1985.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

§ 202. Seals of Courts

The Courts of the Navajo Nation shall each adopt a seal which shall be used to authenticate their respective judgments and other papers. The form of the seals and regulations for their use shall be specified by rules of court adopted and placed in effect as provided in 7 NNC §601.

HISTORY

CD-94-85, December 4, 1985.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

§ 203. Copies of laws

Each Court of the Navajo Nation shall be provided with copies of applicable federal, Navajo Nation and state laws and regulations.

HISTORY

CD-94-85, December 4, 1985.
CJA-1-59, January 6, 1959.

§ 204. Law applicable

A. In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws.

B. Where any doubt arises as to the customs and usages of the Navajo Nation the court may request the advice of counselors familiar with these customs and usages.

C. Any matters not covered by the traditional customs and usages or laws or regulations of the Navajo Nation or by applicable federal laws and regulations, may be decided by the Courts of the Navajo Nation according to the laws of the state in which the matter in dispute may lie.

HISTORY

CD-94-85, December 4, 1985.
CJA-1-59, January 6, 1959.

ANNOTATIONS

1. Navajo law and custom. This section clearly expresses the intent that Navajo law apply wherever possible. *Johnson v. Dixon,* 4 Nav. R. 108, (Nav. Ct. App 1983).

The application of custom depends on a good many circumstances and all the facts of the case. *Lente v. Notah,* 3 Nav. R. 72, (Nav. Ct. App. 1982).

When applying custom, the courts should see whether a particular custom or tradition is generally accepted and applicable to the parties before the court. *Id.*

2. Common law. Navajo Common Law is a body of law which is fully binding on the Navajo Court of Appeals and consists of the customs, traditions and usages of the Navajo People. *Tome v. Navajo Nation,* 4 Nav. R. 159, (Nav. Ct. App. 1983).

3. State law. Courts should carefully make certain that the matter is "not covered" by Navajo law, under subsection (C) of this section, before considering or proceeding to the use of state law. *Johnson v. Dixon,* 4 Nav. R. 108, (Nav. Ct. App. 1983).

Under this section, the traditions and customs of the Navajo People are to be applied where the Navajo Tribal Code is silent and federal law does not prohibit the application of tradition and custom; it is only in a situation where there is no tradition or custom that the Tribal Courts are authorized to apply state law. *Johnson v. Johnson,* 3 Nav. R. 5, (Nav. Ct. App. 1980).

4. Divorce—Division of property. Since nothing is specifically stated in the Navajo Tribal Code as to how either separate or community property is to be divided upon divorce, this section is controlling in the matter. *Johnson v. Johnson,* 3 Nav. R. 5, (Nav. Ct. App. 1980).

Since, under Navajo tradition, a land use permit given from a father to a son cannot be characterized as his separate property, nor as community property, the land use permits belonging to the entire family and to be used for the benefit of the entire family district court properly applied Navajo tradition and custom in awarding land use permits, grazing permit and all other property connected with a farm to wife in divorce proceedings and the award and distribution of the property rights between the parties was a fair and just settlement pursuant to 9 NNC §404 *Id.*

5. Alimony. The courts of the Navajo Nation are empowered to award alimony in dissolution of marriage cases. *Johnson v. Johnson*, 3 Nav. R. 5, (Nav. Ct. App. 1980).

Nothing in Navajo tradition or custom would prohibit the court from applying New Mexico law pursuant to this section and therefore, an award of alimony in a marriage dissolution action in the tribal courts is both proper and authorized. *Id.*

6. Child custody. Since Navajo custom and tradition is but one of many factors to be considered in child custody cases, a trial judge may be justified in disregarding old ways, and the court of appeal will not overturn such a decision unless it was clearly an abuse of discretion. *Lente v. Notah*, 3 Nav. R. 72, (Nav. Ct. App. 1982).

§ 205. Record of proceedings

Each Court of the Navajo Nation shall keep a record of all proceedings of the Court, which record shall reflect the title of the case, the names of the parties, the substance of the complaint, the names and addresses of all witnesses, the date of the hearing or trial, by whom conducted, the findings of the Court or jury, and the judgment, together with any other facts or circumstances deemed of importance to the case. A record of all proceedings shall be kept at the appropriate court and shall be available for public inspection unless prohibited by order of the Court or by applicable laws.

HISTORY

CD-94-85, December 4, 1985.
CJA-1-59, January 6, 1959.

§ 206. Cooperation of federal employees

A. No employee of the federal government shall obstruct, interfere with or control the functions of any Court of the Navajo Nation or influence such functions in any manner except as permitted by federal laws or regulations or in response to a request for advice or information from the Court.

B. Employees of the federal government, particularly those who are engaged in social service, health and educational work, shall assist the Court, upon its request, in the preparation and presentation of the facts in the case and in the proper disposition of the case.

HISTORY

CD-94-85, December 4, 1985.
CJA-1-59, January 6, 1959.

§ 207. Action against provider of an alcoholic beverage

A. Any person who has been injured or damaged by an intoxicated person, or as a consequence of the intoxication of any person, may maintain an action in the Courts of the Navajo Nation against any person, individual, partnership, association or corporation selling or

furnishing liquor or intoxicating beverages for consumption within the Navajo Indian Country if such liquor or intoxicating beverage was a cause of the intoxication.

B. Damages under this section shall include all damages to person or property, including, but not limited to, damages for wrongful death, personal injury and loss of income, and shall include loss of support, companionship, service and affection resulting from the death of a spouse, a minor child or the parent or guardian of a minor child.

C. In addition to any remedy available through subsection (A) above, the prosecutor of the Navajo Nation is authorized to maintain an action for the benefit of an injured party under this section at the request of or after notice to such injured party.

D. Nothing in this section shall be construed to impose civil liability on any person as a consequence of:

1. The bona fide sale or furnishing of liquor or intoxicating beverages for scientific, sacramental, medicinal or mechanical purposes; or

2. The transportation of liquor or intoxicating beverages in unopened containers and, where applicable, containers with unbroken federal tax stamps, through Navajo Indian Country on any highway, roadway or railway right-of-way in conformance with 18 U.S.C. §1154.

HISTORY

CD-94-85, December 4, 1985
CJA-10-78, January 24, 1978.

Subchapter 3. District Courts

§ 251. Appointment

The District Courts of the Navajo Nation shall consist of such judges as shall be appointed by the President of the Navajo Nation, with confirmation by the Navajo Nation Council.

HISTORY

CD-94-85, December 4, 1985.
CD-88-78, §§2, 3, December 20, 1978.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

§ 252. Family Courts

The Family Courts of the Navajo Nation shall have original exclusive jurisdiction of all cases involving domestic relations, probate, adoption, paternity, custody, child support, guardianship, mental health commit-

ments, mental and/or physical incompetence, name changes, and all matters arising under the Navajo Nation Children's Code.

HISTORY

CAU-46-89, August 16, 1989.

Note. Provisions of former §252, adopted by CJA-5-59, January 9, 1959 and CO-69-58, October 16, 1958 relating to term of office of judges were recodified at 7 NNC §355(B), by CD-94-85, December 4, 1985.

CROSS REFERENCES

9 NNC §1001 *et seq.*

§ 253. Jurisdiction—Generally

The District Courts of the Navajo Nation shall have original jurisdiction over:

A. Crimes. All violations of laws of the Navajo Nation committed within its territorial jurisdiction.

B. Civil Causes of Action. All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation.

C. Miscellaneous. All other matters over which jurisdiction has been heretofore vested in the "Navajo Tribal Court of Indian Offenses", or which may hereafter be placed within the jurisdiction of the District Courts by the Navajo Nation Council.

HISTORY

CD-94-85, December 4, 1985.
CF-19-80, February 13, 1980.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

Note. Pursuant to §252 of this title, as adopted by CAU-46-89, August 16, 1989, previous subsection pertaining to "Decedents' Estates" has been deleted.

ANNOTATIONS

1. The Courts of the Navajo Nation are empowered to award alimony in dissolution of marriage cases. *Johnson v. Johnson*, 3 Nav. R. 5, (Nav. Ct. App. 1980).

Nothing in Navajo tradition or custom would prohibit the court from applying New Mexico law pursuant to 7 NNC §204 and therefore, an award of alimony in a marriage dissolution action in the tribal courts is both proper and authorized. *Id.*

This section does not exclude review of Navajo Tribal Council actions from its broad grant of power to the courts. *Halona v. MacDonald*, 1 Nav. R 189, (Nav. Ct. App. 1978).

2. Paragraph (A) of this section enables the Courts of the Navajo Nation to issue summons or warrants applicable to a criminal prosecution. *Navajo Nation v. Atcitty*, 4 Nav. R. 130 (Nav. Ct. App. 1983).

3. Navajo Nation has the power to grant its courts personal jurisdiction over foreign corporations as a consequence of such corporations' acts in Navajo territory, such as wrongful repossession alleged in instant case, according to modern

expansions of the "minimum contacts" due process standard. *Thompson v. Lovelady's Frontier Ford*, 1 Nav. R. 282, (Nav. Ct. App. 1978).

This section's provision for jurisdiction over all other matters over which jurisdiction has been or may be vested implicitly asserts Navajo Nation jurisdiction over non-Indian, non-resident businesses and individuals, and court has jurisdiction over a non-Indian, non-resident business which allegedly wrongfully repossesses personal property upon Navajo land. *Id.*

4. District Court has civil jurisdiction, under this section's provision for jurisdiction over "all other matters which may hereafter be placed within the jurisdiction of the Trial Court," to enjoin a threatened criminal trespass prohibited by the code. *Salt River Project Agricultural Improvement and Power District v. International Brotherhood of Electrical Workers Local Union No. 266*, 1 Nav. R. 277, (Nav. Ct. App. 1978).

5. A non-Indian may be sued in the Navajo courts if he is found within the tribe's territorial jurisdiction; so that defendant corporations could be sued for forcible entry and detainer. *Navajo Tribe v. Orlando Helicopter Airways, Inc., (Nav. Ct. App., January 12, 1972.*

6. Navajo Courts of Indian Offenses exercise broad criminal and civil jurisdiction which covers suits by outsiders against Indian defendants, and no Federal Act has given state courts jurisdiction over such controversies. *Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251 (1959).*

Arizona courts are not free to exercise jurisdiction over a civil suit by a non-Indian against a Navajo Indian where court of action was derived from transaction which took place on the Navajo Reservation. *Id.*

§ 254. Territorial jurisdiction

The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians.

HISTORY

CD-94-85, December 4, 1985.

CJY-57-85, July 25, 1985.

CMY-28-70, May 7, 1970.

Preamble. CJY-57-85 contained the following in the preamble:

"7. It is the intent of these amendments that the reference to 'all land' is comprehensive and includes rights-of-way, fee land, and any other lands, notwithstanding the nature of title thereto, within the exterior boundaries of the Navajo Reservation, Eastern Navajo Agency, dependent Navajo communities, Navajo Indian allotments and all lands held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or any Band of Navajo Indians. Nothing herein shall be construed as constituting authorization for the purchase or lease of lands by any Band of Navajo Indians; and

"8. 'Dependent Navajo Indian communities' is intended to encompass all lands currently within the Eastern Navajo Agency and such other lands as may be

determined consistent with federal law to constitute dependent Navajo Indian communities."

§ 255. Writs or orders

The District Courts shall have the power to issue any writs or orders necessary and proper to the complete exercise of their jurisdiction.

HISTORY

CD-94-85, December 4, 1985.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

ANNOTATIONS

Garnishment. Enabling language of this section and former version of 9 NNC §1303 enable the District Courts of the Navajo Nation to order wage garnishment to any employer, trustee, financial agency or other person within the territorial jurisdiction of the Nation for child support. *Heredia v. Heredia*, 4 Nav. R. 124, (Nav. Ct. App. 1983).

Pursuant to 7 NNC §705 and this section, coupled with Rule 23, Rules of Navajo Civil Procedure, garnishment is permitted. *Tracey v. Heredia*, 4 Nav. R. 149, (Nav. Ct. App. 1983).

§ 256. Temporary or preliminary injunctive relief

No District Court of the Navajo Nation shall enter an order for temporary or preliminary injunctive relief in any proceeding in which there is no appearance by the defendant, unless:

A. The District Court judge certifies in writing as to the specific irreparable harm which would occur were the temporary relief not to be ordered; and

B. The legal counsel for the plaintiff certifies by affidavit as to the efforts which have been made to locate the defendant or defendant's legal counsel to notify him or her of the hearing on preliminary or temporary injunctive relief.

HISTORY

CD-94-85, December 4, 1985.
CF-19-80, §4, February 13, 1980.

§ 257. Sovereign immunity of the Navajo Nation

Jurisdiction of the District Courts of the Navajo Nation shall not extend to any action against the Navajo Nation without its express consent.

HISTORY

CD-94-85, December 4, 1985.
CF-19-80, February 13, 1980.

CROSS REFERENCES

1 NNC §551 *et seq.*, Navajo Sovereign Immunity Act

Subchapter 4. Special Division of Window Rock District Court

§ 291. Establishment

There is established the Special Division of the Window Rock District Court.

HISTORY

CMA-11-89, March 10, 1989.
CMA-8-89, March 1, 1989.

§ 292. Composition

A. The Special Division of the Window Rock District Court shall consist of three judges or retired judges or justices, who shall be assigned in such manner and for such terms as is provided in this section, for the purpose of appointing special prosecutors pursuant to 2 NNC §§2021–2024.

B. Judges of the Special Division shall be appointed for terms of two years each, which terms shall commence on the date of the enactment of this section, and thereafter on the date of every other anniversary of the enactment of this section.

C. The Chief Justice of the Navajo Nation shall designate and assign three judges or retired judges or justices to the Special Division for each successive two-year term. At least two of the judges shall be active permanent judges of District Courts of the Navajo Nation. The third judge may be either an active permanent judge of the Navajo Nation or a retired judge or justice of the Navajo Nation. Unless there are an insufficient number of active permanent judges from at least two District Courts, not more than one judge or retired judge may be assigned to the Special Division from a particular District (or preceding trial) Court. The Chief Justice shall designate one of the judges to be the presiding judge of the Special Division.

D. Judges of the Special Division may only be removed during their terms upon their resignation, or by a two-thirds (⅔) vote of the Navajo Nation Council. Any vacancy in such division shall be filled only for the remainder of the two-year period for which such vacancy occurs and in the same manner as initial appointments to such division were made.

E. Except as provided under subsection (F) of this section, assignment to the Special Division shall not bar any other judicial assignment during the term of assignment to such division.

F. No judge of the Special Division shall be eligible to participate in any judicial proceeding concerning a matter which involves a special prosecutor appointed by the Division while such special prosecutor is

serving in that office, or which involves the exercise of such special prosecutor's official duties, regardless of whether such special prosecutor is still serving in that office.

G. Within five calendar days of the enactment of this section, the Special Division shall be created pursuant to subsection (C) of this section.

HISTORY

CMA-11-89, March 1, 1989.
CMA-8-89, March 1, 1989.

CROSS REFERENCES

2 NNC §2021 *et seq.*

Subchapter 5. Supreme Court

§ 301. Composition

A. The Supreme Court of the Navajo Nation shall consist of the Chief Justice of the Navajo Nation and two Associate Justices of the Supreme Court.

B. The Supreme Court of the Navajo Nation shall sit at Window Rock, Navajo Nation (Arizona).

HISTORY

CD-94-85, December 4, 1985.
CMY-39-78, May 4, 1978.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

§ 302. Jurisdiction—Generally

The Supreme Court shall have jurisdiction to hear appeals from final judgments and other final orders of the District Courts of the Navajo Nation and such other final administrative orders as provided by law. The Supreme Court shall be the court of final resort.

HISTORY

CD-94-85, December 4, 1985.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

§ 303. Writs or orders

The Supreme Court shall have the power to issue any writs or orders necessary and proper to the complete exercise of its jurisdiction or to prevent or remedy any act of any Court which is beyond such Court's jurisdiction, or to cause a Court to act where such Court unlawfully fails or refuses to act within its jurisdiction.

HISTORY

CD-94-85, December 4, 1986.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

Subchapter 7. Judges

Article 1. Generally

§ 351. Salaries

A. Salaries for judges of the Courts of the Navajo Nation shall be established at the following base levels and negotiable thereon.

1. Probationary District Court Judges ..... $25,000 per year
2. District Court Judges ..... $30,000 per year
3. Probationary Associate Justice ..... $30,000 per year
4. Associate Justices ..... $35,000 per year
5. Probationary Chief Justice ..... $45,000 per year
6. Chief Justice ..... $55,000 per year

B. The probationary period for District Court Judges, the Chief Justice and Associate Justices shall be two years from the date of appointment by the President of the Navajo Nation.

C. Judges who have completed the probationary period, if subsequently promoted, need not be subject to the probationary provision as described in subsection (B) of this section.

HISTORY

CD-94-85, Exhibit D, December 4, 1985.
CO-53-81, October 22, 1981.
CF-6-76, February 19, 1976.
CJN-35-61, June 27, 1961.
CJN-40-59, June 10, 1959.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

§ 352. Removal from office

A. The Chief Justice of the Navajo Nation, or the Judiciary Committee of the Navajo Nation Council may recommend the removal of any justice or judge from office if, in the opinion of the Chief Justice, or the Judiciary Committee, there is reasonable cause to believe the justice or judge to be guilty of malfeasance or misfeasance in office, neglect of duty, mental or physical incompetence to perform the duties of his office, or if the justice or judge has been convicted of a felony in a state or federal court since entering upon duty.

B. Such recommendation shall be presented promptly to the Navajo Nation Council, and the justice or judge whom it is sought to remove from office shall be accorded an opportunity to appear before the Navajo Nation Council and present evidence in his own defense. Thereafter such justice or judge may be removed from office by a two-thirds vote of all the members of the Navajo Nation Council.

HISTORY

CD-94-85, December 4, 1985.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.
Note. References to the Advisory Committee are deleted.

CROSS REFERENCES

Judiciary Committee authority to recommend removal of Judges, 2 NNC §574.

§ 353. Retirement

A. The Chief Justice or any justice or judge of the Courts of the Navajo Nation shall retire upon attaining the age of 70 years.

B. The Chief Justice or any justice or judge of the Courts of the Navajo Nation serving under a permanent appointment who has served a total of eight years as permanent or probationary judge or justice may retire if he is at least 55 years of age, or if he has become permanently disabled from performing his duties.

C. If a justice or judge serving under a permanent appointment, who has served a total of eight years as permanent or probationary justice or judge is removed from office by the Navajo Nation Council for inability to perform his duties, and the Navajo Nation Council finds that this inability is not the result of the misconduct of such justice or judge, he shall, after such removal from office, have the status of retired judge.

D. Retired justices or judges who have served 15 or more years as permanent or probationary justice or judge shall receive the full salary of their office during the remainder of their lives.

E. Retired justices or judges with eight years service as permanent or probationary justice or judge shall receive one-half of the salary of their office.

F. Retired justices or judges having more than eight and less than 15 years' service shall receive an amount of more than one-half and less than the full salary of their offices, proportionate to their years of service in excess of eight.

G. Retired justices or judges with less than eight years service shall receive no pension.

H. No incremental increases of salary shall be given to retired justices or judges.

I. Retired justices or judges shall be ineligible to hear any case in any Court of the Navajo Nation unless the Chief Justice shall, with, the consent of the retired justice or judge involved, call him back for temporary duty to help relieve congestion in the docket of the Navajo Nation Courts.

J. Present justices or judges, upon leaving office, whether or not probationary or permanently appointed and approved, unless removed for misconduct, shall be considered as retired justices or judges and entitled to all the privileges provided under this section, including the provision to serve for temporary duty to help relieve congestion in the docket of the Navajo Nation courts.

HISTORY

CD-94-85, December 4, 1985.
CJN-35-61, June 27, 1961.
CJN-33-62, June 18, 1962.
CF-15-61, February 15, 1961.
CJN-40-59, June 10, 1959.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.
Exceptions to provision. CJA-11-84, January 25, 1984.

§ 354. Qualifications for judicial appointment

The following standards and qualifications shall apply to all judicial appointments to the Courts of the Navajo Nation:

A. Member of Navajo Nation and Age. An applicant shall be an enrolled member of the Navajo Nation and shall be over thirty (30) years of age.

B. Criminal Convictions. An applicant shall have never been convicted of a felony, or within the year just past, of a misdemeanor.

C. Education/Training. Each applicant shall be a high school graduate. Higher education or technical training with A.A., B.A., or B.S. degrees shall be preferred.

D. Experience. Each applicant shall have at least two (2) years work experience in law related area and have a working knowledge of Navajo and applicable, federal and state laws. Those applicants with experience working with the Navajo Nation Courts or with state and federal courts will be preferred.

E. Knowledge in Navajo Culture and Tradition. Each applicant must be able to speak both Navajo and English, and have some knowledge of Navajo culture and tradition. The applicant must be able to demonstrate:

1. An understanding of the clan system; and
2. An understanding of religious ceremonies; and
3. An appreciation of the traditional Navajo lifestyle.

F. Health. Each applicant shall produce a certificate of good health from a licensed physician.

G. Driver's License. Each applicant shall possess a valid driver's license.

H. No Physical Addiction. In addition to the requirement of a medical examination pursuant to subsection (H) above, each applicant must attest that he or she has no physical addictions.

I. Writing Sample. Upon initial screening of applicants by the Judiciary Committee, those applicants selected shall submit a writing sample that illustrates the applicant's ability to clearly show organization and communicative abilities.

J. Ethics. Each applicant shall show that he or she has neither present nor past conflicts of interests that would have the appearance of partiality or bias in cases brought in the courts of the Navajo Nation. Each applicant must demonstrate an impartial background that will indicate neutrality and fairness for proper decision making.

K. References. Each applicant must be of good moral character and shall submit letters of reference regarding his or her application. Such letters shall outline the applicant's motivation and employment performance, and the applicant's character and capacity for honesty and impartiality.

L. Management Ability. Each application shall show managerial skills necessary for the smooth operation of a Court. Such information as the applicant's record of supervising staff, coordinating budget and personnel requirements and verbal communication and writing abilities shall be carefully reviewed by the Judiciary Committee.

M. Probationary Status Evaluations. A probationary judge shall submit to periodic evaluation of work performance as designated by the Judiciary Committee of the Navajo Nation Council.

N. Political Appointments. Each applicant shall be selected and evaluated without regard to political affiliation or association.

HISTORY

CD-94-85, December 4, 1985.

§ 355. Appointment; term of office

A. The President of the Navajo Nation shall appoint the Chief Justice, Associate Justices, and District Court Judges with confirmation by the Navajo Nation Council from among those recommended by the Judiciary Committee of the Navajo Nation Council.

B. The Chief Justice, and the Associate Justices of the Supreme Court and the District Court Judges shall be appointed for a probationary period of two years and upon permanent appointment shall serve thereafter during good behavior or until they are 70 years of age.

C. A probationary Chief Justice, Justice or Judge shall not be recommended for permanent appointment unless he or she has successfully completed a course of training accredited for judges and he or she has a satisfactory performance evaluation as determined by the Chief Justice and the Judiciary Committee of the Navajo Nation Council.

D. At any time during the probationary term of any Chief Justice, Justice or Judge, regardless of the length of service of such judge, the Judiciary Committee may recommend to the President of the Navajo Nation that the probationary judge be removed from office. The President of the Navajo Nation, pursuant to such recommendation, may remove such probationary judge from office. Any judge so removed shall not be eligible for the status of retired judge and shall not be called to sit in any case pursuant to 7 NNC §353. At the conclusion of the two-year probationary term, the Judiciary Committee shall review the record and qualifications of each probationary judge and shall recommend to the President whether or not each probationary judge has satisfactorily completed the probationary term and should be appointed to a permanent position. The President shall not appoint to a permanent position any judge not recommended by the Judiciary Committee, but the President, at his discretion, may appoint any judges recommended by the Judiciary Committee to permanent positions. The appointments shall be submitted to the Navajo Nation Council for confirmation.

HISTORY

CD-94-85, December 4, 1985.

CROSS REFERENCES

See 2 NNC §574, Judiciary Committee authority.

Article 2. Chief Justice

§ 371. Administrative duties

In addition to his judicial duties, the Chief Justice of the Navajo Nation shall have the duty of supervising the work of all justices and judges of the Navajo Nation and shall have the duty of administering the Judicial Branch. He shall advise the President of the Navajo Nation and the Judiciary Committee of the Navajo Nation Council as to whether probationary justices and judges shall be offered permanent appointments.

HISTORY

CD-94-85, December 4, 1985.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

§ 372. Acting Chief Justice

The Chief Justice of the Navajo Nation shall designate one Associate Justice of the Supreme Court to act as Chief Justice whenever the Chief Justice is absent from the territorial jurisdiction of the Navajo Nation, is on vacation, ill or otherwise unable to perform the duties of his office. The Chief Justice shall delegate to the acting Chief Justice some or all of the powers of, the office of Chief Justice. The Chief Justice may at any time change his designation of the Associate Justice empowered to act as Chief Justice.

HISTORY

CD-94-85, December 4, 1985.
CJA-5-59, January 9, 1959.

Subchapter 9. Clerks and Bailiffs

§ 401. Clerks and bailiffs—Appointment

A. Each judge of the District Courts of the Navajo Nation shall, with the approval of the Chief Justice, appoint clerks and bailiffs of the Court.

B. The Chief Justice shall appoint the clerk of the Supreme Court.

HISTORY

CD-94-85, December 4, 1985.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

§ 402. Duties and authority

The clerks of the court shall have such duties and authorities as provided herein, or by rules of court adopted and placed in effect pursuant to 7 NNC §601, or as may be hereafter provided by resolution of the Navajo Nation Council, or as may be hereafter delegated by the Justices and Judges of the Navajo Nation.

HISTORY

CD-94-85, Exhibit D, December 4, 1985.
CJA-5-59, January 9, 1959.
CO-69-58, October 16, 1958.

§ 403. Salary and grade

A. The beginning salary and increments for clerks and bailiffs of the court shall be in accordance with the prevailing rates established by the Navajo Nation, and the positions shall be graded in accordance with the established personnel policies and procedures.

B. Those presently serving as clerks and bailiffs shall be subject to the above provisions upon their appointment and approval by the Chief Justice.

HISTORY

CD-94-85, December 4, 1985.
CJN-40-59, June 10, 1959.

§ 404. Application of Judicial Branch personnel policies and procedures

All employment in positions, other than judicial appointments, within the Judicial Branch shall be in accordance with the established Judicial Branch personnel policies and procedures.

HISTORY

CD-94-85, December 4, 1985.

Title 1

General Provisions

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Chapter 1. Navajo Nation Bill of Rights

SECTION

1. Other rights not impaired; deletion or abridgment only by public referendum
2. Equality of rights not abridged by entitlements, benefits or privileges; nor by affirmative action necessary to support rights of the Navajo People to economic opportunity
3. Denial or abridgment of rights on basis of sex; equal protection and due process of Navajo Nation law
4. Freedom of religion, speech, press, and the right of assembly and petition
5. Searches and seizures
6. Right to keep and bear arms
7. Rights of accused; trial by jury; right to counsel
8. Double jeopardy; self-incrimination; deprivation of property
9. Cruel and unusual punishment; excessive bail and fines

CROSS REFERENCES

United States Code. Civil action for deprivation of rights, 42 U.S.C. §§1983, 1984.

Equal rights under the law, 42 U.S.C. §1981.

Federal civil rights law regarding public accommodations, facilities, education and programs, employment and voting, 42 U.S.C. §§2000a *et seq.*

Offenses, prosecutions and proceedings in vindication of rights, 42 U.S.C. §§1985–1991.

Organization of Indian tribes, constitution and bylaws, 25 U.S.C. §476.

ANNOTATIONS

Authority of Indian governments. While Congress retains paramount authority to legislate for and enforce its laws on all the tribes in certain respects, it has recognized the authority of Indian governments over their reservation and if this

power is to be taken away from them it is for Congress to do it. *Oliver v. Udall* (1962) 306 F.2d 819.

Indian tribes have a status higher than that of states and are subordinate and dependent nations possessed of all powers as such only to the extent that they have expressly been required to surrender them by the superior sovereign, the United States. *Native American Church v. Navajo Tribal Council* (1959) 272 F.2d 131.

§ 1. Other rights not impaired; deletion or abridgment only by public referendum

The enumeration herein of certain rights, shall not be construed to deny or disparage others retained by the people. No provision of this chapter, the Navajo Nation Bill of Rights, shall be abridged or deleted by amendment or otherwise, except by referendum vote of the Navajo electorate, in accordance with applicable provisions of the laws of the Navajo Nation.

HISTORY

CD-59-86, December 11, 1986.
CO-63-67, October 9, 1967.
Note. 1 NNC §1 was formerly codified at 1 NNC §8.

§ 2. Equality of rights not abridged by entitlements, benefits or privileges; nor by affirmative action necessary to support rights of the Navajo People to economic opportunity

Recognition, enactment, lawful implementation and enforcement of provisions for specific entitlements, benefits and privileges based upon membership in the Navajo Nation or in other recognized Tribes of Indians and affirmative action in support of Navajo or other Indian preference in employment and business contracting or otherwise necessary to protect and support the rights of Navajo People to economic opportunity within the jurisdiction of the Navajo Nation, shall not be abridged by any provision herein nor otherwise be denied.

HISTORY

CD-59-86, December 11, 1986.

§ 3. Denial or abridgment of rights on basis of sex; equal protection and due process of Navajo Nation law

Life, liberty, and the pursuit of happiness are recognized as fundamental individual rights of all human beings. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall any person within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of life, liberty or property, without due process of law. Nor shall such rights be deprived by any bill of attainder or ex post facto law.

HISTORY

CD-59-86, December 11, 1986.

CF-9-80, February 7, 1980.

Note. 1 NNC §3 was formerly codified at 1 NNC §9.

Preamble. CF-9-80 contained the following preamble:

"Whereas: 1. The tradition and culture of the Navajo Nation has always emphasized the importance of the woman in Navajo society; and

"2. Navajo culture and society is both matrilineal and matrilocal; and

"3. The Navajo Tribal Council by Resolution CO-63-67, of October 9, 1967, passed the Navajo Bill of Rights; and

"4. No provision was made in the Navajo Bill of Rights for equal protection of the laws for both men and women; and

"5. Such a declaration would be in keeping with the tradition of the Navajo People."

ANNOTATIONS

1. Interpretation. The proper interpretation of the Navajo Equal Rights guarantee is that there can be no legal result on account of a person's sex, no presumption in giving benefits or disabilities gauged by a person's sex and no legal policy which has the effect of favoring one sex or the other. *Help v. Silvers a.k.a. Silver Fox*, 4 Nav. R. 46 (Nav. Ct. App. 1983).

2. Presumptions. Under the Navajo Equal Rights Amendment, there can be no presumption, in a child custody dispute, that a young child should be in the care of the mother. *Help v. Silvers a.k.a. Silver Fox*, 4 Nav. R. 46 (Nav. Ct. App. 1983).

§ 4. Freedom of religion, speech, press, and the right of assembly and petition

The Navajo Nation Council shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people peaceably to assemble, and to petition the Navajo Nation government for a redress of grievances.

HISTORY

CD-59-86, December 11, 1986.

CO-63-67, October 9, 1967.

Note. 1 NNC §4 was formerly codified at 1 NNC §1.

§ 5. Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

HISTORY

CD-9-86, December 11, 1986.

CO-63-67, October 9, 1967.

Note. 1 NNC §5 was formerly codified at 1 NNC §4.

§ 6. Right to keep and bear arms

The right of the people to keep and bear arms for peaceful purposes, and in a manner which does not breach or threaten the peace or unlawfully damage or destroy or otherwise infringe upon the property rights of others, shall not be infringed.

HISTORY

CD-59-86, December 11, 1986.
CO-63-67, October 9, 1967.
Note. 1 NNC §6 was formerly codified at 1 NNC §2.

§ 7. Rights of accused; trial by jury; right to counsel

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, and shall be informed of the nature and cause of the accusation; shall be confronted with the witnesses against him or her; and shall have compulsory process for obtaining witnesses in their favor. No person accused of an offense punishable by imprisonment and no party to a civil action at law, as provided under 7 NNC §651 shall be denied the right, upon request, to a trial by jury of not less than six (6) persons; nor shall any person be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of their inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation.

HISTORY

CD-59-86, December 11, 1986.
CO-63-67, October 9, 1967.
Note. 1 NNC §7 was formerly codified at 1 NNC §6.

CROSS REFERENCES

United States Code. Right to speedy trial, 42 U.S.C. §1992.

ANNOTATIONS

Sufficiency of complaint. This section requires that prosecutors prepare criminal complaints which allege the basic parts of the statute creating the crime and sufficient facts fitting within the statute to enable the defendant and his defense attorney to prepare their case. *Navajo Nation v. Benson Lee*, 4 Nav. R. 185, (W.R. Dist. Ct. 1983).

§ 8. Double jeopardy; self-incrimination; deprivation of property

No person shall be subject for the same offense to be twice put in jeopardy of liberty, or property; nor be compelled in any criminal case to be a witness against themselves; nor shall private property be taken nor its lawful private use be impaired for public or governmental purposes or use, without just compensation.

HISTORY

CD-59-86, December 11, 1986.
CO-63-67, October 9, 1967.
Note. 1 NNC §8 was formerly codified at 1 NNC §5.

CROSS REFERENCES

United States Code. Double jeopardy, 42 U.S.C. §2000h-1.

ANNOTATIONS

Eminent domain. The Navajo Tribe has the power to take or authorize the taking of property without the consent of the owners of the property or of any interest therein, provided that the owners are given due process of law and just compensation. *Dennison v. Tucson Gas and Electric Co.*, 1 Nav R. 95, (Nav. Ct. App. 1974).

Under the customary division of governmental power into three separate branches, a division which exists in the Navajo Nation, the right to exercise the power of eminent domain may be authorized only by the legislature and there can be no taking of private property for public use against the will of the owner without direct authority from the legislature and then the taking must be only in the manner prescribed by the legislature. *Dennison v. Tucson Gas and Electric Co.*, 1 Nav. R. 95, (Nav. Ct. App. 1974).

Where Chairman of the Navajo Tribe, on behalf of the tribe, granted gas and electric company a right-of-way across land of plaintiffs, who had a grazing permit and had a home and other improvements on the land, to build and maintain a power line, and just compensation was not given plaintiffs, the taking of the land was illegal and not in accord with 16 N.T.C. §§551 *et seq.*, and defense of sovereign immunity from suit was not available to the tribe in plaintiffs suit for damages, an injunction against further trespass and cancellation of their allegedly fraudulently obtained consent to the taking. *Dennison v. Tucson Gas and Electric Co.*, 1 Nav. R. 95 (Nav. Ct. App. 1974).

§ 9. Cruel and unusual punishment; excessive bail and fines

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

HISTORY

CD-59-86, December 11, 1986.
CO-63-67, October 9, 1967.
Note. 1 NNC §9 was formerly codified at 1 NNC §7.

CJA-18-60

RESOLUTION OF THE
NAVAJO TRIBAL COUNCIL

To Provide for the Compensation of Navajo Indian Claimants of Improvements and Customary Use Rights in Areas Adversely Disposed of by the Navajo Tribe

WHEREAS:

1. The custom of the Navajo Tribe is that improvements of individual Navajo Indians on unwithdrawn Navajo tribal lands are considered as the personal property of such Indians and not of the Tribe, and that such Navajo Indians are entitled to payment of damages whenever such improvements are removed or destroyed as a result of adverse disposition by the Tribe of the land in which they are located.

2. Navajo Indians who hold customary use rights for grazing or other purposes of land which is adversely disposed of by the Navajo Tribe frequently suffer great economic damage thereby, separate and apart from any damage to their improvements, and it is just that provision be made for compensation of such persons.

NOW THEREFORE BE IT RESOLVED THAT:

1. Damages to improvements of individual Navajo Indians.

A. Whenever the Navajo Tribe disposes of land containing any improvement belonging to a Navajo Indian who will not donate the same, whether the disposition is made by surface lease, permit, consent to grant of right of way or consent to commencement of construction on a proposed right of way, or in any other manner that gives the grantee or proposed grantee exclusive use of the surface of the land containing such improvement, or authorizes the grantee or proposed grantee to use the surface of the land in such manner that said improvement or improvements must be removed, damaged, or destroyed, the Navajo Tribe will pay damages to the rightful claimant of such improvement or improvements.

B. As used herein "improvement" means houses, hogans, sunshades, stables, storage sheds and dugouts, and sweathouses; sheep and horse corrals, lamb pens, and fences lawfully maintained; irrigation ditches, dams, charcos, development work on springs, and other water supply developments; any and all structures used for lawful purposes and other things having economic value. Where any improvement of a Navajo Indian is readily removable and he has an opportunity to remove the same, damages payable on account of said improvement shall be limited to the reasonable cost of removal, if any, even though the claimant thereof may have failed to remove such improvement and it may have been destroyed or damaged in the authorized course of use of the land on which it is located.

C. No damages shall be paid to any person for any improvement, when such person at the time of building or acquiring said improvement knew or with reasonable diligence ought to have known that the area in which it was located was proposed to be disposed of by the Navajo Tribe adversely to such person's interest.

D. Damages to be paid to individual Navajo Indians under Section 1 of this resolution shall be fixed by negotiation and consent between the Chairman of the Navajo Tribal Council or his authorized representative and the individual involved. If no agreement satisfactory to the Chairman or his representative can be reached with a reasonable time, the Chairman of the Navajo Tribal Council shall appoint one appraiser, the individual shall appoint one appraiser, and the two appraisers so appointed shall appoint a third appraiser; but if they cannot agree upon the third appraiser within ten days, the Chairman may appoint him. The three appraisers shall examine the improvement alleged to be damaged and shall appraise and determine the damages. Their determination shall be submitted to the Resources Committee and when, if and as approved by said committee, the amount thereof shall be final. The Tribe shall pay the fees of said appraisers, except where they are regular Tribal employees, in which case they shall not be entitled to any fees. In addition the Tribe shall pay the reasonable and necessary expenses of said appraisers, whether or not such appraisers are Tribal employees.

2. Economic damage to intangible interests of Navajo Indians.

A. Whenever as a result of the granting of any lease or permit embracing Navajo Tribal land, or of granting

permission by the Navajo Tribe for the use of Tribal land, or as a result of the use of Navajo Tribal land under such lease, permit or permission, the value of any part of such land for its customary use by any Navajo Indian formerly lawfully using the same is destroyed or diminished, the Navajo Tribe will compensate the former Indian user in the manner hereinafter specified.

B. When the livelihood of the former Navajo Indian user is gravely affected by the new use, such user shall have first priority in resettling on other lands acquired by the Navajo Tribe, except the area acquired pursuant to the Act of September 2, 1958 (92 Stat. 1686); and the Tribe shall pay the expense of removing said person, his family, and property, to any new land made available for his use; and such shall constitute full compensation to such Navajo.

C. In all other cases involving damages under this paragraph, the amount thereof shall be fixed and determined in the manner specified in Paragraph 1-D hereof.

D. Where by reseeding, irrigation, or otherwise, the remaining land in the customary use area of any individual damaged by adverse disposition of Tribal land is within a reasonable time made able to provide the same economic return as his former entire customary use area, no damages shall be payable to such person, except for the period, if any, between adverse disposition of the land in the customary use area and the time when the productivity of the remaining land achieves equality with the entire former customary use area.

E. Only lawful and authorized use shall be compensated under this section of this resolution. Thus, no person shall be compensated for loss of use of land for grazing animals in excess of his permitted number, or without a permit.

F. Every person otherwise entitled to damages under subsection C of this section shall not be entitled to receive any payment thereof until he has surrendered for cancellation his grazing permit as to all animal units in excess of the carrying capacity of the land remaining in his customary use area. Persons so surrendering their grazing permits shall be entitled to an immediate lump sum payment of $10 for each sheep unit cancelled.

3. No adverse disposition of Tribal land to be made until individual damages are estimated.

A. Neither lessee, permittee, or the grantee of a right of way or other interest in or right to use Tribal lands shall commence any construction thereon, nor make any change in the grade or contour thereof or remove any surface vegetation thereon until the damages to the improvements thereon or the customary use rights of all the individuals affected thereby have been estimated by the Department of Land Investigations of the Navajo Tribe. Unless the Tribal Council has previously authorized the payment of such damages from non-reimbursable funds of the Navajo Tribe, the Chairman shall require the applicant for such lease, permit or grant of a right of way or other interest in or right to use Tribal lands to deposit with the Treasurer of the Navajo Tribe an amount equal to at least double the estimate of damage made by the Department of Land Investigations. After the lease, permit or grant of right of way or user has become final and the damages have been determined, either by appraisal, estimate or by consent as herein before provided, the Chairman shall cause the Treasurer to pay, from and out of this deposit, to the person or persons damaged thereby such sum as he or they may be entitled to under the terms of this resolution, and to return to the applicant the excess thereof, except that where the individual damaged has not consented to the determination of the amount thereof, it shall be withheld in order to satisfy the excess amount, if any, determined under sub-paragraph C of Section 2 of this resolution. Such disbursements shall be made without further appropriation of the Navajo Tribal Council. All sums held by the Treasurer of the Navajo Tribe, pursuant to the terms of this resolution, for a period of more than thirty (30) days shall be deposited in Federal Savings and Loan Association or invested in bonds of the United States until needed for disbursement.

4. Retroactive application.

A. This resolution shall apply to all losses suffered by individual Navajo Indians as a result of adverse disposition of land or use thereof pursuant to adverse disposition, by authority of the Navajo Tribe, since January 1, 1955. The Chairman shall give priority to settlement of all claims of individuals which accrued between January 1, 1955, and the date of adoption of this resolution by the Navajo Tribal Council.

B. There is authorized to be appropriated a sufficient sum of Tribal funds not otherwise appropriated to pay all claims for individual damages under this resolution which accrued between January 1, 1955, and the date of adoption of this resolution, and the Executive Secretary and the Tribal Comptroller are hereby directed to estimate the same and present an appropriate budget amendment to the Navajo Tribal Council at its next session.

5. Repeal. All resolutions and parts of resolutions in conflict with this resolution are hereby repealed.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Navajo Tribal Council at a duly called meeting at Window Rock, Arizona, at which a quorum was present and that same was passed by a vote of 63 in favor and 0 opposed, this 22nd day of January, 1960.

Vice-Chairman
Navajo Tribal Council

Chapter 13. Compensation for Improvements and Customary Use Rights Upon Adverse Disposition of Land

SECTION

1401. Damages to improvements of individual Navajo Indians
1402. Economic damage to intangible interests of Navajo Indians
1403. Adverse disposition of Navajo Nation land not to be made until individual damages are estimated

ANNOTATIONS

1. The Navajo Tribe has the power to take or authorize the taking of property without the consent of the owners of the property or of any interest therein, provided that the owners are given due process of law and just compensation. *Dennison v. Tucson Gas and Electric Co.*, Navajo Nation Court of Appeals, (decided December 23, 1974).

2. Under the customary division of governmental power into three separate branches, a division which exists in the Navajo Nation, the right to exercise the power of eminent domain may be authorized only by the legislature and there can be no taking of private property for public use against the will of the owner without direct authority from the legislature and then the taking must be only in the manner prescribed by the legislature. *Dennison v. Tucson Gas and Electric Co.*, Navajo Nation Court of Appeals (Decided December 23, 1974).

3. Where the Chairman of the Navajo Tribe, on behalf of the Tribe, granted gas and electric company a right-of-way across land of plaintiffs, who had a grazing permit and had a home and other improvements on the land, to build and maintain a power line, and just compensation was not given plaintiffs, the taking of the land was illegal and not in accord with this chapter, and the defense of sovereign immunity from suit was not available to the Tribe in plaintiffs' suit for damages. An injunction was obtained against further trespass and cancellation of the allegedly fraudulently obtained consent to the taking. *Dennison v. Tucson Gas and Electric Co.*, Navajo Nation Court of Appeals, (decided December 23, 1974).

§ 1401. Damages to improvements of individual Navajo Indians

A. Whenever the Navajo Nation disposes of land containing any improvement belonging to a Navajo Indian who will not donate the same, whether the disposition is made by surface lease, permit, consent to grant of right-of-way or consent to commencement of construction on a proposed right of way, or in any other manner that gives the grantee or proposed grantee exclusive use of the surface of the land containing such improvement, or authorizes the grantee or proposed grantee to use the surface of the land in such manner that said improvement or improvements must be removed, damaged, or destroyed, the Navajo Nation will pay damages to the rightful claimant of such improvement or improvements.

B. As used in this chapter "improvement" means house, hogans, sunshades, stables, storage sheds and dugouts, and sweathouses; sheep and horse corrals, lamb pens, and fences lawfully maintained; irrigation ditches, dams, charcos, development work on springs, and other water supply developments; any and all structures used for lawful purposes and other things having economic value. Where any improvement of a Navajo Indian is readily removable and such person has an opportunity to remove the same, damages payable on account of said improvement shall be limited to the reasonable cost of removal, if any, even though the claimant thereof may have failed to remove such improvement and it may have been destroyed or damaged in the authorized course of use of the land on which it is located.

C. No damages shall be paid to any person for any improvement, when such person at the time of building or acquiring said improvement knew or with reasonable diligence ought to have known that the area in which it was located was proposed to be disposed of by the Navajo Nation adversely to such person's interest.

D. Damages to be paid to individual Navajo Indians under this section shall be fixed by negotiation and consent between the President of the Navajo Nation or his or her authorized representative and the individual involved. If no agreement satisfactory to the President or his or her representative can be reached within a reasonable time, the President of Navajo Nation shall appoint one appraiser, the individual shall appoint one appraiser, and the two appraisers so appointed shall appoint a third appraiser; but if they cannot agree upon the third appraiser within 10 days, the President may appoint him or her. The three appraisers shall examine the improvement alleged to be damaged and shall appraise and determine the damages. Their determination shall be submitted to the Resources Committee and when, if, and as approved by said Committee the amount thereof shall be final. The Navajo Nation shall pay the fees of said appraisers, except where they are regular Navajo Nation employees, in which case they shall not be entitled to any fees. In addition the Navajo Nation shall pay the reasonable and necessary expenses of said appraisers, whether or not such appraisers are Navajo Nation employees.

HISTORY

CN-101-72, November 30, 1972.
CJA-18-60, January 22, 1960.

CROSS REFERENCES

Damages for improvements to specific highways, 14 NNC §§1023.

§ 1402. Economic damage to intangible interests of Navajo Indians

A. Whenever as a result of the granting of any lease or permit embracing Navajo Nation land, or of granting permission by the Navajo Nation for the use of Navajo Nation land, or as a result of the use of Navajo Nation land under such lease, permit or permission, the value of any part of such land for its customary use by any Navajo Indian formerly lawfully using the same is destroyed or diminished, the Navajo Nation will compensate the former Navajo Indian user in the manner hereinafter specified.

B. When the livelihood of the former Navajo Indian user is gravely affected by the new use, such user shall have first priority in resettling on other lands acquired by the Navajo Nation, except the area acquired pursuant to the Act of September 2, 1958 (72 Stat. 1686); and the Navajo Nation shall pay the expense of removing said person, his or her family, and property to any new land made available for his or her use, and such shall constitute full compensation to such Navajo.

C. In all other cases involving damages under this paragraph, the amount thereof shall be fixed and determined in the manner specified in 16 NNC §1401(D).

D. Where by reseeding, irrigation, or otherwise, the remaining land in the customary use area of any individual damaged by adverse disposition of Navajo Nation land is within a reasonable time made able to provide the same economic return as his or her former entire customary use area, no damages shall be payable to such person, except for the period, if any, between adverse disposition of the land in the customary use area and the time when the productivity of the remaining land achieves equality with the entire former customary use area.

E. Only lawful and authorized use shall be compensated under this section. Thus, no person shall be compensated for loss of use of land for grazing animals in excess of his or her permitted number, or without a permit.

F. Every person otherwise entitled to damages under subsection (C) of this section shall not be entitled to receive any payment thereof until that person has surrendered for cancellation that person's grazing permit as to all animal units in excess of the carrying capacity of the land remaining in that person's customary use area. Persons so surrendering their grazing permits shall be entitled to an immediate lump sum payment of $10 for each sheep unit cancelled.

HISTORY

CJA-18-60, January 22, 1960.

§ 1403. Adverse disposition of Navajo Nation land not to be made until individual damages are estimated

Neither lessee, permittee, or the grantee of a right-of-way or other interest in or right to use Navajo Nation lands shall commence any construction thereon, nor make any change in the grade or contour thereof or remove any surface vegetation thereon until the damages to the improvements thereon or the customary use rights of all the individuals affected thereby have been estimated by the Office of Navajo Land Administration of the Navajo Nation. Unless the Navajo Nation Council has previously authorized the payment of such damages from nonreimbursable funds of the Navajo Nation, the President shall require the applicant for such lease, permit or grant of a right of way or other interest in or right to use Navajo Nation lands to deposit with the Controller of the Navajo Nation an amount equal to at least double the estimate of damage made by the Office of Navajo Land Administration. After the lease, permit, or grant of right of way or user has become final and the damages have been determined, either by appraisal, estimate or by consent as hereinbefore provided, the President shall cause the Controller to pay, from and out of this deposit, to the person or persons damaged thereby such sum as he, she or they may be entitled to under the terms of this resolution, and to return to the applicant the excess thereof, except that where the individual damaged has not consented to the determination of the amount thereof, it shall be withheld in order to satisfy the excess amount, if any, determined under 16 NNC §1402(C). Such disbursements shall be made without further appropriation of the Navajo Nation Council. All sums held by the Controller of the Navajo Nation, pursuant to the terms of this chapter, for a period of more than 30 days shall be deposited in a Federal Savings and Loan Association or invested in bonds of the United States until needed for disbursement.

HISTORY

CJA-18-60, January 22, 1960.

Cite as 1 Nav. R. 95

HALDERMAN DENNISON, MARIE DENNISON

and MARY DENNISON

Plaintiffs-Appellees

vs.

TUCSON GAS AND ELECTRIC COMPANY

JELCO, INCORPORATED

PETER MACDONALD, Chairman of the Navajo Tribal Council

THE NAVAJO TRIBE OF INDIANS

GRAHAM HOLMES, BEN LYNCH

NED PLUMMER and CHARLES PITTMAN

Defendants-Appellants

Decided on December 23, 1974

Fred Johnson, D.N.A., Window Rock, Arizona, for Plainitiffs-Appellees

Perry Allen, Chief Prosecutor, Office of the Prosecutor, Window Rock, Arizona, for Defendants-Appellants

Before KIRK, Chief Justice, BENNALLEY and YELLOWHAIR, Associate Justices

KIRK, Chief Justice

On April 8, 1974, this Court granted the request of Peter MacDonald and the Navajo Tribe of Indians, for a review of the

Trial Court's decision adverse to their interest in the above entitled matter dated March 1, 1974, the same being docket number WR-RO-11-74, in and for the Judicial District of Window Rock, Navajo Nation (Arizona).

The parties will be referred to as plaintiffs and defendants as they appeared in the Trial Court.

Oral arguments were presented on behalf of the parties in this Court on May 9, 1974.

The Court has determined the facts as follows:

1. The plaintiffs, Dennison family, are Navajo Indians residing on the Navajo Reservation near Tohatchi, Navajo Nation (New Mexico), within the exterior boundaries of Navajo Grazing District 14.

2. The plaintiffs have a permit to graze an undisclosed number of sheep in an undefined area of District 14, known as their "traditional use area."

3. The plaintiffs have a home and other improvements, including sheep corrals, as well as what is called an "intangible interest" (livelihood) in the above said area.

4. Sometime in 1973, the defendant, Peter MacDonald, on behalf of defendant, the Navajo Tribe of Indians, granted a right-of-way to defendant, Tucson Gas and Electric Company, for the purpose of constructing and maintaining a power line for the transmission of electrical energy above, over and across Navajo Tribal Land, including some portion of the plaintiffs' "traditional use area."

5. The defendant, Jelco, Incorporated, is a Utah corporation engaged in the construction business and employed by defendant Tucson Gas and Electric Company to construct the above said power line.

6. Defendants Pittman, Lynch, and Plummer appear to be Navajo Indians employed by the Navajo Tribe of Indian Affairs in some capacity, and are alleged to be agents of the defendant Tucson Gas and Electric Company, and in fact, had some part in securing and obtaining plaintiffs' written consent to the passage of the power line over and

across their "traditional use area."

7. The defendant Graham Holmes, is a non-Indian employed by the Navajo Tribe in the Office of the Navajo Land Administration in a supervisory or consulting capacity at Window Rock, and is alleged to have had an active part, and did have some part in securing obtaining the plaintiffs' written consent to the construction of the power line over and across their "traditional use area."

8. The plaintiffs in fact signed some type of consent for the construction of and the passage of the power line over and across their "traditional use area" and they accepted a check in the amount Five Thousand Dollars ($5,000.00) from defendant Tucson Gas and Electric Company for reasons that appear unclear even to the parties.

9. When the defendant Tucson Gas and Electric Company made application to the Navajo Tribe for the right-of-way across Tribal lands, the defendant Peter MacDonald, acting on behalf of the defendant Navajo Tribe of Indians, did not require the applicant of the right-of-way to deposit with the Treasurer of the Navajo Tribe an amount of money equal to at least double the estimated damages made by the Department of Land Investigation in accordance with Navajo Law, as set forth by the Navajo Tribal Council in 16 N.T.C. § 553, for the protection of individual Navajo Indians, who may be dispossessed or partially dispossessed by the granting of just such a right-of-way.

10. When defendant Jelco, Incorporated started construction of the power line over and across plaintiffs' "traditional use area", changing the contour of the surface and removing surface vegetation, etc., the plaintiffs brought a proceeding in the Trial Court to cancel their consents for the construction and the passage of the power line over and across their "traditional use area" alleging that their consent was obtained by fraud, deceit and duress; and for an injunction against all of the defendants from further trespass to their property; and for damages for the actual trespass to their use land; and for punative damages for the insolent manner in which the trespass was accomplished. Plaintiffs offered to return the uncashed check for Five Thousand Dollars ($5,000.00) to the defendant Tucson Gas and Electric Company.

11. The Trial Court dismissed the action for damages against the following defendants for lack of jurisdiction:

(1). Tucson Gas and Electric Company
(2). Jelco, Incorporated
(3). Holmes, Lynch, Plummer and Pittman

The Trial Court denied the plaintiffs' request for an injunction against Peter MacDonald, the Navajo Tribe of Indians, and the other defendants. The Trial Court further directed that a date be set for the remaining issues, i.e. damages, and whether the plaintiffs were denied the opportunity to exhaust their administrative remedies.

12. The defendants Peter MacDonald and the Navajo Tribe of

Indians, maintain through their counsel, the Navajo Prosecutor, Mr. Perry Allen, that the Navajo Tribal Government is immune from suit by one of its members, in any event, under the legal concept of sovereign immunity, and that Peter MacDonald, Chairman of the Tribal Council in negotiating the right-of-way grant to the Tucson Gas and Electric Company was acting within the scope of the authority vested in him by the Navajo Tribal Council and that therefore he too is immune from suit.

The Court has further determined that this case involves the nature, source, and the lawful exercise of the governmental power of Eminent Domain, a subject with which the parties hereto and their lawyers of record seem to be totally unfamiliar and for that reason we feel impelled to make the following comments and observations:

Eminent Domain is the power of any sovereign to take or to authorize the taking of any property within its jurisdiction for public use without the consent of the owner. It is an inherent power and authority which is essential to the existence of all governments.

Therefore, as in this case, the sovereign (the Navajo Tribal Government), has the power and the authority to take or to authorize the taking of the Dennison property, all or part of it, without their consent. Plaintiffs' consent to the granting of the right-of-way is totally unnecessary.

But, before the government can exercise this power of taking private property without the owners consent, it must provide just compensation for the property taken and provide the owner thereof with due process of law.

These two prohibitions or restrictions on the exercise of the inherent governmental power of Eminent Domain are derived from:

A. The Constitution of the United States - 5th Amendment.

(1) Private property shall not be taken for public use without just compensation.

(2) No person shall be deprived of life, liberty, or property without due process of law.

B. Constitutional Rights of Indians, N.T.C. App., P. 317, Section 1302, (5) (8), known as the Indian Civil Rights Act of 1968.

(1) No Indian Tribe in exercising the powers of self-government shall:

(a) ...(5) take any private property for public use without just compensation.

(b) ...(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of life, liberty or property without due process of law.

C. Navajo Bill of Rights, 9 N.T.C. §§ 1, 5 and 8.

(1) Note, that the Navajo Tribal Council, prior to the passage by Congress of the Indian Civil Rights Act of 1968, guaranteed to the Navajo people that it would make no law for the taking of private properly for public use without just compensation.

(2) Also, the Navajo Tribal Council has guaranteed that it will make no law which denys to any person within its jurisdiction the equal protection of its laws or deprive any person within its jurisdiction of life, liberty, or property without due process of law.

Furthermore, under the customary division of governmental powers into three (3) branches, executive, legislative, and judicial, the right to authorize the exercise of the power of Eminent Domain is wholly legislative (Navajo Tribal Council) and there can be no taking of private property for public use against the will of the owner with out direct authority from the legislative body (Navajo Tribal Council) and then the taking must be only in the manner as prescribed by the legislative body (Navajo Tribal Council).

In 1960, the Navajo Tribal Council vested the exercise of the Eminent Domain power of the Navajo Nation in the Executive Branch of the Navajo Government, and provided by law the exact manner and the procedure to be followed in its execution or use. Tribal Council Resolution CJA-18-60.

Upon reading the above said tribal resolution, as codified in 16 N.T.C., we find that:

Whenever an application is filed with the Navajo Tribe for a right-of-way across tribal lands which may effect the possessary rights of individual Navajos, the Chairman shall:

A. Require the Department of Land Investigation of the Navajo Nation to:

(1) Estimate probable damages to the improvements of individual Navajo's property upon the land.

(2) Estimate the value of probable economic loss to individual Navajos whose customary use right for grazing and other purposes may be effected by the granting of the right-of-way.

B. Next, when the estimated probable damages to individual Navajos property upon the land and the probable economic loss to individual Navajos because of the lessening of their use right, if any, is figured and totaled by the experts from the Navajo Department of Land Investigation, the Chairman of the Navajo Tribal Council shall:

(1) Require the applicant of the right-of-way, in this case, Tucson Gas and Electric Company, to deposit with the Navajo Tribal Treasurer, a sum of money equal to at least double the estimated damages as made by the Department of Land Investigation. This is the Tribal Council's guarantee to the Navajo people that their property will not be taken for public use by their government without just compensation and that the taking will be in accordance with the law as prescribed by the Navajo Tribal Council (due process of law) and not in accordance with the whimsical capricious however well intended, policies of governmental servants.

(2) After the first step has been taken, that is the estimate made and recorded and the deposit of at least twice the amount of the estimate has been made to the Navajo Tribal Treasurer for the protection of the rights of the individual Navajos effected, then and only then may the right-of-way agreement be finalized and COMMENCED ON BEHALF OF THE GRANTEE (Tucson Gas and Electric Company). This is Navajo due process of law, for the next step is:

C. To make the individual Navajos affected by the right-of-way, an offer of the amount of damages as previously determined. It cannot be just any amount but the previously determined amount made by the Department of Land Investigation by using the formula as set forth by the Navajo Tribal Council.

(1) Where the individual Navajo accepts the offer of the damages as determined by and in accordance with the law, the Chairman shall cause the Treasurer to pay the Navajo that amount out of the deposit to which he is entitled and return the excess of the deposit to the grantee of the right-of-way.

(2) Where the individual Navajo refuses to accept the amount of money damages as determined

by the Department of Land Investigation within a reasonable time, the Chairman shall set in motion a "condemnation proceeding" where in where the Resources Committee of the Navajo Tribal Council makes the final judgment, for,
(3) The Chairman shall:

(a) Appoint one (1) appraiser.
(b) Individual Navajo shall appoint one (1) appraiser.
(c) The two (2) appraisers shall appoint a third appraiser.
(d) If the two (2) appraisers cannot agree upon the third appraiser within ten (10) days, the Chairman may appoint the third appraiser.

(4) The three (3) appraisers shall:

(a) Examine the improvements alleged to be damaged.
(b) Appraise and determine the damages.

(5) The determination of the appraisers shall be submitted to the Resources Committee and when, if, and as approved by said committee, the amount thereof shall be final. Anything less cannot be considered due process of law.

Such disbursement shall be made from the deposit without further appropriation of the Navajo Tribal Council. Furthermore, all sums of money deposited with the Treasurer by the applicant of the right-of-way for the above said purpose, if not disbursed in thirty (30) days, shall be deposited in a Federal Savings and Loan Assocation or invested in bonds of the United States until needed for disbursement in accordance with the above procedure.

Further, no payment to an individual which includes a determination for loss of economic livelihood shall be made, until he has surrendered for cancellation his grazing permit, but only to the

animal units in excess of the carrying capacity of the land remaining in his customary use area. Payment of Ten Dollars ($10.00) for each cancelled unit shall be made.

It should be noted that Chapter 11 of Title 16, Navajo Tribal Code entitled, "Compensation for Improvements and Customary Use Rights upon Adverse Disposition of Land", by the Navajo Tribe, does not impose a duty upon the individual Navajo effected, to initiate an administrative proceeding when dissatisfied with the amount of damages offered. No, the duty imposed by the Navajo Tribal Council in enacting the above resolution, is imposed upon the Executive Branch of the government to initiate or start condemnation proceedings, not before the Courts, but before the Resources Committee of the Navajo Tribal Council, whenever a Navajo citizen adversely affected by the granting of the right-of-way across tribal lands, refuses to negotiate or accept the amount of money offered to him by the tribe, as just compensation. In other words, the Navajo Tribal Council has vested the judicial authority of determining what is or what is not just compensation under the above law, in the Resources Committee of the Navajo Tribal Council, rather than in the Courts of the Navajo Nation.

Now we come to the remedies of the individual Navajo who may be adversely effected by the granting of a right-of-way across tribal lands.

It is settled law that when land is taken or damaged by

authority of law and in compliance with the provision of the law, and the law provides a means of recovering damages which may be instituted by the person in possession of the land, the statutory remedy provided is exclusive and no other remedy will be permitted.

But, when the statutory remedy provided in the law cannot be initiated by the owner of the land, and the condemnor (Tribe) alone can put the remedy in to operation and fails to do so, then the statutory remedy that is provided by the law is not exclusive and the owner who is alleged to have been damaged may resort to his other remedies. These remedies include injuction relief as well as relief for damages.

When we test the facts of this case with the above law we find that if the plaintiffs were damaged it resulted from the exercise of eminent domain power of the Navajo Nation and that the eminent domain power of the Navajo Nation as exercised by the Executive Branch of the Navajo Government in this particular case was illegal and not in compliance which is designated the "Governing Body" of the Navajo Nation.

It is one of the glories of our society that no man or no division of government is above the law. The Navajo Tribal Council has declared that the Navajo people have a right to be secure in their possessions and that they shall not be taken from them by their government except by due process of law and the payment of just compensation. This philosophy of the law is in keeping with the Declaration of Independence, the great charter of all free men. That

the only reason governments are established among men is to make secure the basic rights of the people. We intend to up hold this concept and to permit the law to become the great teacher rather than the elected or appointed governmental officials.

It goes without saying that if the officials and employees of the Executive Branch of the Navajo Government, had exercised the power and authority vested in their branch, in the manner prescribed by law, the plaintiffs in this case would have no standing in this Court because of the remedy of the statute would have provided due process of law and just compensation. But, since they did not do so, we must hold for the plaintiff.

The Court has always upheld and presently does uphold the sovereign immunity doctrine of the Navajo Nation, but for anyone to seriously impose that defense under the facts of this case causes concern among the Court, regarding the competency of the legal advisors to the prosecutor and the competency of the legal advisors to the office of the Navajo Land Administration. All that the plaintiffs would be entitled to from the Navajo Nation under the statute, in any event, would be, just compensation. How could they be deprived of this simply because some officials and employees in the Executive Branch, to put it mildly, neglected to follow the law? We consider the Navajo Nation the only real defendant and consider the written consent of the plaintiffs to be of no force or effect and we pass no judgment on the conduct of the other defendants at this time.

Unless the Prosecutor files a confession of judgment on behalf of the Navajo Nation in this court within ten (10) days from the date of this order, in an amount concurred in by the plaintffs, the Trial Court is directed to set the case for immediate trial on the sole issue of damages, if any, suffered by the plaintiffs. The Trial Court shall use care and determine the damages if any, in accordance with the formula as set forth by the Navajo Tribal Council in 16 N.T.C., Chapter 11. The judgment, if any, shall be directed and entered against Peter MacDonald, Chairman, and the Navajo Nation.

BENNALLEY, Associate Justice, and YELLOWHAIR, Associate Justice, concur.

Cite as 2 Nav.R. 1

GLENN GEORGE, Administrator of the Estate of RANDY GENE GEORGE, Deceased, For the Estate; GLENN GEORGE and MARY GEORGE

Plaintiffs-Appellants

vs.

THE NAVAJO INDIAN TRIBE; THE NAVAJO POLICE DEPARTMENT; ALFRED YAZZIE; HERBERT BEGAY; CALVIN YAZZIE; and THE NAVAJO TRIBAL MAINTENANCE OFFICE

Defendants-Appellees

Decided on January 04, 1979

Martha Blue, Ward, Hufford & Blue, Flagstaff, Arizona, for Plaintiffs-Appellants

Byron Caton, Tansey, Rosebrough, Roberts & Gerding, Farmington, New Mexico, for Defendants-Appellees

Before NESWOOD, Acting Chief Justice, JOHN and WALTERS, Associate Justices

JOHN, Associate Justice

I.

This case is on appeal from a judgment of the Window Rock District Court, finding for the defendants in the above entitled wrongful death action.

On or about July 5, 1974, the deceased was arrested in Window Rock, Arizona on a charge of public drunkeness and incarcerated in the jail facilities located at Window Rock, Navajo Nation (Arizona). On the morning of July 6, 1974 the deceased was discovered

hanging from the wires of the light fixture and was pronounced dead.

A complaint was filed on November 12, 1975 asking for $2,000,000 in damages. The defendants filed a Motion to Quash the jury panel in early 1977 on the grounds that all non-Indians were excluded and that it was a violation of the 1968 Indian Civil Rights Act (25 U.S.C. 1302) to do so. While District Court Judge Merwin Lynch originally ruled against them, he later, on his own motion, did include non-Indians on the jury.

During the course of the trial, the judge excluded two expert witnesses offered by the plaintiffs. Stanley Maskell was to have testified to the conditions and standard of care applicable to Arizona rural jail facilities, but was excluded on the grounds that he was not an expert on Navajo jail facilities. Albert Goldtooth was to have testified to the standard of care for handling juveniles and for inspecting and maintaining jail conditions, but was not allowed to testify as an expert because he only had an 11th grade education.

The District Court also denied admission into evidence of a memorandum prepared by Kimeric Hayner, then legal Advisor to the Navajo Police Department, on procedures for handling juveniles offenders.

During his closing argument, defendants' counsel briefly referred to the testimony of Stanley Maskell. This was quickly objected to by the opposing side as improper argument, as it referred to a

matter not in evidence. Defendants' counsel thereafter refrained from any such references.

The jury instructions given included one on agency law. While there is some confusion on the questions of whether the plaintiffs either properly submitted their own instruction or objected to the instruction given, it seems that the instruction they claimed they submitted differed from the one actually read to the jury.

The jury returned a verdict for the defendants and judgment was entered accordingly. Plaintiffs appealed.

II.

The issues before the Court are:

1. Whether the composition of the jury panel was contrary to the Navajo Tribal Code.

2. Whether the failure to allow the plaintiffs' two expert witnesses offered in the standard of care for juveniles and the standard of care for maintenance and other matters is reversible error.

3. Whether the ruling denying admission into evidence of the memorandum by Mr. Hayner regarding the established juvenile practices is reversible error.

4. Whether the closing argument of defendants' counsel was improper and prejudicial to the plaintiffs and is rever-

sible error.

5. Whether the District Court's refusal to give the requested instruction was reversible error.

III.

Title 7, Section 654 of the Navajo Tribal Code (1977 Compilation) states the eligibility of jurors as follows:

> "Any Navajo Indian over the age of 21 years of at least ordinary intelligence and not under judicial restraint shall be eligible to be a juror."
>
> (emphasis added)

7 NTC 654 was enacted in 1959 by Trial Council Resolution CJA-5-59. In 1968 the United States Congress passed the Indian Civil Rights Act codified as 25 U.S.C. 1302, which states in part:

> "No Indian Tribe in exercising powers of self-government shall ...
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

The case of Dodge v. Nakai, 298 F.Supp. 17 (DC., Ariz., 1969) made it clear that the law extends to any person, Indian or non-Indian.

In the cases of Alexander v. Louisana, 405 U.S. 625, 31 L.Ed.2d 536, 92 S.Ct. 1221 and Carter v. Greene County, 396 U.S. 320, 24 L.Ed.2d 549, 90 S.Ct. 518, among others, the United States Supreme Court recognized that to deny representation on a jury on the basis of race violated the provision of the 14th Amendment to the United States Constitution.

> "The exclusion of Negroes from jury service because of their race is 'practically a brand upon them...' That kind of discrimination contravenes the very idea of a jury "a body truly representative of the community'..."
>
> 24 L.Ed.2d at 558

> "The commissioners, in any event, had a duty 'not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds.' "
> (citations omitted)
>
> 31 L.Ed.2d at 543

While the Court recognizes the fact that the 14th Amendment does not apply to Indian Tribes, the restrictions of the 1968 Indian Civil Rights Act are esentially derived from the United States Constitution. See Hennessy v. Dimmler, 394 NYS2d 786 (1977, Co. Ct.); State v. Railey, 87 N.M. 275, 532 P.2d 204 (1975, N.M. App.)

This Court feels that the systematic exclusion of non-Indians from jury panels would violate 25 U.S.C. 1302 (8) in the

same manner as the case above. Because it is recognized that the language of this section is derived from similar provisions of the United States Constitution, we believe the intent of Congress was to prohibit denials of equal protection in this manner.

Therefore, we cannot sanction the provision of 7 N.T.C. 654 limiting jurors to Navajo Indians. 7 N.T.C. 654 is declared null and void insofar as it restricts jury service to only Navajos.

IV.

The qualifying of expert witnesses is one area of trial procedure which is left to the sound discretion of the trial judge. See Rules 23 and 24 of the Navajo Rules of Evidence.

There is no substitute for first hand observation and examination of the qualifications of such experts. The Court of Appeals must exercise considerable restraint in this area and must resist the temptation to jump in and substitute its own opinion for the opinion of the trial judge and reverse his judgment on this basis.

Given the justificable reluctance on our part to outguess the District Court on matters of this nature, we must, however, exercise our power of review and determine whether there is some reasonable basis behind the judge's exclusion of the two witnesses offered as experts in this case. We find no such reasonable basis.

Mr. Maskell was excluded because he was not an expert on Navajo jail facilities. This Court believes that there are really few experts, if any, in this narrow field and none were readily available to the plaintiffs. The fact is that Mr. Maskell was an expert in Arizona rural jail facilities, and area that overlaps and parallels to a great extent the area of our own jail system. His testimony would have certainly been of some value and assistance to the jury in its determination of the standard of care that should be applicable to the Window Rock facility. We therefore believe it was an error to exclude his testimony.

Mr. Goldtooth was excluded as an expert witness apparently because he had only an 11th grade education. What type of formal education a person possesses certainly is relevant in any determination of his knowledge and skills. However, it is not the sole determinative factor. Self-education and experience can be just as important. Again, Mr. Goldtooth's testimony as an expert might have been of assistance to the jury, and it was error to exclude it.

Having found error in the exclusion of the above two expert witnesses, we must now decide whether this was reversible error. We find that it was not.

Extensive evidence was introduced as to the jail conditions and procedures at Window Rock, both in general and for the night when the deceased was incarcerated. All this was evidence the jury could use in determining the standard of care. While the testimony of

the two experts might have added to this fund of knowledge, we cannot, upon review of the subject matter of the testimony, conclude that a new trial would clearly result in a different verdict from that already reached. See Wedness v. Central States Fire Insurance Co., 259, 47 NW2d 879.

V.

We find that the exclusion of the memo by Mr. Hayner was not reversible error.

Mr. Hayner was at one time the legal advisor to the Navajo Police Department. He had no authority to dictate to the police what procedures to follow in handling juveniles. All he could do was to advise them of the law in the area. As police officers, they are already charged, under our system of justice, with such a knowledge.

Besides, on review of the evidence, it is not clear if this memo was posted at the time of the deceased's arrest or if it was otherwise known, or should have been known, by the defendant police officers.

VI.

Counsel, when making their closing arguments to the jury,

are expected to marshall the facts presented and use their utmost powers of persuasion to convince the jurors as to the soundness of their client's case. Anything less would be a violation of their ethical duty imposed by Cannon 7 of the Code of Professional Responsiblity ("A Lawyer should represent a Client Zealously within the Bounds of the Law").

What a lawyer is not permitted to do is make an inflamatory or prejudicial argument and thus improperly influence the jury. Upon review of defendants' counsel's closing remarks in this case, however, we cannot find any statements that even remotely approach this level of misconduct. One single reference to the testimony of an excluded witness, which was immediately objected to, is not enough to cause us to overturn the jury's verdict.

We therefore conclude that the closing argument of defendant's counsel was not reversible error.

VII.

The two jury instructions on agency to be examined here the one given and the one the plaintiffs claim should have been given are almost identical in wording but they contain a substantial and critical difference.

The instruction requested by the plaintiffs reads as follows:

"A person has notice of a fact if he or his agent

> knows the fact, has reason to know it, should know it, or has been given a notification of it.
>
> Knowledge acquired by an agent during the agency and within its scope is imputed to the principal even though the knowledge so acquired by the agent is not actually conveyed to the principal."

The legal result can easily be reached, from reading the above instruction, that any information conveyed to the agent during the course of his activities, no matter under what circumstances and no matter what its content, is imputed to the principal. This is a far reaching and staggering theory. Police officers usually have numerous contacts with the public during their working day. Do the plaintiffs seriously suggest that the substance of all conversations and communications conveyed to an individual officer, no matter how seemingly irrelevant or of a non-serious nature at that moment, be chargeable to the knowledge of the Police Department as an entity? This Court does not believe that is a correct statement of the law.

The instruction that actually was given reads as follows:

> "Generally, knowledge of the agent which he is under a duty to disclose to the principal or to another agent of the principal is imputed to the principal."

The key difference in the given instruction from the one plaintiffs requested is that it makes it clear that the only knowledge

imputed to the principal is that what the agent is under the duty to disclose.

We believe the instruction given correctly states the law on agency. We therefore conclude there was no error in the refusal to give the plaintiffs' requested instruction.

VIII.

For the reasons stated above, the judgment of the District Court, finding for the defendants, is AFFIRMED.

BLUEHOUSE, Associate Justice, concurs.

NESWOOD, Acting Chief Justice, Dissenting

I respectfully dissent. While I agree with Parts I-III, and Parts V-VII of the majority opinion, I disagree as to Part IV and to the ultimate judgment of this Court.

Expert witnesses are a vital part of most negligence actions because of the peculiar legal concept involved, "standard of care". When one fails to observe a standard of care in a particular situation, one is negligent. Put another way, negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the

existing circumstances would not have done. Baltimore &. P.R. Co. v. Jones, 95 U.S. 439, 24 L.Ed. 506 (1877), Owl Drug Co. v. Crandall, 52 Ariz. 322, 80 P.2d 952 (1938), Stewart v. Smith, 68 Ariz. 91, 200 P.2d 353 (1948).

The key words in the above definition are, "under the circumstances." One cannot determine what a reasonable person would do under certain circumstances, unless one has a basis of comparison.

The testimony of the expert witnesses in this case was for the purpose of forming such a comparison. It was a vital part of the plaintiffs' case. Without a basis of comparison with other jails and procedures, I don't see how the jurors could have formed an opinion as to the standard of care for the jail facility in question.

I would therefore REVERSE the judgment of the District Court.

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE FEDERAL NATIONAL MORTGAGE ASSOCIATION
AND
THE NAVAJO NATION

WHEREAS, the Federal National Mortgage Association ("Fannie Mae") has established a Native American Housing Initiative (the "Fannie Mae Initiative"), whereby Fannie Mae offers to purchase from Fannie Mae-approved lenders certain first-lien mortgages made by such lenders to individual members of the Navajo Nation for the financing of single-family and extended-family, owner-occupied principal residences located within the Navajo Nation; and

WHEREAS, the Navajo Nation, recognizing the needs of its members to obtain conventional mortgage financing for the financing of such residences, desires to participate in the Fannie Mae Initiative; and

WHEREAS, the Department of the Interior, Bureau of Indian Affairs (the "BIA") Navajo Area Office Director, must approve this agreement as it pertains to trust or restricted lands within the Navajo Nation.

NOW, THEREFORE, in consideration of the premises and the mutual promises contained herein, the parties hereby agree as follows:

1. Pursuant to the Fannie Mae Initiative, Fannie Mae-approved lenders will make mortgage loans available to qualified members of the Navajo Nation for the financing of residences located within the Navajo Nation, pursuant to the terms of this Memorandum of Understanding and in conformance with the applicable laws and regulations relating to Indian trust, restricted and unrestricted lands, including 25 U.S.C. §§ 415 and 635 and 25 C.F.R. Part 162.

2. The Navajo Nation and Fannie Mae acknowledge and agree that Fannie Mae shall be entitled to rely on Opinions of the Solicitor of the Judicial Branch of the Navajo Nation in carrying out the terms of the Fannie Mae Initiative pursuant to this Memorandum of Understanding. The Opinions of the Solicitor provide, among other things, that contracts, agreements and security instruments to which the Navajo Nation is a party are enforceable in the courts of the Navajo Nation. Opinions of the Solicitor No. 95-17 and 95-17A, are attached hereto as Exhibits 1 and 2, and are incorporated herein by this reference.

3. The Navajo Nation has established legally-enforceable regulations, policies and procedures which apply to the conveyance of security interests in real property, including both freehold and leasehold estates in real property, as collateral for loans to members of the Navajo Nation from Fannie Mae-approved lenders in accordance with the Fannie Mae Initiative and procedures for resale of such security interests in real property. Such regulations, policies and

procedures are described in the Opinions of the Solicitor and, for use in connection with homesite leasehold interests, the Navajo Nation Homesite Lease forms, copies of which are attached as Exhibits 3 and 4.

4. The Navajo Nation has established legally-enforceable regulations, policies and procedures relating to mortgage foreclosures and evictions in the event of borrower defaults on the above-described mortgage loans. Such regulations, policies and procedures are described in the Opinions of the Solicitor, the Mortgage instrument which is attached hereto as Exhibit 5 and, for use in connection with homesite leasehold interests, the Navajo Nation Homesite Lease forms.

5. Each member of the Navajo Nation to whom a loan is made by a Fannie Mae-approved lender pursuant to the Fannie Mae Initiative shall hold, possess or obtain a leasehold interest or other real property interest acceptable to such lender and to Fannie Mae in land within the Navajo Nation. The form of the Navajo Nation Homesite Lease applicable to trust or restricted land, attached hereto as Exhibit 3, is hereby declared acceptable to Fannie Mae and to the BIA. The form of the Navajo Nation Homesite Lease applicable to unrestricted land, attached hereto as Exhibit 4, is hereby declared acceptable to Fannie Mae.

6. Each member of the Navajo Nation borrowing from a Fannie Mae-approved lender in accordance with the Fannie Mae Initiative, will convey a security interest in real property as collateral for the mortgage loan made to such member in accordance with the terms of the Homesite Lease or other instrument creating or reflecting the property interest and the mortgage instrument.

7. The respective forms of Mortgage and Note attached hereto as Exhibits 5 and 6, are hereby declared to be acceptable to the Navajo Nation, Fannie Mae and the BIA, and shall be utilized by Fannie Mae-approved lenders pursuant to the Fannie Mae Initiative.

8. The Navajo Nation shall permit Fannie Mae-approved lenders making mortgage loans pursuant to the Fannie Mae Initiative and Fannie Mae, and their respective successors, assigns, agents and employees, to enter the Navajo Nation for the purposes of carrying out such actions as are reasonably necessary to allow the lender and/or Fannie Mae to evaluate the advisability of providing the mortgage loan and otherwise enforce the terms of such loan.

9. The Navajo Nation will assist Fannie Mae-approved lenders and Fannie Mae, and their respective successors and assigns, to the maximum extent reasonably possible in their efforts to manage and operate the Fannie Mae Initiative in a prudent, cost-effective, and culturally-sensitive manner. This shall include assisting such lenders and/or Fannie Mae in finding qualified substitute purchasers where borrowers under the Fannie Mae Initiative are unable to fulfill their mortgage loan obligations; carrying out foreclosures and evictions in a timely manner in accordance with the applicable regulations, policies and procedures referred to in paragraph 4 and the terms of the mortgage loan documents; assuring that mortgages and other relevant legal instruments, including Homesite Leases, can be recorded properly; and otherwise assisting in assuring that the Fannie Mae Initiative is managed and operated in a prudent, cost-effective and culturally-sensitive manner.

10. Fannie Mae hereby consents to the exclusive jurisdiction of the Courts of the

Navajo Nation with respect to all matters in connection with or arising out of this Memorandum of Understanding and hereby agrees that no action or proceeding in connection with or arising out of this Memorandum of Understanding or the terms and provisions of the notes and mortgages evidencing the mortgage loans to Navajo Nation members will be brought by any Fannie Mae-approved lender and/or Fannie Mae in any state court.

IN WITNESS WHEREOF, the parties hereto have signed this Memorandum of Understanding as follows:

The Federal National Mortgage Association

By: June 19, 1996

Robert Zoellick Date
Executive Vice President and
General Counsel

The Navajo Nation

By: June 19, 1996

Thomas Atcitty Date
Vice President

Approved:

June 19, 1996

ACTING Area Director Date
Bureau of Indian Affairs

EXHIBIT

OPINION OF THE SOLICITOR

JUDICIAL BRANCH OF THE NAVAJO NATION

No. 95-17

NAVAJO NATION-FANNIE MAE HOUSING FINANCE INITIATIVE

August 24, 1995

PROBLEM STATEMENT

On May 25, 1995, representatives of Fannie Mae, the Navajo Nation Department of Justice and the Office of the Solicitor, Judicial Branch of the Navajo Nation, met to discuss a joint initiative for Fannie Mae-approved lenders to make loans to qualified residents of the Navajo Nation to finance homes on leasehold estates located on trust or restricted lands of the Navajo Nation in accordance with the terms and conditions established by Fannie Mae under the initiative, in conformance with applicable laws and regulations pertaining to Indian trust lands, including 25 U.S.C. §§ 415 and 635, and the regulations at 25 CFR Part 162. "Fannie Mae" is a secondary mortgage lender, which means that it purchases mortgages from banks so they will have more monies available for individual home loans.

A June 12, 1995 letter from John M. Ingram, Esq., the Assistant General Counsel of Fannie Mae, asks for a solicitor's opinion which outlines foreclosure and eviction remedies available under Navajo Nation law. A June 12, 1995 letter from President Hale's Executive Staff Assistant confirms an agreement that the solicitor to the Courts of the Navajo Nation will prepare such an opinion to clarify Navajo Nation law for purposes of a memorandum of understanding.

This opinion is based upon a review of a proposed Memorandum of Understanding between Fannie Mae and the Navajo Nation, organic statutes outlining the legal organization of the Government of the Navajo Nation, including relevant Navajo Nation Council resolutions; all applicable federal and Navajo Nation statutes,

regulations, policies and procedures relating to trust lands of the Navajo Nation, including Homesite Lease Policy and Procedures; the model note and mortgage instruments approved by the Navajo Nation in connection with the memorandum of understanding; and a standard Navajo Nation Homesite Lease.

POWER AND AUTHORITY TO EXECUTE A MEMORANDUM OF UNDERSTANDING

The Fannie Mae counsel letter asks whether the Navajo Nation has the power and authority to execute the memorandum of understanding and if such would violate any applicable organizational document, federal or Navajo Nation law, regulation, policy or procedure, or result in the breach of any material agreement, indenture or other instrument to which the Navajo Nation is a party. I am of the opinion that the Navajo Nation has the power and authority to execute the MOU and such will not violate any provision of any organizational documents or any laws, regulations, policies or procedures (federal or tribal) applicable to the Navajo Nation or result in a breach of any material agreement, indenture or other instrument to which the Navajo Nation is a party. That conclusion is based upon a review of the Treaty of Alliance of 1868, applicable federal statutes and regulations, Navajo Nation organic statutes, pertinent regulations, and policies or procedures (federal or Navajo Nation). There are no remaining material agreements, indentures or other instruments to which the Navajo Nation is a party which may affect or limit this opinion.

The Treaty of 1868

The Navajo Nation concluded its final treaty of alliance with the United States of America at Fort Sumner, New Mexico Territory, on June 1, 1868. The United States Senate advised ratification on July 25, 1868, and the Treaty was proclaimed by President Andrew Johnson on August 12, 1868. 15 Stat. 667; 1 Navajo Tribal Code 9 (1978). Article II of the Treaty sets out a legal description of lands to be reserved by

the Navajo Nation,[1] and Article II states that such lands are "set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them...." The prevailing federal policy in 1868 was that Indians should be turned into farmers, so Articles V, VI and VII have provisions for the allocation of farming land to individuals. Article V establishes the procedure to set aside 160 acres of farming land to a "head of a family," issue a certificate, record it, survey the land and reserve to the United States the power to pass laws to address the character of land title, alienation and descent of property to descendants. As will be discussed below, the Navajo Nation reserved the treaty right to enact laws regarding other interests in non-agricultural land.

The Navajo Nation Organic Governmental Code

Following the enactment of the Indian Reorganization Act of 1934 (the IRA), which provided for the organization of Indian nation governments on a corporate model, Navajos rejected a governmental form under the Act by 384 votes out of 15,600 votes cast.[2] Graham D. Taylor, The New Deal and American Indian Tribalism 33 (1980). The Navajo rejection of the IRA was a major defeat for Commissioner of Indian Affairs John Collier, who put a great deal of attention into Navajo ratification, because supporters of the IRA in Congress said that if it "did not work among the Navajos it would not work anyplace." Id. Navajos instead chose to form their government by statute, much as British Commonwealth nations adopt organizational organic statutes in place of a constitution.

On August 6, 1959, the Navajo Nation Council adopted a governmental code for the Navajo Nation, which was codified as Title 2 of the Navajo Tribal Code (1978).

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1 The Term "reservation" in treaties refers to aboriginal lands to be kept or "reserved" by the Indian nation entering into a treaty.

2 The voter turnout was 96%!

Navajo Nation Council Res. No. CAU-50-59. The code was adopted during the Termination Period of Indian Affairs law, when Indian nations were threatened with extinction by Congress. It provided for a chairman-council legislative government, which is common to most Indian nations, and as the governmental form evolved, it became a "strong chairman" and council form, along the lines of "strong mayor" municipal governments. On December 15, 1989, the Navajo Nation Council chose to reorganize, creating a three-branch government with executive (headed by the president), legislative (the Navajo Nation Council and a speaker) and judicial (headed by the chief justice) branches. Navajo Nation Council Res. No. CD-68-89 (codified at 2 N.T.C. §§ 1-1013).

The president of the Navajo Nation is its chief executive officer, and he has the power to "Negotiate and execute contracts subject to applicable laws," and "Exercise such powers as may be lawfully delegated to the Office of the President of the Navajo Nation." 2 N.T.C. § 1005(c)(2), (9). The power to execute contracts includes the power to execute a memorandum of understanding, which is a form of intergovernmental agreement. While Fannie Mae is not a federal agency as such, but an independent organization formed by Congress, ratification of the memorandum of understanding would fall under the jurisdiction of the Intergovernmental Relations Committee of the Navajo Nation Council. The statute which gives the committee its powers provides that it has the power "To authorize, review, approve and accept agreements, including contracts and grants, between the Navajo Nation and any federal, state or regional authority upon the recommendation of the standing committee which has oversight of the division, department or program which has applied for the agreement." 2 N.T.C. § 823(b)(6). Fannie Mae is "federal" to the extent it was created by federal legislation, and it is an "authority" in the sense that it has the authority to engage in a broad range of financial activities. The governmental code does not specifically vest a standing

committee with the power to recommend such an intergovernmental agreement, but in Navajo Nation practice, the Community Development and Resources committees would have interests in the memorandum of understanding. See, 2 N.T.C. §§ 423, 695.

Authority to approve land use rights and interests is vested in the Resources Committee of the Navajo Nation Council, including the power "To give final approval of any land exchanges, or, non-mineral leases, subleases or assignments of Navajo land;..." "To approve homesite leases, or certificate, land withdrawals for homesites or residential subdivisions, and promulgate rules and regulations thereto;" and "To oversee and regulate all activities within Navajo Nation lands...." 2 N.T.C. § 695(2), (4), (5).

Federal Law

Navajo Nation lands are held in trust by the United States for the benefit of the Navajo Nation as a whole and for individual Navajos who hold allotment interests. Leases of such trust or restricted lands are governed by 25 U.S.C. § 415 (1992). Indian lands, whether they are tribally or individually owned [sic.], may be leased for public, religious, educational, recreational, residential or business purposes with the approval of the Secretary of the Interior. Id. (Emphasis supplied.) This section is implemented by regulations which are codified as 25 CFR Part 162. 26 F.R. 10966 (November 23, 1961); redesignated at 47 F.R. 13327 (May 30, 1982). Indian nations may grant leases of "tribal land" following negotiation by a representative, subject to written approval of the Secretary of the Interior. 25 CFR §§ 162.3, 162.6(a), and 162.5(a). "'Tribal land' means land or any interest therein held by the United States in trust for a tribe... subject to Federal restrictions against alienation or encumbrance...." 25 CFR § 162.1(c).

Thus, the Navajo Nation has the power to negotiate and lease, subject to written

secretarial approval, including the power to negotiate financing arrangements, such as those represented in the proposed Fannie Mae memorandum of understanding. In practice, the Bureau of Indian Affairs (which has delegated authority from the Secretary of the Interior) acknowledges Indian nation self-government, self-determination and autonomy in negotiating arrangements which affect tribal land.

ENFORCEMENT OF FANNIE MAE NOTE AND MORTGAGE AGREEMENTS

The June 12, 1995 Fannie Mae counsel letter asks whether its standard form note and mortgage instruments are enforceable by a lender, Fannie Mae or any successors or assigns. I am of the opinion that the Note and Mortgage, when executed by a Navajo borrower, shall constitute obligations of the borrower enforceable by the lender, Fannie Mae, or any of their respective successors or assigns, in accordance with the terms provided therein in the appropriate Courts of the Navajo Nation.

The issue invokes the jurisdiction, powers, statutory subject matter jurisdiction, applicable law and usages of the Courts of the Navajo Nation.

Jurisdiction

The civil trial court level of the Courts of the Navajo Nation is the District Court. 7 N.T.C. § 201 (1986 Supp.).[3] The District Courts have civil jurisdiction over "All civil actions in which the defendant is a resident of Navajo Indian Country, or has caused an action to occur within the territorial jurisdiction of the Navajo Nation." 7 N.T.C. § 253(2). That territorial jurisdiction and Navajo Indian Country are defined in 7 N.T.C. § 254: "The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian

[3] The Navajo Nation courts and the Judicial Branch of the Navajo Nation were reorganized under the Judicial Reform Act of 1985, Navajo Nation Council Res. No. CD-94-85 (December 4, 1985) (codified at Title 7, Navajo Tribal Code).

Reservation[4] or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo tribe[5] or any Band of Navajo Indians." Thus, the District Court has exclusive jurisdiction over any civil action involving the lease or mortgage of trust lands within Navajo Indian Country.

The applicable law in actions before the Navajo Nation courts includes pertinent laws of the United States, laws or customs (called "Navajo common law") of the Navajo Nation, or , where there is no applicable federal or Navajo Nation law, "the laws of the state in which the matter in dispute may lie." 7 N.T.C. § 204. Parties may rely upon applicable Navajo Nation statutes, as indicated below, or have the choice of law of state remedies.

The Forcible Entry and Detainer Statute

The Navajo Nation has the statute of 5 Ric. II, st. I and 8 Hen. VI, c. 9, relating to forcible entry and detainer actions. Blackstone's Commentaries *179. Navajo Nation Council Res. No. CN-100-69 (November 21, 1969) (codified at 16 N.T.C. §§ 1801-1810). The statute addresses the right of actual possession of land, and it is the sole remedy for possessory actions. 16 N.T.C. § 1805. A "possessory action" is one which involves the right of possession of an interest less than a fee in land.

The most recent interpretation of the statute is the Navajo Nation Supreme Court decision in Burnside v. Thriftway Marketing Corporation, Nos. SC-CV-38-94 and SC-CV-45-94 (August 17, 1995) (consolidated appeals). In that case, which involved two separate forcible entry and detainer actions against the Thriftway Marketing Corporation, the Navajo Nation Supreme Court ruled: (1) a trial judge may construe lease documents in a forcible entry and detainer action without violating the statutory

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[4] Which includes the 1868 "reservation" and subsequent additions to the reservation. See, James M. Goodman, The Navajo Atlas 57 (1982) and accompanying map.

[5] The preferred term is the "Navajo Nation," but the preamble of the Treaty of 1868 refers to the Navajo Nation or tribe of Indians."

prohibition against trying title; and (2) the forcible entry and detainer statute is the appropriate remedy in the Navajo Nation to try possessory interests in estates other than fee simple, i.e. homesite permits or business site permits. The opinion also addressed the need for Navajo Nation and secretarial (i.e. the Secretary of the Interior) approval of leases and subleases within the Navajo Nation. The decision shows the commitment of the Navajo Nation courts to provide adequate remedies to enforce lease instruments.

Given the Navajo Nation's territorial jurisdiction statute, which covers all lands within the exterior boundaries of the Navajo Nation Reservation, including fee land, statutory civil jurisdiction over all civil actions where the defendant resides within the Navajo Nation or causes an action within its territorial jurisdiction, and the "all writs" remedy section, Fannie Mae may acquire mortgage interests in fee lands within the Navajo Nation and have remedies in the Navajo Nation courts to secure such interests. Mortgages affecting fee lands may be enforced using equitable remedies, including the traditional equitable remedy of mortgage foreclosure, and the "all writs" statute gives the Navajo Nation courts the authority to offer that remedy.

The forcible entry and detainer statute is commonly used for evictions under the standard form HUD Mutual Help and Occupancy Agreement ("MHOA"), which is used for the purchase and sale of homes under the Indian Housing Program of the U.S. Department of Housing and Urban Development. A MHOA deals with homes on individual homesites or areas leased by the Navajo Housing Authority for reconveyance to individual Navajo homebuyers following full satisfaction of its terms. If a homebuyer fails to comply with the provisions of the MHOA, the Navajo Housing Authority has the contractual authority to terminate the agreement and seek enforcement of the termination through an eviction under the forcible entry and detainer statute.

We must clearly distinguish between fee simple interests in land and leasehold interests under the federal legislation and regulations addressed above. There are some fee lands within the Navajo Nation, and standard fee mortgage and loan arrangements may be used to deal with them. Leasehold agreements involving those lands are "possessory interests" which are subject to this statute. Therefore, Fannie Mae or other lenders may use the Navajo Nation forcible entry and detainer statute to enforce possessory interests of less than a fee on trust leasehold estates or common law mortgage foreclosure procedures for interests in fee lands. Lenders and borrowers also have the flexibility of choosing procedures in mortgage agreements, and the provisions of such agreements may be specifically enforced in a Navajo Nation court.

A forcible entry and detainer action falls under the "miscellaneous" jurisdiction of the District Court, as a statute enacted by the Navajo Nation Council which vests specific subject matter jurisdiction. 7 N.T.C. § 253(4). There is no right to a jury trial in miscellaneous actions. 7 N.T.C. § 651.

Other Remedies

The Courts of the Navajo Nation are courts of general jurisdiction, like state courts, in that they have general jurisdiction over all civil actions involving a resident of Navajo Indian Country or occurring within that territorial jurisdiction. 7 N.T.C. § 253(2). Given that general jurisdiction, a District Court can offer <u>any</u> remedy: "The District Courts shall have the power to issue any writs or orders necessary and proper to the complete exercise of their jurisdiction." 7 N.T.C. § 255. That includes all writs allowable at English or American common law (to the extent English common law was received in the United States[6]), or traditional actions in equity.

Mortgage foreclosure is a creature of English equity law, and its principles are

[6] <u>See</u>, John Chipman Gray, <u>The Nature and Sources of Law</u> 231-233 (1916).

well-established in the United States. See 3 Blackstone's Commentaries * 435, 439.[7] The Navajo Nation courts will do mortgage foreclosures where such may be required by an agreement of private parties or where fee land interests are involved. A related concept is that of specific performance, where parties seek the enforcement of a term of an agreement, including the cancellation of a leasehold interest and remedies spelled out in a note or loan instrument.

Another concept, which is recognized by the Courts of the Navajo Nation, is "private law." That is a corpus of law which is created by the agreement of parties.[8] As shown, the Navajo Nation courts have the jurisdictional and procedural capacity to enforce agreements entered into or executed within the Navajo Nation. Parties can create their own "law" by means of an agreement which details rights, responsibilities and remedies.

FORECLOSURE AND EVICTION

The June 12, 1995 Fannie Mae counsel letter asks whether the Courts of the Navajo Nation recognize judicial or nonjudicial foreclosure and eviction actions, and whether they have the authority to enforce such actions in accordance with Fannie Mae notes and mortgages and any applicable laws and regulations. It is my opinion that the Courts of the Navajo Nation recognize foreclosure (judicial and nonjudicial) and eviction actions and have the authority to enforce such actions in accordance with the terms of the Notes and Mortgages entered into pursuant to the MOU and any applicable laws or regulations.

The Courts of the Navajo Nation recognize promissory obligations, i.e. contracts and agreements, and often enforce them. See, Michael D. Lieder, "Navajo Dispute Resolution and Promissory Obligations: Continuity and Change in the Largest Native

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7 I use Cooley's Third American edition, 1884.

8 See, e.g., Maria Isabel Trujillo Calzado, *Institutional Aspects of Family Law in Santa Fe of Granada in the XVI Century*, in THE INFLUENCE OF SPANISH LAW IN THE NEW WORLD (State Bar of New Mexico, March 26, 1992) (conference materials).

American Nation," 18(1) American Indian Law Review 1 (1984). The Navajo Nation courts have a reputation for competence and fairness of treatment of lenders. Paul E. Frye, "Lender Recourse in Indian Country: A Navajo Case Study," 21 New Mexico Law Review 275 (1991). Our law permits both judicial foreclosure remedies, as outlined above, or non-judicial remedies as agreed by the parties in their private agreement.

Aside from the legal authorities cited in the previous section, which prompt a positive answer to Fannie Mae's counsel's question here, the Honorable Robert Yazzie has made public policy statements to the effect that the Navajo Nation courts have a leadership role in economic development by offering a positive business climate in judicial proceedings.[9] One of the problems of economic development in Navajo Indian Country is that given a relative absence of honest and ethical non-Navajo business interests, Navajos fall prey to lenders who engage in sharp business practices. They include shoddy goods, inferior services, high interest rates, fraud and overreaching. The courts are aware of unconscionable business dealings.[10] Chief Justice Yazzie's policy is relevant to this memorandum of understanding, which seeks to attract a reputable lending institution to this region to promote home loans to Navajos.

IMPAIRMENT OF CONTRACTS AND ILLEGAL TAKINGS

The fourth, and final, question posed by Fannie Mae's general counsel has to do with the law of impairment of contract. Do the Navajo Nation courts recognize impairment for contract actions and actions for taking property without due process of law, if, for example, a lender, Fannie Mae or a successor acquires leasehold interests pursuant to a judicial or nonjudicial foreclosure or there is a taking in breach of the Homesite Lease? The Courts of the Navajo Nation recognize impairment of contract

9 The Hon. Robert Yazzie, "Economic Development, Business Climate, and Law" (May 18, 1993).

10 In January 1984, Lawrence Rosen of Princeton University related that "unconscionability" is a Pueblo common law principle, picked up by Karl Llewellyn, author of the Uniform Commercial Code, when he did research in Santa Fe. Indian consumers are acutely familiar with it.

actions and actions for the unconstitutional (or "quasi-unconstitutional" in our system) taking of property (i.e. without compensation) within the meaning of the Navajo Nation Bill of Rights and, therefore, if any lender, Fannie Mae, or any of their respective successors or assigns, acquires any of the leased premises or improvements thereon described in any Navajo Nation Homesite Lease pursuant to a foreclosure (judicial or nonjudicial) or assignment in lieu of foreclosure, the lender or Fannie Mae, or any of their respective successors or assigns, shall be entitled to maintain a breach or termination of the Homesite Lease by the Navajo Nation, as ground lessor, during the term of such lease. For greater precision, Navajo Nation law provides that any lender, Fannie Mae, or any of their respective successors or assigns, shall have the ability to maintain a cause of action against the Navajo Nation for a breach/impairment of contract and/or seek a mandamus or other injunctive remedy under 1 N.T.C. § 354(a) to prevent an illegal taking in violation of due process.

Further, in the event that the Navajo Nation enters into a Note and Mortgage as contemplated in the encumbrance provisions of a model Home Site Lease, Fannie Mae would have protecting and enforceable legal remedies to implement such provisions. The Home Site Lease would vest important property rights, according to its terms, which could not be denied without violation of the property and takings provisions of the due process clause of the Navajo Nation Bill of Rights.

The Navajo Nation does not have a constitution, but it does have the Navajo Nation Bill of Rights (as amended, 1985) which gives due process protection against illegal takings without compensation. The clause recognizes property interests which are vested by governmental action in the form of approved land use leases. There are at least three aspects to the question posed: an illegal taking under the proposed memorandum of understanding; an illegal taking under the terms of a homesite lease; and Navajo Nation due process precedent.

The proposed memorandum of understanding is an agreement between Fannie Mae and the Navajo Nation, and so long as it is in place, it can be enforced by Fannie Mae. Possessory interests given to land users under a Home Site Lease are property interests which are protected by law, and if a lessee pledges interests in the lease to a mortgagee which are assignable to Fannie Mae, subject to the approvals required in the lease, then any interests vested by virtue of such agreements are entitled to protection and enforcement. An individual homesite lease has a term during which the lessee or successors in interest have the exclusive right to occupation and use of the described premises, which may be pledged as a security interest.

The Navajo Nation courts have always been concerned with the sanctity of property rights. In the 1977 case of Estate of Nelson, the former Court of Appeals dealt with grazing permit interests. 1 Navajo Rep. 162 (Court of Appeals, 1977). A grazing permit is a usufructuary or land use right, and the Court chose to treat it as real property, and apply transfer of title law, because: "Land is of primary importance to the Navajo people, and to hold otherwise would cheapen the importance of land transfers." Id. at 165. Land use rights are primary rights.

The Court of Appeals decision in Dennison v. Tucson Gas and Electric Company is a leading Navajo Nation due process "takings" decision.[11] 1 Navajo Rep. 95 (1974). The issue was whether the Navajo Nation violated any due process rights of the holders of a "traditional use area" (a unique Navajo Nation form of land tenure) by constructing a power line though the area without the occupants' true consent, just compensation or compliance with a statute which required a bond for double the damages caused by the disturbance of the land. Id., at 96-97. The Court was unequivocal in its declaration of the takings doctrine, stating that "before the government can exercise this power of taking private property without the owners

11 And a landmark in Navajo Nation constitutional law. It helped trigger a constitutional crisis involving Chief Justice Virgil Kirk and Chairman Peter MacDonald.

consent, it must provide just compensation for the property taken and provide the owner thereof with due process of law." Id. at 98. (Emphasis in the original.)[12]

The Navajo Nation courts have been consistent in the application of due process of law to protect liberty and property rights. In Nez v. Bradley, the former Court of Appeals adopted the doctrine of interpretation that "Where federally protected rights have been invaded, it has been the rule from the beginning that the courts will be alert to adjust their remedies so as to grant the necessary relief." 3 Navajo Rep. 126, 130 (Court of Appeals, 1982); citing Bell v. Hood, 327 U.S. 678 (1946). The court of Appeals also adopted the principle that a violation of the Navajo Nation Bill of Rights will be deemed a "constitutional question," and that the Navajo Nation must follow its own laws and procedure. Id., at 131. That would include any land use right granted by the Navajo Nation pursuant to its leasing laws.

The Navajo Nation Supreme Court applies Navajo common law to interpret the Navajo nation Bill of Rights. One author noted: "The right to due process has been explored more often by the Navajo Nation Supreme Court than any other right." Daniel L. Lowery, "Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992", 18(2) American Indian Law Review 379, 422 (1993). In the case of In re Estate of Begay #2, the Court ruled that "Due process is found by synthesizing the principles of Navajo custom and government, and it is applied 'as fairness and respect.'" 19 Am. Ind. L. Rep. 6130, 6131 (1990). Among the due process rights the Court said it will enforce is due process, which "must be provided when the government takes private property without the owner's consent." Id.

The issue of sovereign immunity was discussed at length in meetings with Fannie Mae representatives. Any lender, or its successor, would have a prospective mandamus or other injunctive remedy under 1 N.T.C. Sec. 354(a) to prevent an illegal

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12 Chief Justice Kirk and Associate Justices Bennalley and Yellowhair put a great deal of emphasis in this opinion. It represented a new trend in Navajo Nation law to exercise judicial review over executive acts.

taking in violation of due process.

CONCLUSION

This opinion is the product of many fruitful and cooperative discussions among representatives of the Navajo Nation Department of Justice, Fannie Mae (known formally as the Federal National Mortgage Association) and the Judicial Branch. The initiative to improve the economic climate of the Navajo Nation is welcome, and in keeping with Justice Raymond D. Austin's urging to open up private home ownership opportunities in the Navajo Nation. In Brown v. Todacheeney, Justice Austin noted:

> Housing shortage is a severe problem on the Navajo Nation. A majority of the reservation homes are inadequate and most likely would not meet the minimum building standards set by any state's law. While the federal government funds some housing construction projects on the reservation, the entity actually needed to attack the problem, the private real estate market, is virtually nonexistent. The void perhaps underlies the Navajo Nation's lack of interest in enacting a building code, mortgage laws, and other laws that regulate the housing construction industry. Thus, the principles set forth below by this court [recognizing a warranty of habitability in construction] may be the first spark in the darkness.

19 Indian L. Rep. 6133, No. A-CV-35-91 (September 2, 1992). Brown was a "first spark," and it was followed by other Judicial Branch initiatives to show that there are adequate remedies under existing law, without the need to enact mortgage laws. The Navajo Nation courts are an essential part of the process, and we appreciate an opportunity to be a part of it.

OFFICE OF THE SOLICITOR

James W. Zion, Solicitor

EXHIBIT 2

OPINION OF THE SOLICITOR (SUPPLEMENTAL)

JUDICIAL BRANCH OF THE NAVAJO NATION

No. 95-17A

SPECIFIC PERFORMANCE REMEDIES IN HOUSING FORECLOSURE

April 1, 1996

QUESTION: What is the policy of Navajo Nation law regarding specific performance of mortgage or loan agreements for the sale, construction, rehabilitation or repair of homes?

PROBLEM STATEMENT

The Navajo Nation is engaged in discussions with Fannie Mae, a secondary lender in the housing market, and the Office of Native American Programs, U.S. Department of Housing and Urban Development, to complete understandings and agreements to make home loans readily available to Navajo borrowers. The availability of prompt and appropriate remedies for lenders is an issue in such discussions. That issue raises the question of the enforceability of loan agreements where a homesite or other lease is used as security for a loan, along with the house. More specifically, this opinion will address the policies of Navajo Nation law regarding due process and specific performance as they apply to lending.

JUDICIAL POLICY IN DECISIONS OF THE NAVAJO NATION SUPREME COURT

Prior to discussion of the issue of specific performance, it is useful to review prior Navajo Nation Supreme Court statements of public policy on housing development and lending. In the case of Brown v. Todacheeney, No. A-CV-35-91 (1992), Associate Justice Raymond D. Austin observed, in a unanimous opinion of the Navajo Nation Supreme Court:

> Housing shortage is a severe problem on the Navajo Nation. A majority of the

> reservation homes are inadequate and most likely would not meet the minimum building standards set by any state's law. While the federal government funds some housing construction projects on the reservation, the entity actually needed to attack the problem, the private real estate market, is virtually nonexistent. The void perhaps underlies the Navajo Nation's lack of interest in enacting a building code, mortgage laws, and other laws that regulate the housing construction industry. Thus, the principles set forth below by this court may be the first spark in the darkness....

Thus, the Navajo Nation Supreme Court used its decision in the Brown case to set a course of action to actively encourage private lenders to enter the housing lending market, and to make the Judicial Branch an essential part of that initiative.

In 1994, the Judicial Branch took part in the legislative review of a proposed memorandum of understanding with the United States Department of Veterans Affairs[1] to facilitate direct loans to Native American veterans living on trust lands in Indian Country. There was discussion of whether Navajo Nation law was adequate to provide legal remedies to implement the agreement. Solicitor Opinion No. 94-11, "Housing Foreclosure Remedies" (April 20, 1994), laid out the remedies available under Navajo Nation law and showed that our laws are quite sufficient to carry out the purposes of the Veterans Department program under 38 U.S.C. Sec. 3761, *et seq.*

In August 1994, a member of the staff of the Office of the Chief Justice participated in a housing law seminar sponsored by the National Indian Justice Center where lending issues and enforcement were discussed with loan enforcement officers and attorneys of the Federal Deposit Insurance Corporation (FDIC). The conference also coincided with publication of an interim rule

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[1] In Navajo Nation legislative practice, resolutions for committee or Navajo Nation Council action (including legislation and proposed agreements) are referred to affected governmental entities for comments and recommendations where the proposed action will affect that organization. 2 N.N.C. Sec. 164 (1995). The V.A. agreement was submitted to the Judicial Branch because court enforcement of agreements was an issue.

by the U.S. Department of Housing and Urban Development to implement the Indian Loan Guarantee Program authorized by section 184 of the Housing and Community Development Act of 1992. 59(159) Federal Register 42732 (Thursday, August 18, 1994). The conference was an opportunity for the Navajo Nation Judicial Branch to assure FDIC enforcers and HUD officials that there are no impediments to lending in the Navajo Nation and that home loans are secure because they are backed up with remedies provided under existing Navajo Nation law.

The Judicial Branch offered its comments on the HUD interim rule for loan guarantees for Indian housing on October 15, 1994. The comments took the position that the Navajo Nation is in full compliance with the requirements of the interim rule, and urged HUD to immediately implement the program in the Navajo Nation. "Comments Regarding Loan Guarantees for Indian Housing," 24 CFR Part 955, Docket No. R-94-1730.

In April 1995, the Judicial Branch participated in a national conference of Federal Deposit Insurance Corporation attorneys and enforcement officers to discuss the lending climate in Indian Country, discrimination issues and the role of federal bank regulators in the larger scheme of American Indian policy. Again, the Judicial Branch policy in support of private lending initiatives offered assurances that a lack of judicial remedies is not an impediment to lending in the Navajo Nation.

In May 1995, the Navajo Nation Department of Justice invited the Judicial Branch to participate in discussions of a proposed Fannie Mae initiative for a loan program in the Navajo Nation. Following the meeting, Solicitor's Opinion No. 95-17, "Navajo Nation Fannie-Mae Housing Finance Initiative (August 24, 1995), memorialized the issues and discussed applicable Navajo Nation law. This opinion is a supplement to that 1995 opinion.

In the meantime, Navajo Nation initiatives under the HUD Section 184 Loan Guarantee Program continued, and the Judicial Branch solicitor was asked to comment on subleases pursuant to foreclosure to the Associate Field Counsel of the Office of Native American Programs, HUD, to address that situation. The solicitor gave his letter opinion on the issue on January 24, 1996, to show the ability of lenders to sublease on foreclosure.

Finally, Fannie Mae officials ask for a formal opinion, based upon a November 29, 1995 solicitor's opinion letter, which discusses specific performance and process to enforce loan and mortgage agreements. The concern raised by Fannie Mae and other potential lenders is whether Navajo Nation officials or legislative bodies (i.e. a committee or the Navajo Nation Council) may block or impair specific performance of loan or mortgage agreements.

SPECIFIC REMEDIES

The Navajo Nation Supreme Court, as it is with most American courts, establishes patterns of legal theory as it renders decisions. The most recent problem confronting the Court is the reconciliation of remedies under the Navajo Nation Sovereign Immunity Act with the civil rights provisions of the Navajo Nation Bill of Rights. The Court struggles with the legislative history of the Sovereign Immunity Act and Navajo Nation Bill of Rights (which were enacted on the same day) to answer the question of how full civil rights protection may be offered in light of the bar against recovery where the Navajo Nation does not have insurance or resources to pay a monetary judgment. The Court is developing an approach that since civil rights protection is an overriding value, the courts should provide prospective relief where retrospective relief in the form of damages is not available. In Raymond v. Navajo Agricultural Products Industry, No. SC-CV-26-94 (July 20, 1995), the Court pointed out the difference between prospective mandamus or injunctive relief versus

retrospective monetary relief in construing the Sovereign Immunity Act. Slip Op. at 6.

The civil right under discussion with Fannie Mae and others is the right of lenders to have assurances that mortgages and other loan arrangements will be honored if the Navajo Nation is involved as a party. The more specific problem is what would happen in the event a public official illegally seeks to modify an existing agreement or impede its performance. Navajo Nation law is clear that if an individual has a statutory or contractual right to be enforced against the Navajo Nation, the courts will honor the right and implement it with a wide range of specific remedies. In most mortgage situations, only private parties will be involved, and sovereign immunity is not a consideration. In the unlikely event a public official of Navajo Nation Government seeks to impede or deny a foreclosure remedy, the courts are able to issue writs of mandamus, prohibition, assistance or other forms of injunctive relief to stop official misconduct.

Counsel for the Navajo Nation argued, in the Raymond case above, that where damage actions are not available due to a lack of insurance or assets pledged to pay a monetary judgment that parties should seek prospective relief to cure civil rights violations. The legislative history of the Sovereign Immunity Act and the Navajo Nation Bill of Rights, reflected in preamble language of the two measures, shows that civil rights are a higher value in Navajo Nation law and many kinds of civil rights violations may be cured through early intervention for equitable relief. The Raymond opinion and others show that the Navajo Nation Supreme Court is moving in the direction of making a clear demarcation between prospective and retroactive relief (immediate equitable and curative remedies rather than money damages where such may not be available) to address the enforcement of rights where sovereign immunity may otherwise be a bar.

The question is whether businesses and lenders have assurances that the Navajo Nation court

system will maintain a favorable business climate in terms of due process and making certain agreements will be honored. Those points were addressed in the March 14, 1996 Navajo Nation Supreme Court opinion in Rough Rock Community School v. Navajo Nation, No. SC-CV-06-94. The appellants in that case, quasi-public schools which receive funding through the Navajo Nation, specifically raised the business climate issue. While the Court held that legislative modification of the schools' organization structure under state law was not a "taking" of property and thus a violation of due process, it reiterated its policy that the maintenance of a favorable climate for "outside" business has a solid foundation in the Navajo Nation. Slip Op. at 6-7; citing TBI Contractors v. The Navajo Tribe of Indians, No. A-CV-28-85 (August 12, 1988); Largo v. Gregory & Cook, Inc., No. A-CV-11-93 (February 17, 1995); and Reservation Business Services v. Albert, No. SC-CV-05-94 (March 16, 1995). The Court also cited, with approval, a law journal article on the history of the Navajo Nation courts protecting legitimate business interests. *Id.* at 7, citing Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 New Mexico L. Rev. 275 (1991). The opinion clearly states a judicial policy of honoring contractual rights.

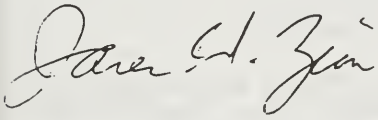
Fannie Mae and lenders can be assured that in the event that mortgage foreclosure or other forms of prospective relief are needed to enforce contractual terms, and the Navajo Nation or its officials are involved, the Sovereign Immunity Act is not a bar to relief. Navajo Nation law recognizes the difference between specific relief to enforce agreements and retrospective monetary relief. Where money damages are not available, but there are substantive rights to be enforced, the courts will not hesitate to provide any remedy that will rectify the situation. Given that the Navajo Nation courts have civil jurisdiction over any act which arises within our territorial jurisdiction, they can offer any remedy known at law or equity to enforce mortgage agreements.

A major Indian law text, David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., Federal Indian Law: Cases and Materials, at 527 (3rd ed. 1993), gives special mention of the Navajo court policy of "blending the old with the new" and says that the Navajo courts "have carried out these tasks with a widely respected degree of professionalism, independence, and institutional competence, while at the same time maintaining an abiding an rigorous respect for the integrity of the Navajo way." Most recently, the Royal Commission on Aboriginal Peoples - Canada reviewed the work of the Navajo Nation courts with approval, saying that "visits to the Navajo courts by Aboriginal groups and commissions of inquiry from Canada have become akin to the search for the Holy Grail." Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada 190 (February 1996).

CONCLUSION

If the issue is lender confidence and assurances that the rules of the game will not be changed, there is ample evidence in Navajo Nation law that lenders can be confident and have definite assurances that the rules of the game will not be changed. Fannie Mae has further assurances in discussions of a future relationship with the Navajo Nation courts. Fannie Mae has offered to provide technical assistance and training in modern mortgage law, and when there are meetings with Navajo Nation judges, more precise enforcement issues can be discussed. The Navajo Nation Judicial Conference has adopted standard policies to deal with emergent issues such as the appointment of counsel for indigents, sentencing, child support enforcement and other issues. The Judicial Conference has discussed lender remedies and consumer rights and concludes that responsible lenders who deal with consumers fairly have no cause to fear that legitimate expectations will not be honored. Returning to Justice Austin's statements on behalf of a unanimous Court in

the 1992 Brown decision, *supra*, the spark he kindled became a flame in the recent 1996 Rough Rock Community School decision, also for a unanimous Court. We invite the lawyers for lenders and commercial interests to review the due process decisions of the Navajo Nation courts. They show a heightened awareness of the need for fundamental fairness to all, and the actual application of a degree of fairness which is not matched by most American courts. Lenders should have no fear of the legal climate of the Navajo Nation.



James W. Zion, Solicitor to the Courts of the Navajo Nation

EXHIBIT

FORM 200C
April, 1996

UNITED STATES
DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
and
THE NAVAJO NATION

LEASE NO. _____

HOMESITE LEASE
(Tribal Member Only)
(Trust or Restricted Land Only)

THIS LEASE is made and entered into by and between THE NAVAJO NATION, P. O. Box 9000, Window Rock, Navajo Nation (Arizona) 86515, ("Lessor"), and _____

_____, C#_____ and _____

_____, C#_____,

whose address is _____

_____, ("Lessee") in accordance with 2 N.T.C. §695(b)(4)(i) and Resolution No. RCD-289-93 of the Resources Committee of the Navajo Nation Council, the provisions of 25 U.S.C. §415, as implemented by the regulations contained in 25 C.F.R. Part 162, and all amendments or successors thereto, which by this reference are made a part hereof. In the event this Lease is held by two or more persons, it shall be held in the following tenure:

_____.

WITNESSETH:

1. **DEFINITIONS.** (A) "Secretary" means the Secretary of the Interior or his duly authorized representative or successor.

(B) "Approved Encumbrance" means an encumbrance approved in writing by the Secretary and Lessor. "Encumbrancer" means the owner and holder of an Approved Encumbrance, or either of them.

2. **LEASED PREMISES.** For and in consideration of the rents, covenants, agreements, terms and conditions contained herein, Lessor hereby leases to Lessee all that tract or parcel of land situated within the _____ Chapter of the Navajo Nation, (County of _____, State of _____,) which is more particularly described in Exhibit "A," attached hereto and by this reference made a part hereof, containing approximately _____ acre(s), more or less, subject to any prior, valid existing rights-of-way. There is hereby reserved and excepted from the leased premises rights-of-way for utilities constructed by or on authority of Lessor.

3. **USE OF LEASED PREMISES.** (A) Lessee shall develop, use and occupy the leased premises for residential purposes only and said premises shall not be used for any other purpose. Lessee may construct, improve and maintain a dwelling and related structures on the leased premises and may otherwise develop, use or occupy said premises for residential purposes only.

(B) Lessee agrees not to use or cause to be used any part of the leased premises for any unlawful conduct or purpose.

4. **TERM.** Lessee shall have and hold the leased premises for a term of sixty-five (65) years, beginning on the date of approval of this Lease by the Secretary. This Lease may be renewed for an additional term of up to twenty-five (25) years, provided that this Lease is in good standing. Lessee shall give written notice of intent to renew this Lease to the Director of the Navajo Land Department, or its successor, at least six (6) months, but no more than twelve (12) months, prior to the expiration date of this Lease. Renewal of this Lease is subject to the approval of Lessor and the Secretary and to the provisions of Navajo Nation law and the regulations contained at 25 C.F.R. Part 162, including all amendments and successors thereto.

5. **RENT.** (A) In consideration of the foregoing and the terms and conditions of this Lease, Lessee hereby covenants and agrees to pay Lessor, in lawful money of the United States, an annual rental of One Dollar ($1.00). In accordance with 25 C.F.R. §162.5(b)(2), only nominal rental is provided for herein because this Lease is for homesite purposes to a Tribal member and the leased premises are not commercial or industrial in character. Lessee agrees that there shall be no adjustment of the rental required herein in the event that this Lease is terminated before its term otherwise would expire or in the event that any part of the leased premises is taken under the laws of eminent domain.

(B) Rental payments are due and payable on or before the effective date of this Lease and thereafter on or before each anniversary date of this Lease. Lessee may pay the total amount due at any time prior to the expiration of this Lease. Rental payments shall be made by check or money order made out to the Navajo Nation, and shall be paid at the local Navajo Land Department Homesite Section Office, or at such other location as Lessor hereafter may designate in writing. Failure to make rental payments when due shall constitute a default under this Lease.

(C) While the leased premises are in trust or restricted status, the Secretary in his discretion may suspend the direct rental payment provisions of this Lease, in which event the rental payments provided for herein shall be paid directly to the Secretary. Lessor, Lessee and an Encumbrancer, if any, shall be notified of any such change in the direct rental provisions of this Lease.

6. **DEVELOPMENT OF LEASED PREMISES; IMPROVEMENTS.** (A) Lessee shall develop the leased premises within two (2) years of the effective date of this Lease. Prior to the expiration of said period, Lessee may request in writing from Lessor an extension of the development period for a period not to exceed two (2) additional years. Lessor shall not unreasonably withhold approval of such request. Failure to develop the leased premises in accordance with this provision shall constitute a default under this Lease.

(B) All buildings and other improvements now existing, or hereafter constructed on the premises, shall be the leasehold property of Lessee during the term of this Lease, including any renewal thereof.

(C) Lessee is hereby specifically authorized to enter into appropriate service line agreements with utility companies for the provision of utility services to the leased premises, including gas, water, sewer, electricity, telephone, television and other utilities, without further consent by Lessor, on the condition that:

(1) such agreements are for the sole purpose of supplying utility services to the leased premises;

(2) such agreements authorize utility service lines only within the leased premises;

(3) such agreements do not extend beyond the term of this Lease, including any extensions thereof;

(4) executed copies of such agreements, together with plats or diagrams showing with particularity the location, size and extent of such service lines, are filed by the utility companies with the Lessor and with the Secretary within thirty (30) days of their execution; and

(5) such agreements are otherwise in accordance with the provisions of 25 C.F.R. §169.22, including any amendments or successors thereto.

Nothing contained herein shall be construed to limit the right of Lessor to enter into service line agreements with utility companies for service lines across the leased premises, nor otherwise to affect the rights-of-way reserved to Lessor in Section 2 of this Lease.

7. **DELIVERY OF PREMISES; CUSTOMARY USE RIGHTS.** (A) Subject to the provisions of subsection (B) below, upon expiration or termination of this Lease, Lessee shall peaceably and without legal process deliver up possession of the leased premises to Lessor,

including all improvements thereon, in good condition, usual wear and tear excepted.

(B) In the event that Lessee holds customary use rights to the leased premises under the laws and customs of the Navajo Nation at the beginning date of this Lease, and has not otherwise transferred, surrendered, or abandoned such customary use rights during the term of this Lease, then upon the expiration or termination of this Lease, Lessee shall be entitled to possession of the leased premises, including all improvements thereon, in accordance with the laws and customs of the Navajo Nation.

8. **INHERITANCE.** This Lease may be transferred by will or by intestate succession in accordance with the laws and customs of the Navajo Nation, including all amendments and successors thereto.

9. **ASSIGNMENT.** This Lease may be assigned with the prior written approval of Lessor and the Secretary, subject to the laws of the United States and the Navajo Nation, including all amendments and successors thereto. No assignment of this Lease or any interest therein shall be valid and binding without such prior written approval. In the event this Lease or any interest therein is mortgaged or pledged as security for a loan, approval of any subsequent assignment shall be required by the lender, sureties, and loan guarantors, if any.

10. **ENCUMBRANCE.** (A) This Lease or any interest therein may not be encumbered without the prior written approval of Lessor and the Secretary, and no such encumbrance shall be valid without said prior approval. An Approved Encumbrance must be confined to the leasehold interest of Lessee, and shall not jeopardize in any way Lessor's interest in the land. Lessee agrees to furnish any requested financial statements or analyses pertinent to the proposed encumbrance that Lessor and the Secretary may deem necessary to justify the amount, purpose and terms of said proposed encumbrance.

(B) In the event of default by Lessee of the terms of an Approved Encumbrance, Encumbrancer may exercise any rights provided in such Approved Encumbrance, provided that prior to any sale of the leasehold, Encumbrancer shall give to Lessor and the Secretary written notice of the same duration as is required to be given to Lessee by the terms of such Approved Encumbrance and by applicable law. In the event of such default, Lessor shall have the following rights which may be exercised at any time prior to the completion of sale:

(1) To pay to Encumbrancer any and all amounts secured by the Approved Encumbrance, plus unpaid interest accrued to the date of such payment, plus expenses of sale incurred to the date of such payment.

(2) To execute in favor of Encumbrancer a promissory note and a new encumbrance, which new encumbrance must be approved by the Secretary, for any and all amounts secured by the Approved Encumbrance, plus unpaid interest accrued to the date of such execution, plus expenses of sale incurred to the date of such execution, upon the same terms and conditions as originally provided by the Approved Encumbrance, or upon such other terms and conditions as Lessor and the lender may agree, and delivering to Encumbrancer a policy of title insurance in the face amount of such promissory note, issued by a reputable title insurance company acceptable to Encumbrancer, and insuring that the new encumbrance is a first lien upon the property described in this Lease, subject only to current taxes and to conditions, restrictions and reservations of record which are acceptable to Encumbrancer at the time of recording the new encumbrance.

(C) If Lessor exercises either of the above rights, all right, title and interest of Lessee in this Lease shall terminate and Lessor shall acquire this Lease; provided, however, that such termination shall not relieve Lessee of any obligation or liability which shall have accrued prior to the date of termination. Acquisition of this Lease by Lessor under these circumstances shall not serve to extinguish this Lease by merger or otherwise.

(D) If Lessor declines to exercise either of the above rights and sale of the leasehold under the Approved Encumbrance shall occur, the purchaser at such sale shall succeed to all of the right, title and interest of Lessee in this Lease. It is further agreed that if the purchaser at such sale is Encumbrancer, Encumbrancer may sell and assign this Lease without any further approval by Lessor and the Secretary, provided that the assignee shall agree in writing to be bound by all the terms and conditions of this Lease. During such period of time Encumbrancer retains title thereto, it may sublease the property for periods not to exceed one year in accordance with terms of the mortgage, notwithstanding any contrary provision contained within the Lease. If Encumbrancer is the purchaser, it shall be required to perform the obligations of this Lease only so long as it retains title thereto. If the purchaser is other than Encumbrancer, written approval by Lessor and the Secretary of any assignment shall be required and said purchaser shall agree in writing to be bound by all the terms and conditions of this Lease.

11. **DEFAULT.** (A) Time is declared to be of the essence in this Lease. Should Lessee default in any payment of monies when due under this Lease or be in violation of any other provision of this Lease, said violation may be acted upon by the Secretary in accordance with 25 C.F.R. Part 162, or any amendments or successors thereto.

(B) In addition to the rights and remedies provided by the aforementioned regulations, Lessor and the Secretary, either jointly or severally, may exercise the following options upon Lessee's default, subject to the provisions of subsection (D) below:

(1) Enforce, by suit or otherwise, Lessee's compliance with all terms of this Lease; or

(2) Re-enter the leased premises and remove all persons and property therefrom, and re-let the premises without terminating this Lease as the agent and for the account of Lessee, but without prejudice to the right to terminate the Lease thereafter, and without invalidating any right of Lessor or the Secretary, or Encumbrancer, if any, or any obligations of Lessee hereunder. The terms and conditions of such re-letting shall be in the sole discretion of Lessor, who shall have the right to alter and repair the premises as it deems advisable and to re-let with or without any equipment or fixtures situated thereon. Rents from any such re-letting shall be applied first to the expense of re-letting, collection, altering and repairing, including reasonable attorney's fees and any reasonable real estate commission actually paid, insurance, taxes and assessments and thereafter toward payment to liquidate the total liability of Lessee. Lessee shall pay to Lessor monthly when due, any deficiency and Lessor or the Secretary may sue thereafter as each monthly deficiency shall arise; or

(3) Take any other action authorized or allowed under applicable law.

(C) No waiver of a breach of any of the terms and conditions of this Lease shall be construed to be a waiver of any succeeding breach of the same or any other term or condition of this Lease. Exercise of any of the remedies herein shall not exclude recourse to any other remedies, by suit or otherwise, which may be exercised by Lessor or the Secretary, or any other rights or remedies now held or which may be held by Lessor in the future.

(D) Lessor and the Secretary, as the case may be, shall give to an Encumbrancer a copy of each notice of default by Lessee at the same time as such notice of default shall be given to Lessee. Lessor and the Secretary shall accept performance by an Encumbrancer of any of Lessee's obligations under this Lease, with the same force and effect as though performed by Lessee. An Encumbrancer shall have standing to pursue any appeals permitted by applicable federal or Navajo Nation law that Lessee would be entitled to pursue. Neither Lessor nor the Secretary shall terminate this Lease if an Encumbrancer has cured or is taking action diligently to cure Lessee's default or has commenced and is

pursuing diligently either a foreclosure action or an assignment in lieu of foreclosure.

12. **SANITATION.** Lessee hereby agrees to comply with all applicable sanitation laws, regulations or other requirements of the United States and the Navajo Nation. Lessee agrees to dispose of all solid waste in compliance with applicable federal and Navajo Nation law either in an approved sanitary landfill or transfer station, or with a commercial sanitary collection service. Lessee further agrees at all times to maintain the entire leased premises in a safe and sanitary condition, presenting a good appearance both inside and outside the leased premises.

13. **HAZARDOUS SUBSTANCES.** Lessee shall not cause or permit any hazardous substance to be used, stored, generated or disposed of on or in the leased premises without the prior written approval of Lessor, which approval may be given, given upon conditions, or denied in the sole discretion of Lessor and Encumbrancer, if any, respectively.

14. **TERMINATION OF FEDERAL SUPERVISION.** Nothing contained in this Lease shall operate to delay or prevent a termination of federal responsibilities with respect to the leased premises by the issuance of a fee patent, or otherwise, during the term of this Lease, however, such termination shall not serve to abrogate this Lease. Lessor and Lessee and an Approved Encumbrancer, if any, shall be notified of any such change in the status of the leased premises.

15. **INTEREST OF MEMBER OF CONGRESS.** No member of or delegate to Congress or any Resident Commissioner shall be admitted to any share or part of this Lease or to any benefit that may arise herefrom.

16. **OBLIGATIONS TO THE UNITED STATES.** It is understood and agreed that while the leased premises are in trust or restricted status, all of Lessee's obligations under this Lease are to the United States as well as to Lessor.

17. **EMINENT DOMAIN.** If the leased premises or any part thereof is taken under the laws of eminent domain at any time during the term of this Lease, Lessee's interest in the leased premises or the part of the leased premises taken shall thereupon cease. Compensation awarded for the taking of the leased premises or any part thereof, including any improvements located thereon, shall be awarded to Lessor and Lessee as their respective interests may appear at the time of such taking, provided that Lessee's right to such awards shall be subject to the rights of an Encumbrancer under an Approved Encumbrance.

18. **MINERALS.** All minerals, including sand and gravel, contained in or on the leased premises are reserved for the use of

Lessor. Lessor also reserves the right to enter upon the leased premises and search for and remove minerals located on the property, paying just compensation for any damage or injury caused to Lessee's personal property or improvements constructed by Lessee.

19. **GOVERNING LAW AND CHOICE OF FORUM.** Except as may be prohibited by applicable federal law, the law of the Navajo Nation shall govern the construction, performance and enforcement of this Lease. Any action or proceeding brought by Lessee against the Navajo Nation in connection with or arising out of the terms and conditions of this Lease shall be brought only in the Courts of the Navajo Nation, and no such action or proceeding shall be brought by Lessee against the Navajo Nation in any court of any state.

20. **CONSENT TO JURISDICTION.** Lessee hereby consents to the jurisdiction of the Navajo Nation, including its legislative, judicial and regulatory jurisdiction, including but not limited to jurisdiction to levy fines and to enter judgments for compensatory and punitive damages and injunctive relief, in connection with all activities conducted by Lessee in the Navajo Nation or which have a proximate legal effect on persons or property within the Navajo Nation.

21. **NO WAIVER OF SOVEREIGN IMMUNITY.** Nothing in this Lease shall be interpreted as constituting a waiver, express or implied, of the sovereign immunity of the Navajo Nation.

22. **SUCCESSORS AND ASSIGNS.** The terms and conditions contained herein shall extend to and be binding upon the successors, heirs, assigns, executors, administrators and agents, including all contractors and subcontractors, of Lessee. Except as the context otherwise requires, the term "Lessee," as used in this Lease, shall be deemed to include all such successors, heirs, assigns, executors, administrators and agents.

23. **NOTICES.** All notices, payments and demands shall be in writing, and shall be sent to the parties hereto at the respective addresses herein recited or to such other addresses as the parties may hereafter designate in writing. Copies of all notices and demands shall be sent to the Secretary.

24. **EFFECTIVE DATE.** This Lease shall take effect on the date of approval of this Lease by the Secretary.

THE NAVAJO NATION, LESSOR

_____ By: _____
Date Director, Navajo Land Department

WITNESSES:

_____ _____
LESSEE

_____

_____ _____
LESSEE

_____

APPROVED: _____
(Date)

_____
Superintendent, _____ Agency
Bureau of Indian Affairs

EXHIBIT 4

FORM 200UL
April, 1996

THE NAVAJO NATION

LEASE NO. _____

HOMESITE LEASE
(Unrestricted Land Only)

THIS LEASE is made and entered into by and between THE NAVAJO NATION, P.O. Box 9000, Window Rock, Navajo Nation (Arizona) 86515, ("Lessor"), and _____, C#_____

and _____, C#_____,

whose address is _____

_____, ("Lessee") in accordance with 25 U.S.C. §635 and 2 N.T.C. §695(b)(4)(i) and Resolution No. RCD-289-93 of the Resources Committee of the Navajo Nation Council, and all amendments or successors thereto, which by this reference are made a part hereof. In the event this Lease is held by two or more persons, it shall be held in the following tenure:

_____.

WITNESSETH:

1. **DEFINITIONS.** As used in this Lease, the term "Approved Encumbrance" means an encumbrance approved in writing by Lessor. "Encumbrancer" means the owner and holder of an Approved Encumbrance," or either of them.

2. **LEASED PREMISES.** For and in consideration of the rents, covenants, agreements, terms and conditions contained herein, Lessor hereby leases to Lessee all that tract or parcel of land situated within _____ Chapter of the Navajo Nation, (County of _____, State of _____), which is more particularly described in Exhibit "A," attached hereto and by this reference made a part hereof, containing approximately _____ acre(s), more or less, subject to any prior, valid existing rights-of-way. There is hereby reserved and excepted from the leased premises rights-of-way for utilities constructed by or on authority of Lessor.

3. **USE OF LEASED PREMISES.** (A) Lessee shall develop, use and occupy the leased premises for residential purposes only and said premises shall not be used for any other purpose. Lessee may construct, improve and maintain a dwelling and related structures on the leased premises and may otherwise develop, use or occupy said premises for residential purposes only.

(B) Lessee agrees not to use or cause to be used any part of the leased premises for any unlawful conduct or purpose.

4. **TERM.** Lessee shall have and hold the leased premises for a term of sixty-five (65) years, beginning on the date of approval of this Lease. This lease may be renewed for an additional term of up to twenty-five (25) years, provided that the Lease is in good standing. Lessee shall give written notice of intent to renew this Lease to the Director of the Navajo Land Department, or its successor, at least six (6) months, but no more than twelve (12) months, prior to the expiration date of this Lease. Renewal of this Lease is subject to the approval of the Lessor and to the provisions of Navajo Nation law.

5. **RENT.** (A) In consideration of the foregoing and the terms and conditions of this Lease, Lessee hereby covenants and agrees to pay Lessor, in lawful money of the United States, an annual rental of One Dollar ($1.00). Lessee agrees that there shall be no adjustment of the rental required herein in the event that this Lease is terminated before its term otherwise would expire or in the event that any part of the leased premises is taken under the laws of eminent domain.

(B) Rental payments are due and payable on or before the effective date of this Lease and thereafter on or before each anniversary date of this Lease. Lessee may pay the total amount due at any time prior to the expiration of this Lease. Rental payments shall be made by check or money order made out to the Navajo Nation and shall be paid at the local Navajo Land Department Homesite Section Office, or at such other location as Lessor hereafter may designate in writing. Failure to make rental payments when due shall constitute a default under this Lease.

6. **DEVELOPMENT OF LEASED PREMISES; IMPROVEMENTS.** (A) Lessee shall develop the leased premises within two (2) years of the effective date of this Lease. Prior to the expiration of said period, Lessee may request in writing from Lessor an extension of the development period for a period not to exceed two (2) additional years. Lessor shall not unreasonably withhold approval of such request. Failure to develop the leased premises in accordance with this provision shall constitute a default under this Lease.

(B) All buildings and other improvements now existing, or hereafter constructed on the leased premises, shall be the leasehold property of Lessee during the term of this Lease, including any renewal thereof.

(C) Lessee is hereby authorized to enter into appropriate service line agreements with utility companies for the provision of utility services to the leased premises, including gas, water, sewer, electricity, telephone, television and other utilities, without further consent by Lessor, on the condition that:

(1) such agreements are for the sole purpose of supplying utility services to the leased premises;

(2) such agreements authorize utility service lines only within the leased premises;

(3) such agreements do not extend beyond the term of this Lease, including any extensions thereof; and

(4) executed copies of such agreements, together with plats or diagrams showing with particularity the location, size and extent of such service lines, are filed by the utility companies with the Lessor within thirty (30) days of their execution.

Nothing contained herein shall be construed to limit the right of Lessor to enter into service line agreements with utility companies for service lines across the leased premises, nor otherwise to affect the rights-of-way reserved to Lessor in Section 2 of this Lease.

7. **DELIVERY OF PREMISES; CUSTOMARY USE RIGHTS.** (A) Subject to the provisions of subsection (B) below, upon expiration or termination of this Lease, Lessee shall peaceably and without legal process deliver up possession of the leased premises to Lessor, including all improvements thereon, in good condition, usual wear and tear excepted.

(B) In the event that Lessee holds customary use rights to the leased premises under the laws and customs of the Navajo Nation at the beginning date of this Lease, and has not otherwise transferred, surrendered, or abandoned such customary use rights during the term of this Lease, then upon the expiration or termination of this Lease, Lessee shall be entitled to possession of the leased premises, including all improvements thereon, in accordance with the laws and customs of the Navajo Nation.

8. **INHERITANCE.** This Lease may be transferred by will or by intestate succession in accordance with the laws and customs of the Navajo Nation, including all amendments and successors thereto.

9. **ASSIGNMENT.** This Lease may be assigned with the prior written approval of Lessor, subject to the laws of the Navajo Nation, including all amendments or successors thereto. No assignment of this Lease or any interest therein shall be valid and binding without such prior written approval. In the event this Lease or any interest therein is mortgaged or pledged as security for a loan, approval of any subsequent assignment shall be required by the lender, sureties, and loan guarantors, if any.

10. **ENCUMBRANCE.** (A) This Lease or any interest therein may not be encumbered without the written approval of the Lessor, and

no such encumbrance shall be valid without said prior approval. An Approved Encumbrance must be confined to the leasehold interest of Lessee, and shall not jeopardize in any way Lessor's interest in the land. Lessee agrees to furnish any requested financial statements or analyses pertinent to the proposed encumbrance that Lessor may deem necessary to justify the amount, purpose and terms of said proposed encumbrance.

(B) In the event of default by Lessee of the terms of an Approved Encumbrance, Encumbrancer may exercise any rights provided in such Approved Encumbrance, provided that prior to any sale of the leasehold, Encumbrancer shall give to Lessor notice of the same character and duration as is required to be given Lessee by the terms of such Approved Encumbrance and by applicable law. In the event of such default, Lessor shall have the following rights which may be exercised at any time prior to the completion of sale:

(1) To pay to Encumbrancer any and all amounts secured by the Approved Encumbrance, plus unpaid interest accrued to the date of such payment, plus expenses of sale incurred to the date of such payment.

(2) To execute in favor of Encumbrancer a promissory note and a new encumbrance for any and all amounts secured by the Approved Encumbrance, plus unpaid interest accrued to the date of such execution, plus expenses of sale incurred to the date of such execution, upon the same terms and conditions as originally provided by the Approved Encumbrance, or upon such other terms and conditions as Lessor and the lender may agree, and delivering to Encumbrancer a policy of title insurance in the face amount of such promissory note, issued by a reputable title insurance company acceptable to Encumbrancer, and insuring that the new encumbrance is a first lien upon the property described in this Lease, subject only to current taxes and to conditions, restrictions and reservations of record which are acceptable to Encumbrancer at the time of recording the new encumbrance.

(C) If Lessor exercises either of the above rights, all right, title and interest of Lessee in the Lease shall terminate and Lessor shall acquire the Lease; provided, however, that such termination shall not relieve Lessee of any obligation or liability which shall have accrued prior to the date of termination. Acquisition of this Lease by Lessor under these circumstances shall not serve to extinguish the Lease by merger or otherwise.

(D) If Lessor declines to exercise either of the above rights and sale of the leasehold under the Approved Encumbrance shall occur, the purchaser at such sale shall succeed to all of the rights, title, and interest of Lessee in this Lease. It is further

agreed that if the purchaser at such sale is Encumbrancer, Encumbrancer may sell and assign this Lease without any further approval by Lessor, provided that the assignee shall agree in writing to be bound by all the terms and conditions of this Lease. If Encumbrancer is the purchaser, it shall be required to perform the obligations of this Lease only so long as it retains title thereto. During such period of time Encumbrancer retains title thereto, it may sublease the property for periods not to exceed one year in accordance with terms of the mortgage, notwithstanding any contrary provisions contained within the Lease. If Encumbrancer is the purchaser, it shall be required to perform the obligations of this Lease only so long as it retains title thereto. If the purchaser is other than Encumbrancer, written approval by Lessor of any assignment shall be required and said purchaser shall agree to be bound by all the terms and conditions of this Lease.

11. **DEFAULT.** (A) Time is declared to be of the essence in this Lease. Should Lessee default in any payment of monies when due under this Lease, or be in violation of any other provision of this Lease, said violation may be acted upon by Lessor in accordance with Navajo Nation law.

(B) In addition to the rights and remedies provided by the aforementioned law, Lessor may exercise the following options upon Lessee's default, subject to the provisions of subsection (D) below:

(1) Enforce by suit or otherwise, Lessee's compliance with all terms of this Lease; or

(2) Re-enter the leased premises and remove all persons and property therefrom, and re-let the premises without terminating this Lease as the agent and for the account of Lessee, but without prejudice to the right to terminate the Lease thereafter, and without invalidating any right of Lessor, or Encumbrancer, if any, or any obligations of Lessee hereunder. The terms and conditions of such re-letting shall be in the sole discretion of Lessor who shall have the right to alter and repair the premises as it deems advisable and to re-let with or without any equipment or fixtures situated thereon. Rents from any such re-letting shall be applied first to the expense of re-letting, collection, altering, and repairing, including reasonable attorney's fees and any real estate commission actually paid, insurance, taxes and assessments and thereafter toward payment to liquidate the total liability of Lessee. Lessee shall pay to Lessor monthly when due, any deficiency and Lessor may sue thereafter as each monthly deficiency shall arise; or

(3) Take any other action authorized or allowed under applicable law.

(C) No waiver of a breach of any of the terms and conditions of this Lease shall be construed to be a waiver of any succeeding breach of the same or any other term or condition of this Lease. Exercise of any of the remedies herein shall not exclude recourse to any other remedies, by suit or otherwise, which may be exercised by Lessor, or any other rights or remedies now held or which may be held by Lessor in the future.

(D) Lessor shall give to an Approved Encumbrancer a copy of each notice of default by Lessee at the same time as such notice of default shall be given to Lessee. Lessor shall accept performance by an Approved Encumbrancer of any of Lessee's obligations under this Lease, with the same force and effect as though performed by Lessee. An Approved Encumbrancer shall have standing to pursue any appeals, permitted by applicable Navajo Nation law that Lessee would be entitled to pursue. Lessor shall not terminate the Lease if an Approved Encumbrancer has cured or is taking action diligently to cure Lessee's default and has commenced and is pursuing diligently either a foreclosure action or an assignment in lieu of foreclosure.

12. **SANITATION.** Lessee hereby agrees to comply with all applicable sanitation laws, regulations or other requirements of the United States and the Navajo Nation. Lessee agrees to dispose of all solid waste in compliance with applicable federal and Navajo Nation law, either in an approved sanitary landfill or transfer station, or with a commercial sanitary collection service. Lessee further agrees at all times to maintain the entire premises in a safe, sanitary condition, presenting a good appearance both inside and outside the leased premises.

13. **HAZARDOUS MATERIALS.** Lessee shall not cause or permit any hazardous substance to be used, stored, generated, or disposed of on or in the premises without the prior written approval of Lessor, which approval may be given, given upon conditions, or denied in the sole discretion of Lessor and Encumbrancer, if any, respectively.

14. **INTEREST OF MEMBER OF CONGRESS.** No member of or delegate to Congress or any Resident Commissioner shall be admitted to any share or part of this Lease or to any benefit that may arise herefrom.

15. **OBLIGATIONS TO THE UNITED STATES.** It is understood and agreed that should the leased premises be placed in trust or restricted status, all of Lessee's obligations under this Lease and the obligation of any sureties shall be to the United States as well as to Lessor and the provisions of 25 U.S.C. §415, as implemented by the regulations contained in 25 C.F.R. Part 162, and all amendments or successors thereto, shall apply.

may hereafter designate in writing.

23. **EFFECTIVE DATE.** This Lease shall take effect on the date of approval of this Lease by Lessor.

THE NAVAJO NATION, LESSOR

_____ By: _____
Date Director, Navajo Land Department

WITNESSES:

_____ _____
LESSEE

_____ _____
LESSEE

COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal and Interest; Prepayment and Late Charges. Borrower shall promptly pay when due the principal of and interest on the debt evidenced by the Note and any prepayment and late charges due under the Note.

2. Funds for Taxes and Insurance. Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments are due under the Note, until the Note is paid in full, a sum ("Funds") for: (a) yearly taxes and assessments which may attain priority over this Security Instrument as a lien on the Property; (b) yearly leasehold payments or ground rents on the Property, if any; (c) yearly hazard or property insurance premiums; (d) yearly flood insurance premiums, if any; (e) yearly mortgage insurance premiums, if any; and (f) all sums payable by Borrower to Lender, in accordance with the provisions of paragraph 8, in lieu of the payment of mortgage insurance premiums. These items are called "Escrow Items." Lender may, at any time, collect and hold Funds in an amount not to exceed the maximum amount a lender for a federally related mortgage loan may require for Borrower's escrow account under the federal Real Estate Settlement Procedures Act of 1974, as amended from time to time, 12 U.S.C. 2601 et seq. ("RESPA"), unless another law that applies to the Funds sets a lesser amount. If so, Lender may, at any time, collect and hold Funds in an amount not to exceed the lesser amount. Lender may estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with applicable law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is such an institution) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items. Lender may not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. Unless an agreement is made or applicable law requires interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender may agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds, showing credits and debits to the Funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for all sums secured by this Security Instrument.

If the Funds held by Lender exceed the amounts permitted to be held by applicable law, Lender shall account to Borrower for the excess Funds in accordance with the requirements of applicable law. If the amount of the Funds held by Lender at any time is not sufficient to pay the Escrow Items when due, Lender may so notify Borrower in writing, and, in such case, Borrower shall pay to Lender the amount necessary to make up the deficiency. Borrower shall make up the deficiency in no more than twelve monthly payments, at Lender's sole discretion.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender. If, under paragraph 21, Lender shall acquire or sell the Property, Lender, prior to the acquisition or sale of the Property, shall apply any Funds held by Lender at the time of acquisition or sale as a credit against the sums secured by this Security Instrument.

3. Application of Payments. Unless applicable law provides otherwise, all payments received by Lender under paragraphs 1 and 2 shall be applied: first, to any prepayment charges due under the Note; second, to amounts payable under paragraph 2; third, to interest due; fourth, to principal due; and last, to any late charges due under the Note.

4. Charges; Liens. Borrower shall pay all applicable taxes, assessments, charges, fines and impositions attributable to the Property which may attain priority over this Security Instrument and leasehold payments or ground rents, if any. Borrower shall pay these obligations in the manner provided in paragraph 2, or if not paid in that manner, Borrower shall pay them on time directly to the person owed payment. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this paragraph. If Borrower makes these payments directly, Borrower shall promptly furnish to Lender receipts evidencing the payments.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 15 days of receipt of notice.

5. Hazard or Property Insurance. Borrower shall keep the improvements now existing or hereafter erected

on the Property insured against loss by fire, hazards included within the term "extended coverage" and any other hazards, including floods or flooding, for which Lender requires insurance. This insurance shall be maintained in the amounts and for the periods that Lender requires. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's approval, which shall not be unreasonably withheld. If Borrower fails to maintain coverage described above, Lender may, at Lender's option, obtain coverage to protect Lender's rights in the Property in accordance with paragraph 7.

All insurance policies and renewals shall be acceptable to Lender and shall include a standard mortgage clause. Lender shall have the right to hold the policies and renewals. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible and Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. If Borrower abandons the Property, or does not answer within sixty (60) days of receipt of a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may collect the insurance proceeds. Lender may use the proceeds to repair or restore the Property or to pay sums secured by this Security Instrument, whether or not then due. The sixty (60)-day period will begin when the notice is deemed to have been received by Borrower in accordance with paragraph 14.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of the payments. If under paragraph 21 the Property is acquired by Lender, Borrower's right to any insurance policies and proceeds resulting from damage to the Property prior to the acquisition shall pass to Lender to the extent of the sums secured by this Security Instrument immediately prior to the acquisition.

6. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application; Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence within sixty days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control. Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate, or commit waste on the Property. Borrower shall be in default if any forfeiture action or proceeding, whether civil or criminal, is begun that in Lender's good faith judgment could result in forfeiture of the Property or otherwise materially impair the lien created by this Security Instrument or Lender's security interest. Borrower may cure such a default and reinstate, as provided in paragraph 18, by causing the action or proceeding to be dismissed with a ruling that, in Lender's good faith determination, precludes forfeiture of the Borrower's interest in the Property or other material impairment of the lien created by this Security Instrument or Lender's security interest. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

7. Protection of Lender's Rights in the Property. If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include paying any sums secured by a lien which has priority over this Security Instrument, appearing in court, paying reasonable attorneys' fees and entering on the Property to make repairs. Although Lender may take action under this paragraph 7, Lender does not have to do so.

Any amounts disbursed by Lender under this paragraph 7, shall become additional debt of Borrower secured by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment.

8. Mortgage Insurance. If Lender required mortgage insurance as a condition of making the loan secured by this Security Instrument, Borrower shall pay the premiums required to maintain the mortgage insurance in

effect. If, for any reason, the mortgage insurance coverage required by Lender lapses or ceases to be in effect, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the mortgage insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the mortgage insurance previously in effect, from an alternate mortgage insurer approved by Lender. If substantially equivalent mortgage insurance coverage is not available, Borrower shall pay to Lender each month a sum equal to one-twelfth of the yearly mortgage insurance premium being paid by Borrower when the insurance coverage lapsed or ceased to be in effect. Lender will accept, use and retain these payments as a loss reserve in lieu of mortgage insurance. Loss reserve payments may no longer be required, at the option of Lender, if mortgage insurance coverage (in the amount and for the period that Lender requires) provided by an insurer approved by Lender again becomes available and is obtained. Borrower shall pay the premiums required to maintain mortgage insurance in effect, or to provide a loss reserve, until the requirement for mortgage insurance ends in accordance with any written agreement between Borrower and Lender or applicable law.

9. Inspection. Lender or its agent may make reasonable entries upon and inspections of the Property. Lender shall give Borrower notice at the time of or prior to an inspection specifying reasonable cause for the inspection.

10. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in lieu of condemnation, shall be assigned and paid to Lender, and shall be applied in the manner described below.

In the event of a total taking of the Property, the proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with any excess paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Property immediately before the taking is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the taking, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the taking, divided by (b) the fair market value of the Property immediately before the taking. Any balance shall be paid to Borrower. In the event of a partial taking of the Property in which the fair market value of the Property immediately before the taking is less than the amount of the sums secured immediately before the taking, unless Borrower and Lender otherwise agree in writing or unless applicable law otherwise provides, the proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the condemnor offers to make an award or settle a claim for damages, Borrower fails to respond to Lender within sixty (60) days after the date the notice is deemed to have been received in accordance with paragraph 14, Lender is authorized to collect and apply the proceeds, at its option, either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due.

Unless Lender and Borrower otherwise agree in writing, any application of proceeds to principal shall not extend or postpone the due date of the monthly payments referred to in paragraphs 1 and 2 or change the amount of such payments.

11. **Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to any successor in interest of Borrower shall not operate to release the liability of the original Borrower and Borrower's successors in interest. Lender shall not be required to commence proceedings against any successor in interest or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

12. **Successors and Assign Bound; Joint and Several Liability; Co-signers.** The covenants and agreements of this Security Instrument shall bind and benefit the successors and assigns of Lender and Borrower, subject to the provisions of paragraph 17. Borrower's covenants and agreements shall be joint and several. Any Borrower who co-signs this Security Instrument, but does not execute the Note: (a) is co-signing this Security Instrument only to mortgage, grant and convey that Borrower's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower may agree to extend, modify, forbear, or make any accommodations with regard to the terms of this Security Instrument or the Note without that Borrower's consent.

13. **Loan Charges.** If the loan secured by this Security Instrument is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this

refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge under the Note.

14. Notice. Any notice to Borrower provided for in this Security Instrument shall be in writing and shall be delivered personally to Borrower, unless Borrower elects to receive notice only by certified mail, return receipt requested, to the mailing address designated herein, by checking box (a) below. If Borrower does not elect to receive notice only by certified mail, Borrower may require that personal delivery of written notice be accompanied by an oral Navajo language translation, by checking box (b) below. In addition, regardless of whether written notice upon Borrower is to be made by personal delivery or by certified mail, Borrower may require that written notice also be given to a debt counseling entity and/or to another person and/or entity, by certified mail, return receipt requested, to the mailing address(es) designated herein, by checking box(es) (c) and/or (d) below. (Check applicable box(es).)

a. ___ Only by certified mail, return receipt requested
b. ___ Written personal delivery accompanied by oral Navajo language translation
c. ___ Notice to the debt counseling entity selected by Borrower:
Name of entity:_____
Address:_____
Contact person:_____
Telephone:_____
d. ___ Notice to other individual or entity:_____
Name:_____
Address:_____
Contact person (if any):_____
Telephone:_____

Notice by personal delivery shall be deemed to have been received on the date delivered with proof of delivery thereof. Notice by certified mail shall be deemed to have been received on the date shown on the return receipt received by Lender, or, if no receipt is returned to Lender, twenty-one (21) days after mailing. Notice to Borrower shall be deemed to have been received on the latest date that notice is made in accordance with each of the methods selected by Borrower in this Security Instrument.

Any notice to Lender shall be deemed to have been given to Lender by mailing it by first class mail to Lender's address designated herein.

Any party, debt counseling entity and/or other person may change the address to which notice shall be delivered or mailed by notice to the other party(ies), entity and/or person.

15. Governing Law; Severability. This Security Instrument shall be governed by the law of the Navajo Nation and applicable federal law. The courts of the Navajo Nation shall have sole and exclusive jurisdiction with respect to all controversies or claims relating to or arising out of this Mortgage or the Note. In the event that any provision or clause of this Security Instrument or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision. To this end the provisions of this Security Instrument and the Note are declared to be severable.

16. Borrower's Copy. Lender shall cause Borrower to be given one conformed copy of the Note and of this Security Instrument.

17. Transfer of the Property or a Beneficial Interest in Borrower; Assumption. If all or any part of the Property or any interest in it is sold or transferred (or if a beneficial interest in Borrower is sold or transferred and Borrower is neither a natural person nor the Navajo Nation) without Lender's prior written consent, Lender may, at its option, require immediate payment in full of all sums secured by this Security Instrument. Lender shall not exercise this option if such exercise by Lender is prohibited by federal law as of the date of this Security Instrument. Nor shall Lender exercise this option if (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender; and (c) such person otherwise qualifies under Navajo law and Lessor consents to an assignment of the Homesite Lease described above. If the foregoing conditions (a) through (c) are met, and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, then Lender shall release Borrower in writing from all obligations under this Mortgage and the Note.

To the extent permitted by applicable law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that

is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises such option to require immediate payment in full, Lender shall give Borrower notice of acceleration in accordance with paragraph 14. Such notice shall provide a period of not less than sixty (60) days from the date the notice is deemed to have been received in accordance with paragraph 14 within which Borrower must pay all sums secured by this Security Instrument and shall explain the remedies available to Lender if Borrower fails to pay such sums prior to the expiration of such period. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower; provided, however, Lender's right to invoke any remedies under this Security Instrument after the expiration of this period shall be subject to the Navajo Nation's right of first refusal under paragraph 26 to acquire Borrower's interest in the Property.

18. Borrower's Right to Reinstate. If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earlier of: (a) five (5) days (or such other period as applicable law may specify for reinstatement) before sale of the Property pursuant to any power of sale contained in this Security Instrument; or (b) entry of judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses reasonably incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees; and (d) takes such action as Lender may reasonably require to assure that the lien of this Security Instrument, Lender's rights in the Property and Borrower's obligation to pay the sums secured by this Security Instrument shall continue unchanged. Upon reinstatement by Borrower, this Security Instrument and the obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under paragraph 17.

19. Sale of Note; Change of Loan Servicer. The Note or a partial interest in the Note (together with this Security Instrument) may be sold one or more times without prior notice to Borrower. A sale may result in a change in the entity (known as the "Loan Servicer") that collects monthly payments due under the Note and this Security Instrument. There also may be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change in accordance with paragraph 14 above and applicable law. The notice will state the name and address of the new Loan Servicer and the address to which payments should be made. The notice will also contain any other information required by applicable law.

20. Hazardous Substances. Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property that is in violation of any Environmental Law. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property.

Borrower shall promptly give Lender written notice of any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge. If Borrower learns, or is notified by any governmental or regulatory authority, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law.

As used in this paragraph 20, "Hazardous Substances" are those substances defined as toxic or hazardous substances by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials. As used in this paragraph 20, "Environmental Law" means federal laws and laws of the Navajo Nation that relate to health, safety or environmental protection.

21. Acceleration; Remedies. Lender shall give notice to Borrower, the Navajo Nation and the Bureau of Indian Affairs, prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under paragraph 17 unless applicable law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than sixty (60) days from the date the notice is received by Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured

on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding; provided, however, prior to any sale of the Property subsequent to such foreclosure proceeding, Lender shall notify the Navajo Nation of the availability of the Property for sale and the Navajo Nation shall be entitled to exercise its right of first refusal to purchase the Property in accordance with paragraph 26 below and the terms of that certain Homesite Lease described above. Lender shall be entitled to seek all reasonable expenses incurred in pursuing the remedies provided in this paragraph 21, including, but not limited to, reasonable attorneys' fees, and costs of title evidence.

22. Ground Lease Default. A default by Borrower under the ground lease shall constitute a default under this Security Instrument.

23. Release. Upon payment of all sums secured by this Security Instrument, Lender shall release this Security Instrument without charge to Borrower. Borrower shall pay any recordation costs.

24. Redemption Period. If this Security Instrument is foreclosed, the redemption period after judicial sale shall be two months.

25. Riders to this Security Instrument. If one or more riders are executed by Borrower and recorded together with this Security Instrument, the covenants and agreements of each such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Security Instrument as if the rider(s) were a part of this Security Instrument. [Specify rider(s) below.]

_____

_____

26. **Navajo Nation Right of First Refusal.** Subsequent to Borrower's breach of any covenant or agreement in this Security Instrument, and upon the expiration of any applicable cure period provided Borrower under paragraph 21 above, pursuant to the terms of the Homesite Lease described above, the Navajo Nation, as Lessor thereunder, shall have the right of first refusal to acquire Borrower's Property (subject to all valid liens and encumbrances) upon either payment in full of all sums secured by this Security Instrument, assumption of the loan secured by this Security Instrument and execution of an assumption agreement acceptable in all respects to Lender or, prior to Lender's sale of the Property, upon execution of a new Note and Security Instrument for all amounts secured by this Security Instrument, including any and all unpaid interest due hereunder, and the payment to the Lender of any and all reasonable costs and expenses incurred by Lender in connection with its enforcement of this Security Instrument.

This right of first refusal shall be exercised by notice in writing from the Navajo Nation to Borrower and Lender within sixty (60) days from the delivery of written notice from Lender of the availability of the Property. The right of first refusal shall be exercised solely for the purpose of providing a principal residence on the Property.

BY SIGNING BELOW, Borrower and Lender accept and agree to the terms and covenants contained in this Security Instrument, and in any rider(s) executed by Borrower and recorded with it.

_____ _____

Lender -Borrower

_____ _____

Attest -Borrower

_____)
) ss.
_____)

The foregoing instrument was acknowledged before me this _____
[Date]

by _____
[Borrower(s) acknowledging]

My Commission expires:

_____ _____
Notary Public

USE ONLY FOR ENCUMBRANCES OF TRUST OR RESTRICTED LAND:

CERTIFICATE OF APPROVAL

Pursuant to 25 CFR 162.12(c) and authority delegated to the Commissioner of Indian Affairs by the Secretary of the Interior (10 BIAM 2.1, Section 13(n) of Order 2508) and to Area Directors (209 DM 8, Secretary's Order Nos. 3150 and 3177, and 10 BIAM, Bulletin 13, as amended), the foregoing mortgage of leasehold interest is hereby approved on behalf of the Secretary of the Interior upon the condition that the mortgage is subject to the terms and provisions of the lease described therein and the regulations of the Secretary of the Interior relating to the leasing of tribal and individually-owned trust or restricted lands and upon the condition that the mortgage relates only to the leasehold estates and is not to be construed as an encumbrance or lien against tribe's or individual owner's title to the land involved.

_____ _____
Date Area Director, Navajo Area Office

——(Space Below This Line Reserved For Acknowledgment)——

NOTE

EXHIBIT 9

....., 19.....

.....Navajo Nation (.....).....
Property Address City Chapter State Zip Code

1. BORROWER'S PROMISE TO PAY

In return for a loan by Lender to Borrower, Borrower promises to pay U.S. $.....(this amount will be called "principal,") plus interest, to the order of Lender. Lender is ..... Borrower understands that Lender may transfer this Note. Lender and anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called "Note Holder."

2. INTEREST

Interest will be charged on unpaid principal until the full amount of principal has been paid. Borrower will pay interest at a yearly rate of .....%.

Borrower will pay the interest rate required by this Section 2 both before and after any default described in Section 4 of this Note.

3. PAYMENTS

Borrower will pay principal and interest by making payments each month of U.S. $..... Borrower will make such payments on the ..... day of each month beginning on ....., 19..... Borrower will make these payments every month until all of the principal and interest and any other charges, described below, that Borrower may owe under this Note are paid. Borrower's monthly payments will be applied to interest before principal. If, on ....., ..., Borrower still owes amounts under this Note, Borrower will pay all those amounts, in full, on that date, which is called the "maturity date."

Borrower will make such monthly payments at .... or at a different place if required by Note Holder.

4. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If Note Holder has not received the full amount of any monthly payment by the end of ..... calendar days after the date it is due, Borrower will pay a late charge to Note Holder. The amount of the charge will be .....% of the overdue payment of principal and interest, but not less than U.S. $..... and not more than U.S. $..... Borrower will pay this late charge promptly, but only once on any late payment.

(B) Default

If Borrower does not pay the full amount of each monthly payment on the date it is due, Borrower will be in default.

(C) Notice of Default

If Borrower is in default, Note Holder may send Borrower notice as provided in Section 8 below telling Borrower that if Borrower does not pay the overdue amount by a certain date, Note Holder may require Borrower to pay immediately the full amount of principal which has not been paid and all the interest that Borrower owes on that amount. That date must be at least 60 days after the date on which the notice is delivered to Borrower.

(D) No Waiver By Note Holder

Even if, at a time when Borrower is in default, Note Holder does not require Borrower to pay immediately in full as described above, Note Holder will still have the right to do so if Borrower is in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If Note Holder has required Borrower to pay immediately in full as described above, Note Holder will have the right to be paid back by Borrower for all of its reasonable costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.

5. THIS NOTE SECURED BY A MORTGAGE

In addition to the protections given to Note Holder under this Note, a Mortgage of even date herewith protects Note Holder from possible losses which might result if Borrower does not keep the promises made in this Note. That Mortgage describes how and under what conditions Borrower may be required to make immediate payment in full of all amounts that Borrower owes under this Note.

6. BORROWER'S RIGHT TO PREPAY

Borrower has the right to make payments of principal at any time before they are due. A payment of principal only is known as a "prepayment." When Borrower makes a prepayment, Borrower will tell Note Holder in writing that Borrower is doing so. A prepayment of all of the unpaid principal is known as a "full prepayment." A prepayment of only part of the unpaid principal is known as a "partial prepayment."

Borrower may make a full prepayment or a partial prepayment without any penalty. Note Holder will use all of Borrower's prepayments to reduce the amount of principal that Borrower owes under this Note. If Borrower makes a partial prepayment, there will be no changes in the due dates or changes in the amounts of Borrower's monthly payment unless Note Holder agrees in writing to those changes. Borrower may make a full prepayment at any time. If Borrower chooses to make a partial prepayment, Note Holder may require Borrower to make the prepayment on the same day that one of the monthly payments is due.

7. WAIVERS

Borrower waives his or her rights to require Note Holder to do certain things. Those things are: (A) to demand payment of amounts due (known as "presentment"); (B) to give notice that amounts due have not been paid (known as "notice of dishonor"). Anyone else who agrees to keep the promises made in this Note, or who agrees to make payments to Note Holder if Borrower fails to keep his or her promises under this Note, or who signs this Note to transfer it to someone else also waives these rights. These persons may include "guarantors, sureties and endorsers."

8. GIVING OF NOTICES

Any notice to Borrower provided for in this Note shall be in writing and shall be delivered personally to Borrower, unless Borrower elects to receive notice only by certified mail, return receipt requested, to the mailing address designated herein, by checking box (a) below. If Borrower does not elect to receive notice only by certified mail, Borrower may require that personal delivery of written notice be accompanied by an oral Navajo language translation, by checking box (b) below. In addition, regardless of whether written notice upon Borrower is to be made by personal delivery or by certified mail, Borrower may require that written notice also be given to a debt counseling entity and/or to another person and/or entity, by certified mail, return receipt requested, to the mailing address(es) designated herein, by checking box(es) (c) and/or (d) below. [Check applicable box(es).]

a. .... Only by certified mail, return receipt requested
b. .... Written personal delivery accompanied by oral Navajo language translation
c. .... Notice to the debt counseling entity selected by Borrower:
Name of entity:.....
Address:.....
Contact person:.....
Telephone:.....
d. .... Notice to other individual or entity:.....
Name:.....
Address:.....
Contact Person (if any).....
Telephone:.....

Notice by personal delivery shall be deemed to have been received on the date delivered with proof of delivery thereof. Notice by certified mail shall be deemed to have been received on the date shown on the return receipt received by Note Holder, or, if no receipt is returned to Note Holder, twenty-one (21) days after mailing. Notice to Borrower shall be deemed to have been received on the latest date that notice is made in accordance with each of the methods selected by Borrower in this Note.

Any notice to Note Holder shall be deemed to have been given to Note Holder by mailing it by first class mail to Note Holder's address designated herein.

Any party, debt counseling entity and/or other person may change the address to which notice shall be delivered or mailed by notice to the other party(ies), entity and/or person.

9. OBLIGATIONS OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each person is fully and personally obligated to keep all of the promises made in this Note, including the promise to pay the full amount owed. Any person who is a guarantor, surety, or endorser of this Note is also obligated to do these things. Any person who takes over Borrower's rights or obligations under this Note will have all of Borrower's rights and must keep all of Borrower's promises made in this Note. Note Holder may enforce its rights under this Note against each person individually or against all of such persons together. This means that any one of such persons may be required to pay all of the amounts owed under this Note.

10. GOVERNING LAW; SEVERABILITY

This Note shall be governed by the law of the Navajo Nation and applicable federal law. The courts of the Navajo Nation shall have sole and exclusive jurisdiction with respect to all controversies or claims relating to or arising out of this Note. In the event that any provision or clause of this Note conflicts with applicable law, such conflict shall not affect other provisions of this Note which can be given effect without the conflicting provision. To this end the provisions of this Note are declared to be severable.

11. LOAN CHARGES

If a law, which applies to this loan and which sets maximum loan charges, is finally interpreted so that the interest or other loan charges collected or to be collected in connection with this loan exceed the permitted limits, then: (i) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (ii) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Note Holder may choose to make this refund by reducing the principal Borrower owes under this Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment.

.....

Borrower

.....

Borrower

.....

Borrower

(Sign Original Only)

ACCEPTANCE:

.....

Lender

.....

Attest

DRAFT - DRAFT - DRAFT - DRAFT - DRAFT - DRAFT - DRAFT - DRAFT

Civil Rights in Indian Country--Tribal Court Decisions 1988-92
by Jane Marx, Esq
April 30, 1993

INTRODUCTION

This memorandum analyzes civil rights cases decided by tribal courts over the last five years as reported in the Indian Law Reporter. Research is current up to April 23, 1993. No reported civil rights decisions for 1993 were located. This memorandum covers cases brought expressly under the Indian Civil Rights Act, 25 U.S.C. Section 1301--1326 ("ICRA"), as well as other cases that impact the civil rights of tribal members based on tribal constitutions or other law, whether or not the ICRA is cited. The vast majority of cases address claims brought for violation of the guarantees of due process and equal protection. A number of cases deal with specific rights such as the right of a criminal defendant to a fair trial. Still other cases focus on tribal sovereign immunity from suit.

This memorandum groups the cases discussed by topic. Where a case involves more than one topic, it is discussed once and cited again as appropriate.

I. REVIEW OF TRIBAL COURT DECISIONS

A. DUE PROCESS.

1. Removal from Office and Other Employment Issues.

In Kinslow v. Business Committee of the Citizen Band Potawatomi Tribe, 15 Indian L. Rep. 6007 (C.B.Pot.Sup.Ct. Feb. 17, 1988), the Citizen Band Potawatomi Tribe's Business Committee removed a committee member. He sued, claiming that his due process rights had been violated. He alleged that the business committee, composed of members who voted for his removal, was not an impartial tribunal because the committee members were the alleged victims of his claimed misconduct that precipitated the removal action. The Citizen Band Potawatomi Supreme Court held that the plaintiff's rights were not violated. The court noted that due process requires fair treatment, including notice and the right to be heard. However, the court noted that the ICRA allows tribes to structure their governments as they deem appropriate. The Potawatomi constitution authorized removal of a business committee member by other committee members. In contrast to criminal proceedings, the removal proceedings need not be conducted in front of an impartial tribunal.

Similarly, in McClean v. Bailey, 15 Indian L. Rep. 6013 (N.Chy.Tr.Ct. April 22, 1988), the court found no due process violation where a temporary board member of the Northern Cheyenne Housing Authority was removed from her position on the board and another person appointed. The court found that the plaintiff did not have a permanent appointment to the board, did not have a contract and, thus, lacked a property right in the board position. The court's decision, in part, was based on the procedural posture of the case: a petition for an extraordinary writ. The court found that plaintiff had not demonstrated a clear and indisputable right to a board position necessary for the granting of an extraordinary writ.

In re Certified Question II: Navajo Nation v. MacDonald, 16 Indian L. Rep. 6086 (Nav.Sup.Ct. April 13, 1989), presented a different approach. In this case, the Navajo Supreme Court addressed the due process requirements that must be met in placing the tribal Chairman or Vice-Chairman on administrative leave. The court reached the issue prior to being presented with an actual claim for violation of rights, based on the Window Rock District

Court's certification of a number of questions to the supreme court. The supreme court held that the following procedures must be provided: (1) the Tribal Council must act in a properly convened session with a quorum present; (2) an agenda for voting must be adopted; (3) the resolution placing the officials on administrative leave must be approved by a majority of the Council present; and (4) the resolution must not be a bill of attainder. The court expressly adopted the Anglo-American definition and test for whether a resolution is a bill of attainder.

In Southern Ute Public Housing Authority v. Pinnecoose, 18 Indian L. Rep. 6115 (S.Ute Tr.Ct. May 13, 1991), the court addressed certain constitutional claims arising from defendant Pinnecoose's counterclaims against the public housing authority. Although the factual and procedural posture of the housing authority and defendant Pinnecoose is not entirely clear from the opinioning a proceeding
challenging her wrongful termination and violation of her due process rights. Pinnecoose claimed that the housing authority came to know that she was not responsible for missing funds but took no steps to dismiss the action against her. The housing authority moved to dismiss the counterclaim contending defendant failed to state a claim for abuse of process. The court denied the motion, finding that plaintiff's allegations, if true, stated a claim.

The housing authority argued in the alternative that Pinnecoose should be required to prove that the housing authority's claims were a sham and had no realistic basis. The housing authority argued that the fundamental right to petition for redress of grievances can only be denied if the process is used for improper purpose. As such, the housing authority claimed that defendant should be required to prove that the claims were a sham, a recognized exception to the right to petition for redress. The court agreed that defendant should be required to show that the housing authority's claims were not permitted under the right to petition for redress because not supportable in law or fact.

In Davis v. Keplin, 18 Indian L. Rep. 6148 (Turt.Mt.Tr.Ct. Sept. 6, 1991), an employee of the Turtle Mountain Tribe alleged he had been deprived of due process when he was terminated without a hearing. The employee claimed that he was a permanent employee entitled to a hearing under the personnel manual. The court held that it had subject matter over the case and the claims were not barred by the doctrine of sovereign immunity. However, the court ruled that the defendants in their individual capacity were entitled to qualified immunity. The court reasoned that the employee's claims amounted to an allegation that the tribal officials were mistaken when they determined that the employee was a temporary employee. In that regard, the court believed it would be unfair to rule that the ICRA abrogated their qualified immunity.

In Stone v. Swan, 19 Indian L. Rep. 6093 (Colv.Tr.Ct. Apr. 15, 1992), a business council member who was removed from office based on a claim of gross misconduct in office that his removal violated his right to due process because he was not provided adequate notice of the proceedings against him. The Tribal Court of the Colville Confederated Tribes began by noting that it had inherent jurisdiction to review governmental actions to assure compliance with the tribal constitution. After determining that sovereign immunity did not bar review of the claim, the court found that the notice given to the member of the charge against him was adequate. The court found that, after being given notice, the member proceeded to answer the charges. The member did not object to the adequacy of time given to respond or in any way claim that he was being prejudiced by the notice or hearing process. The court found that the notice and process provided was adequate and satisfied traditional notions of due process, and further found that the member waived his right to any further process.

2. Elections.

A number of courts have addressed election requirements imposed by tribal law or the Indian Civil Rights Act. In Kavena v. Hamilton, 16 Indian L. Rep. 6061 (Hopi Tr.Ct. Aug. 15, 1988), the tribal court enjoined a controversial tribal election involving the restructuring of traditional tribal government until guidelines and standards had been adopted that would make the elections conform to the requirements of the ICRA. On appeal, the Hopi Tribal Appellate Court affirmed the tribal court's decision. Kavena v. Hopi Tribal Court, 16 Indian L. Rep. 6063 (Hopi Tr.App.Ct. Mar. 21, 1989). The court reasoned that changes to the referendum could lead to confusion, and the constitutional guarantees of notice and sufficient opportunity to become informed about the elections had not been provided.

In Ponca Tribal Election Board v. Snake, 17 Indian L. Rep. 6085 (Ct.Ind.App. Ponca Nov. 10, 1988), the appellate court faced a claim that the tribal election board's conduct deprived certain potential candidates for public office of due process. The court held that the potential candidates had failed to exhaust their tribal remedies and remanded the case to the Ponca Tribal Election Board for a determination consistent with certain guidelines set forth in the court's opinion.

The Shoshone Bannock Tribal Court reached a similar conclusion in George v. Shoshone Bannock Tribes, 16 Indian L. Rep. 6084 (Sho.-Ban.Tr.Ct. May 10, 1989). In that case, the plaintiff alleged that the results of the primary election were invalid because one of the chosen candidates was not in compliance with the residency requirements. The court dismissed the action on the basis that the plaintiff failed to exhaust her tribal remedies. The court recognized, however, that formal procedures for such tribal remedies did not exist, and the court established proper procedures to follow. The court noted that its subsequent review, if any, would address whether due process and equal protection had been accorded to plaintiff.

In Committee for Better Tribal Government v. Southern Ute Election Board, 17 Indian L. Rep. 6095 (S.Ute Tr. Ct. Aug. 13, 1990), petitioners alleged that the tribal election board failed to take steps to remedy certain irregularities in a recall election, which resulted in a violation of their due process rights. The court rejected the election board's contention that the board, not the court, waasoned that absent legislation prohibiting assertion of tribal court jurisdiction, it would undermine the judicial process to fail to take jurisdiction over the claimed violations. Having asserted tribal court jurisdiction over the recall election issue, the court retained for trial the claim that petitioners had been denied due process of law. The Southwest Intertribal Court of Appeals affirmed the findings of the trial court that allowance of a proxy vote in a recall election was a violation of due process. Southern Ute Election Board v. Comm. for Better Tribal Govt., 18 Indian L. Rep. 6144 (S.W. Intertr.Ct.App. Aug. 19, 1991).

A candidate whose name had been removed from the ballot challenged as illegal her removal from the ballot in Apache Election Board v. Wildes, 18 Indian L. Rep. 6033 (Ct.Ind.App. Apache, Dec. 7, 1990). The court of appeals affirmed the trial court's determination that the election board had unlawfully imposed eligibility requirements in excess of those set forth in the tribal constitution, and held the election results invalid.

In Bennett v. Navajo Board of Election Supervisors, 18 Indian L. Rep. 6009 (Nav.Sup.Ct. Dec. 12, 1990), the Navajo Board of Election Supervisors had disqualified the appellant as a presidential candidate in a primary election based on a tribal statute requiring all candidates for the office of president or vice-president to have previously served as an elected official or as an employee of the Tribe. The disqualified candidate filed an action claiming the statute violated her rights to due process and

equal protection. On appeal, the Navajo Supreme Court agreed. Citing specific federal and tribal law, as well as tribal custom, the court first established the appropriateness of judicial review of the statute and the decision of the board of election supervisors. The court then found that the statute violated due process because the requirement of previous employment with the Nation was vague and uncertain. The court noted that the board of election supervisors could not even decide the meaning of the statute.

In Swan v. CBC, 19 Indian L. Rep. 6113 (Colv.Tr.Ct. July 2, 1992), the court reviewed a claim that it should enjoin the business council's validation of election results because the council failed properly to respond to grievances filed regarding the election. The court found no irregularities in the business council's review of the grievance. The court held that the petitioner had not been denied the right to seek redress or his right to due process.

3. Evictions and Housing.

In Moose v. Lovelock-Winnemucca Indian Housing Authority, 15 Indian L. Rep. 6015 (Lovelock Ct.Ind.Off. May 12, 1988), the Lovelock Court of Indian Offenses took an unusual approach to ensuring itself that it had not deprived a tenant of the right to due process by issuance of an eviction order. In this case, the court sent its eviction order to the BIA court of appeals for an advisory opinion as to whether the evicted tenant was afforded due process under the ICRA. No tribal court of appeals with jurisdiction existed.

In Menominee Tribal Housing Authority v. Tucker, 18 Indian L. Rep. 6131 (Men.Tr.Ct. June 17, 1991), the court faced the issue of whether a tribal housing authority regulation requiring a public housing tenant to file proof of a legal separation in order to be considered for a rent adjustment violates the tenant's rights to due process and equal protection. The court noted initially that the voluminous cases alleging equal protection and due process violations do not contain rigidly fixed definitions and rules. After reviewing applicable regulations, the court held that the tribal housing authority regulation violated the tenant's right to due process.

The court ruled that due process was violated because the housing authority regulation shifted the burden of proving rent reduction entitlement because of a change in family income to the tenant in violation of federal regulations. Additionally, the court found that the regulation requiring a change in status to be filed in court violated due process because it imposed a substantial burden on the tenant to pay attorney's fees and filing fees in order to comply. The court noted that the regulation was particularly troublesome because it placed an additional financial burden on an individual who, by her very status as a public housing tenant, already was suffering from financial hardship.

4. Personal Property.

In Begay v. Navabe heard on the motions. The court recognized that under Navajo law, courts could order forfeiture of an automobile used for illegal delivery of alcohol so long as due process is provided. The court noted the concept of due process in Navajo law preceded the ICRA and the Navajo Bill of Rights. The court recognized that Navajo custom required all parties to a controversy to be notified and provided an opportunity to be heard. The district court procedure lacked such notice and opportunity to be heard.

5. Access to Courts.

In Farmer's State Bank of Mission v. Boyd, 18 Indian L. Rep. 6055 (Rbd.Sx.Tr.Ct.App. July 10, 1990), involving a mortgage foreclosure and sale, a party contended that his constitutional and civil rights were violated because he was not provided a jury trial. The court ruled that neither the Rosebud Sioux Tribe's

Constitution or the ICRA mandated a jury trial in a civil case. The tribal court rules provided for a jury trial in civil cases upon compliance with payment and filing requirements. In this case, the party had failed to comply. The court found no violation of rights. The court also summarily found that the allegation of denial of due process based on inadequate notice was wholly unsupported by evidence.

In Thorstenson v. Cudmore, 18 Indian L. Rep. 6051 (Chy.R.Sx.Ct.App. Feb. 15, 1991), a case involving a contract action between private parties, the Cheyenne River Sioux Tribal Court of Appeals found that it had subject matter jurisdiction over the lawsuit. The sole constitutional issue before the court was whether a Tribal Code provision that tribal court jurisdiction would exist between Indians and non-Indians when they stipulated that the case be heard in tribal court violates due process. The court emphatically held that, where it otherwise has subject matter jurisdiction over a claim, interpreting the code provision to limit tribal court jurisdiction only to cases where the parties so stipulate would violate due process. The court reasoned that Lakota cultural notions of fair play as well as the due process clause of the ICRA are violated by the potential that tribal governments could regulate on-Reservation conduct but the courts would have no ability to enforce those regulations.

In the Matter of the Estate of Goldtooth Begay #2, 19 Indian L. Rep. 6130 (Nav.Sup.Ct. Aug. 11, 1992) presented a different type of access issue. In this case, the estate administrator contended due process was violated by being denied the right to participate in a quiet title action which was litigated prior to the filing of the final report regarding distribution of the estate. At issue was the right to certain grazing and land use permits. The family court accepted the final report of the administrator with the exception of the permits. The court awarded those permits in accordance with the result of the quiet title action. The court found that the administrator was not denied due process because she had filed a motion to intervene in the quiet title action. That motion had not been denied at the time the judge entered the decision in the quiet title action. The court reasoned that if the judge in the quiet title action had failed to rule on the motion to intervene, the administrator and her family should have sought a writ of mandamus. The administrator's failure to take such an action resulted in a waiver of the right to claim a violation of due process.

B. EQUAL PROTECTION.

1. Elections.

In Day v. Hopi Election Board, 16 Indian L. Rep. 6057 (Hopi Tr.Ct. Feb. 29, 1988), the tribal court denied a motion to enjoin a primary election. The court sustained the election board's finding that petitioner could not qualify as a candidate for vice-chairman because he did not speak the Hopi language. Recognizing that the equal protection clause of the ICRA prohibited unreasonable discrimination, the court emphasized that all candidates were bound by the same language requirement. Petitioner was treated the same as other candidates. Reviewing the appropriateness of the language requirement, the court reasoned that a language requirement was no different from minimum age requirements for office. The court held that a language requirement waconstitutionality of tha tribe's election law relating to apportionment of votes. The court rooted its jurisdiction in part on the doctrine of separation of powers. The court also found that the vote apportionment issue was justiciable and not a political question over which it had no authority. The court of appeals reversed the tribal court's finding that the failure of the legislative council to apportion legislative votes according to the number of tribal members living in each district violated the equal protection provisions of the ICRA.

The court of appeals reasoned that where the tribe's election procedures parallel those found in Anglo-American Society, federal constitutional standards should be used to determine whether a challenged procedure violates the ICRA. The court then reviewed United States Supreme Court decisions regarding vote apportionment. On that basis, the court held that the use of a membership roll to weight the votes of legislative council members did not violate the equal protection clause of the ICRA.

In Bennett v. Navajo Board of Election Supervisors, 18 Indian L. Rep. 6009 (Nav.Sup.Ct. Dec. 12, 1990), supra at 7, the Navajo Supreme Court agreed that a potential presidential candidate's right to equal protection of the laws was violated by a statute requiring a candidate for the office of president or vice-president to have previously served as an elected official or as an employee of the Tribe. The court rejected the candidate's claim that the statute denied women equality of rights under the law. The court agreed that the statute impacted the fundamental right to participate in the political, governmental process and that the statutory restriction was unreasonable because a number of candidates might have as much or more experience and knowledge of government processes than elected officials or government employees.

2. Gender Discrimination.

In Muckleshoot Indian Tribe v. Moses, 16 Indian L. Rep. 6073 (Muckleshoot Tr.Ct.App. Apr. 19, 1988), a woman convicted under tribal law of fishing with an unauthorized person aboard her boat claimed that the tribal ordinance discriminates against women. The woman argued that the prohibition against nonmember fishing discriminated against women because fewer tribal women than tribal men can exercise their treaty fishing rights without assistance of a nonmember spouse. The court declined to reach the constitutional issue directly because the claim was unsupported by any credible evidence.

3. Marital Status Discrimination.

In an unusual case, Arizona Public Service Co. v. Office of Navajo Labor Relations, 17 Indian L. Rep. 6105 (Nav.Sup.Ct. Oct. 8, 1990), the court affirmed the finding of the tribal labor relations board that a company policy against nepotism resulted in marital status discrimination in violation of Navajo law. The company policy had resulted in loss of a number of jobs for tribal members. The court determined that the Navajo Preference in Employment Act ("NPEA") prohibited discrimination, including discrimination on the basis of marital status, and that the company policy against nepotism resulted in such discrimination. The court discussed at length the Tribe's authority to enact the NPEA. Having established the appropriateness of the NPEA, the court reviewed the fundamental right of marriage and its particular importance in tribal life. The court held that the anti-nepotism policy as it related to marital status resulted in unlawful discrimination.

In Menominee Tribal Housing Authority v. Tucker, 18 Indian L. Rep. 6131 (Men.Tr.Ct. June 17, 1991), supra at 8, the court held that a tribal housing authority regulation requiring a public housing tenant to file proof of a legal separation in order to be considered for a rent adjustment violates the tenant's rights to equal protection. The court found the classification unreasonable and further found that a regulation requiring a legal separation in order to be eligible for a rent reduction infringed upon the inherent right to marriage and family.

4. Child Custody

In a child custody action, Griffith v. Wilkie, 18 Indian L. Rep. 6058 (N.Plns.Intertr.Ct. App. Jan. 10, 1991), the court of appeals held that a tribal code provision precluding the father of an illegitimate child from custody and care of the child violated the equal protection clause of the ICRA and the federal

constitution. The statute expressly stated that the mother of an illegitimate child was entitled to custody. The court noted that the father had acknowledged paternity and had participated in the support and care of the child since birth. On that basis, it was unreasonable and unconstitutional to deny custody to the father without an examination into the best interests of the child. The court remanded the case to the trial court for a determination of the best interests of the child.

5. Taxation

In Public Service Co. of New Mexico v. Chairman, Tax Protest Panel, 18 Indian L. Rep. 6097 (Jic.Ap.Tr.Ct. May 14, 1991), the Public Service Company challenged imposition of a possessory interest tax on interests held in fee under a lease or through an easement or right-of-way. The company claimed that the tax violated the equal protection clause because it unreasonably discriminated against non-residents. The company argued that the tax unfairly shifted the revenue burdens of the tribe onto nonresident customers of the utility company. The court rejected this argument and ruled that the tax did not violate the right to equal protection. The court reemphasized the taxation authority of tribes. The court then discussed the specific taxation scheme, stating that the possessory tax classified property based on usage, not upon the status of the owner or taxpayer. The court noted that nonresident owners may receive the same exemptions as resident owners receive, and resident owner of certain classes of property are subject to the same tax as nonresident owner of the same class of property.

C. CRIMINAL TRIAL PROCEDURES.

1. Right to Counsel and Effective Assistance of Counsel.

In Lummi Indian Tribe v. Edwards, 16 Indian L. Rep. 6005 (Lummi Tr.Ct.App. June 10, 1988), the court rejected appellant's claim that she was denied her right to counsel and effective assistance of counsel. The court disagreed that she was given court was not sympathetic to her failure to secure assistance until a few days before trial.

In Navajo Nation v. MacDonald, Sr., 17 Indian L. Rep. 6124 (Nav. Sup. Ct. Sept. 21, 1990), four attorneys appointed to represent MacDonald in criminal proceedings and wishing to withdraw as counsel filed a petition for writ of prohibition to force the district court to allow them to withdraw. The Navajo Supreme Court recognized important constitutional issues were at stake, including the attorneys' claims of denial of equal protection as well as MacDonald's right to counsel. The court remanded the case to the trial court for consideration of the facts as well as the law relevant to the claims. In Navajo Nation v. MacDonald, Sr., 17 Indian L. Rep. 6126 (Nav. Sup. Ct. Sept. 26, 1990), the supreme court determined it lacked jurisdiction to act upon the petition for writ of prohibition pending determination by the district court.

In a later proceeding in the criminal case against MacDonald, Sr., the supreme court affirmed the convictions. Navajo Nation v. MacDonald, Sr., 19 Indian L. Rep. 6053 (Nav.Sup.Ct. Dec. 30, 1991). The court rejected claims that MacDonald had been denied his right to counsel and that he had ineffective assistance of counsel.

In Navajo Nation v. MacDonald, Jr., 19 Indian L. Rep. 6079 (Nav.Sup.Ct. February 13, 1992), the court rejected similar claims made by MacDonald, Jr. The court found that counsel were competent and provide an excellent defense.

In a separate but related case, Boos v. Yazzie, 17 Indian L. Rep. 6115 (Nav. Sup. Ct. Sept. 24, 1990), the court upheld the district court's refusal to allow attorneys appointed to represent MacDonald, Jr. in criminal proceedings to withdraw as counsel. The court rejected the attorneys' argument that their appointment constituted a taking of private property for public use without

just compensation, in violation of the Navajo Bill of Rights. Citing federal case law, the court held that appointment of an attorney member of the Navajo Bar to represent an indigent defendant is not taking of private property.

1. Speedy Trial.

In Lummi Indian Tribe v. Edwards, supra, appellant moved for dismissal of her case based on a lapse of approximately 18 months between the time of her arrest and arraignment and the trial. The court held that even under the most liberal interpretation of the ICRA, dismissal of charges against the appellant was not required. The court found that appellant had not shown she would be prejudiced by proceeding with the trial and, in addition, the court found that the appellant herself caused the delay.

In Navajo Nation v. MacDonald, Jr., 19 Indian L. Rep. 6079 (Nav.Sup.Ct. February 13, 1992), supra, the court summarily rejected the contention that MacDonald, Jr. was denied his right to a speedy trial. The court stated that nine months passed between the complaint being filed and trial, and only six and one-half months passed between arraignment and trial. Under these circumstances, no speedy trial rights were denied.

3. Right to Jury Trial.

In Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Peone, 16 Indian L. Rep. 6136 (C.S.&K.Tr. Ct. Sept. 19, 1989), the court went beyond the requirements of the ICRA to find that a criminal defendant had not knowingly and intelligently waived his right to trial by jury. The court found that the defendant had assumed that he had a right to a jury trial but did not know the tribal code required that he request a jury. As a result, he did not request a jury trial. Noting that the ICRA only guarantees a jury trial upon request of the defendant, the court held that a waiver of the right must be knowing and intelligent. In this case, such a waiver had not occurred because the defendant did not know that he was giving up his right. The court granted the defendant's motion for a jury trial.

In Hummingbird v. Southern Ute Indian Tribe, 19 Indian L. Rep. 6067 (S.W.Intertr.Ct.App. Dec. 13, 1991), the court recognized that the right to a trial by jury is a fundamental right pursuant to the Southern Ute Tribal Code as well as the ICRA. The court found, however, that the criminal defendant, having been advised of such a right, failed to request a jury at any point prior to the trial in front of the tribal court judge. As such, the court easily found that the defendant waived her right to a jury trial.

In Navajo Nation v. MacDonald, Sr., 19 Indian L. Rep. 6053 (Nav.Sup.Ct. Dec. 30, 1991), supra at 16-17, the Navajo Supreme Court rejected MacDonald's claim that the jury selection process was tainted and denied him a fair cross sectionjo Nation v. MacDonald, Jr., 19 Indian L. Rep. 6079 (Nav.Sup.Ct. Feb. 13, 1992), the court rejected the same argument made by MacDonald, Jr.

4. Due Process

In Confederated Tribes of the Umatilla Indian Reservation v. Halfmoon, 18 Indian L. Rep. 6014 (Uma.Tr.Ct. Dec. 5, 1990), a criminal defendant contended that he was denied due process of law because he was not permitted to comment on proposed tribal fishing regulations he was charged with violating. The court rejected his claim, noting that the regulation was enacted by the Fish and Wildlife Committee as an emergency regulation, and public comment is not required for emergency regulations.

In Southern Ute Tribe v. Root, 18 Indian L. Rep. 6031 (S.Ute Tr. Ct. Jan 22, 1991), a criminal defendant claimed that tribal code provisions prohibiting driving under the influence and driving with impaired ability were impermissibly vague and therefore resulted in a denial of due process under the ICRA. The court held that, although definitions of the terms would aid prosecution of claims, the statutes provided adequate notice of

prohibited conduct and did not violate due process rights.

In Navajo Nation v. MacDonald, Jr., 19 Indian L. Rep. 6079 (Nav.Sup.Ct. Feb. 13, 1992), supra, the court rejected MacDonald Jr.'s claim that the prosecutor committed misconduct which deprived him of a fair trial. MacDonald claimed numerous incidents of misconduct including inflammatory comments, failure to discloss exculpatory evidence and others. The court found that certain comments were inflammatory but held that they did not rise to the level of a deprivation of due process. The court also rejected claims that pre-trial discovery resulted in a denial of due process.

In another case arising out of Southern Ute Tribal Court, Southern Ute Indian Tribe v. Weaver, 19 Indian L. Rep. 6088 (S.Ute Tr.Ct. Apr. 28, 1992), a criminal defendant participated in a residential alcohol rehabilitation program as part of a court sentence requiring an alcohol evaluation and compliance with the recommendations. The defendant was discharged from the program after violation of treatment center rules. He contended that his discharge did not comply with due process. The court ruled that he was not in custody while in the treatment program because he had not actually been sentence to the center. Thus, due process requirements and grievance procedures applicable to custodial situations did not apply. The court further found that the process afforded him, including notice, right to call witnesses and a written decision, was adequate.

5. Search and Seizure.

In Southern Ute Tribe v. Scott, 18 Indian L. Rep. 6105 (S.Ute. Tr.Ct. Apr. 16, 1991), the court denied a motion to suppress evidence obtained as a result of a roadside sobristy test. The court stated that the roadside test was a search. The court held that the sobriety test did not constitute a valid search because a search warrant was not obtained. However, the court found that the defendant properly was stopped as a result of a moving violation, and the roadside sobriety test was properly administered as a search incident to arrest or as consensual matter. Thus, although the tribal code provides greater guarantees than those imposed under the ICRA or the federal constitution regarding fourth amendment rights, the tribal guarantees were not violated by the officer's conduct.

6. Right Against Self-Incrimination.

In a civil case involving the violation of treaty fishery management rules and regulation, a court held that Miranda rights need not be given. Chippewa-Ottawa Tribes v. Pavement, Jr., 18 Indian L. Rep. 6141 (Chip.-Ott. Cons. Ct. May 29, 1991). In that case, the Tribes charged the defendant with violating tribal restrictions on commercial fishing, which could resulting in suspension of the fishing license, a fine, forfeiture of the catch and other penalties imposed by the court. The court reasoned that the ICRA prohibition against compelled self-incrimination might require Miranda-like warnings to be given to criminal with the trial court that the tri warnings should be given to tribal members arrested for violation of certain fishing statutes. The court of appeals, however, reversed the trial court's dismissal of the charges based on the officer's failure to give Miranda warnings to the defendants upon their arrest. The court of appeals held that the proper remedy was exclusion of the unlawfully obtained statements from the case, not dismissal of the case. The court reasoned that such exclusion conforms to the spirit of fundamental fairness embodied in tribal law.

In Southern Ute Tribe v. Lansing, 19 Indian L. Rep. 6091 (S.Ute Tr.Ct. Mar. 25, 1992), a criminal defendant argued that statements she made to a police officer regarding her involvement in an accident should be suppressed because she was not given her Miranda warnings. The court found that she made the statements in a hospital room where she had been transported by an ambulance, and

doctors and nurses were going in and out of the room. The officer had not directed anyone to transport her to the hospital. The defendant was still in her own clothes when the officer made contact with her. The officer was in uniform but at no time took any action to restrain the defendant. Under these circumstances, the court held that the defendant was not in custody at the time she made statements to the officer, and he had no obligation to inform her of her rights.

7. Double Jeopardy.

Lummi Indian Tribe v. Kinley, 19 Indian L. Rep. 6027 (Lummi Tr.Ct.App.Div. July 24, 1991) involved a claim that the guarantee against double jeopardy barred a subsequent criminal trial for illegal fishing. In that case, defendants were charged with fishing in a tribal fishery that was closed. The defendants also held valid state commercial licenses. The trial court dismissed one charge on the grounds that the Resolution closing the fishery was not in effect on the day in question and dismissed another charge based on the existence of valid state licenses. The court also acquitted the defendants on a third charge based on the prosecution's failure to produce evidence sufficient to show a violation. The court of appeals recognized that the right against double jeopardy stems from the Lummi constitution and the ICRA and federal constitution (the tribal constitution guarantees to tribal citizens the rights protected under the federal constitution). The court determined that, since the factual basis for the charged offenses was the same, permitting the prosecution to appeal parts of the decision regarding whether the resolution was in effect would twice put the defendants in jeopardy for the same offense.

8. Cruel and Unusual Punishment

In Navajo Nation v. MacDonald, Sr., 19 Indian L. Rep. 6053 (Nav.Sup.Ct. Dec. 30, 1991), supra, MacDonald contended that he was subjected to cruel and unusual punishment by the court's refusal to consolidate sentences and the actual imposition of the amount of time and a sentence of hard labor. The court rejected the claims, finding that the sentence was within the boundaries established by the legislature. The court comment that official corruption in public office is a serious offense and an affront to the Navajo people. The court noted that the "hard labor" provision was standard and was not a sentence to existence as a part of chain gang. The court reached the same result in Navajo Nation v. MacDonald, Jr., 19 Indian L. Rep. 6079 (Nav.Sup.Ct. Feb. 13, 1992), supra.

9. Rights of Juvenile Defendants.

The Navajo Supreme Court addressed the fundamental rights of a juvenile taken into police custody in In the Matter of A.W., a minor, 15 Indian L. Rep. 6041 (Nav. Sup. Ct. Aug. 4, 1988). Acknowledging the unique concerns relevant to detention of juveniles and the importance of following procedural guidelines, the court reversed the tribal court's denial of a writ of habeas corpus. The court held that due process in juvenile proceedings must be followed, just as in adult proceedings. The court held that police violated the constitutional rights of the minor child in a number of respects, including the failure to release the child to the parents in a timely manner; failure to provide the child with a padded area to lie on, a blanket, and food; failure to inform the child of his Miranda rights. In addition, the juvenile proceedings must respect the customary primary role of the parents in defending the child's rights. In that rega6 Indian L. Rep. 6017 (Nav. Sup. Ct. Aug. 12, 1988), relying on Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Navajo Supreme Court stated that the ICRA did not expressly waive the Navajo Tribe's immunity from suit. Ths court found that the ICRA applied to the case because the company alleged that a tribal breach of contract resulted in the company being deprived of property without due process. The court thus held that Congress did not waive tribe's

immunity from suit. The court then found no applicable tribal statutory basis for a tribal waiver of immunity.

However, in Dupree v. Cheyenne River Housing Authority, 16 Indian L. Rep. 6106 (Chy.R.Sx.Ct.App. Aug. 19, 1988), the tribal appeals court rejected the Cheyenne River Housing Authority's claim that ICRA actions against it were barred by the doctrine of sovereign immunity. Citing Santa Clara Pueblo, 436 U.S. at 65, the court stated that tribal courts must provide a forum for causes of action based on the ICRA, and in that context, a claim of sovereign immunity was not appropriate. The court found that both the ICRA and the tribe's constitution waived sovereign immunity in tribal court.

In Plummer v. Brown, 16 Indian L. Rep. 6101 (Nav.Sup.Ct. Mar. 23, 1989), one of the series of cases relating to the removal of Navajo Chairman MacDonald (see, e.g., In re Certified Question II: Navajo Nation v. MacDonald, 16 Indian L. Rep. 6086 (Nav.Sup.Ct. April 13, 1989), discussed supra at 3, the court held that MacDonald's suit was barred by the doctrine of sovereign immunity. MacDonald challenged certain resolutions removing him from office. The court stated that the resolutions were passed by the tribal council, and MacDonald's suit was in fact a suit against the tribal council and therefore against the Tribe. The court noted the importance of the tribal council's ability to function in its legislative capacity.

In Committee for Better Tribal Government v. Southern Ute Election Board, 17 Indian L. Rep. 6095 (S.Ute Tr. Ct. Aug. 13, 1990), supra at 6-7, based on the doctrine of sovereign immunity the court dismissed claims against the tribal council and the individually named council members. The court, however, retained claims against the election board and its members to the extent that the claims were based on allegations that the election board's conduct was outside its authority.

The court of appeals reversed a jury verdict in favor of a terminated employee of a community college in Board of Trustees of the Sisseton-Wahpeton Community College v. Wynde, 18 Indian L. Rep. 6033 (N.Plns.Intertr.Ct.App. May 3, 1990), on the ground of sovereign immunity. In that case, the terminated employee essentially claimed that any due process violation required a remedy. The court disagreed, and reasoned that like any sovereign, tribal governments can adopt or reject immunity in whole or in part. In this case, no consent to suit existed, and tribal sovereignty was paramount to the concept of a remedy for a violation of due process.

In Davis v. Keplin, 18 Indian L. Rep. 6148 (Turt.Mt.Tr.Ct. Sept. 6, 1991), supra at 4, an employee of the Turtle Mountain Tribe alleged he had been deprived of due process when he was terminated without a hearing. The court held that the ICRA abrogated tribal sovereign immunity in the limited area of civil rights. Although not entirely clear, the court seemed to be attempting to distinguish a wrongful termination claim from one based on deprivation of protected property right without due process. The court further held that the ICRA did not abrogate the individual defendants' qualified immunity from suit. The court dismissed all claims except the terminated employee's action against the Tribe for equitable relief resulting from a claimed constitutional deprivation.

In Pawnee Tribe of Oklahoma v. Franseen, 19 Indian L. Rep. 6006 (Ct.Ind.App.--Pawnee Sept. 17, 1991), a bingo management company alleged that the Pawnee Tribe terminated an agreement without proper notice, resulting in a taking of its property without compensation. Reversing the decision of the trial court, the court of appeals held that the ICRA did not function as an implied waiver of immunity which would allow suit against the Tribe. The court stated that this claim for money damages was entirely distinct from a case in which it found a waiver of

immunity in conjunction with injunctive relief involving constitutional rights. The court noted that it would not imply a waiver of immunity under the ICRA where none is made in the federaluctant to enter into agreements.

Again, in Stone v. Swan, 19 Indian L. Rep. 6093 (Colv.Tr.Ct. Apr. 15, 1992), supra at 5, the tribal court noted generally the Tribe's sovereign immunity from suit. The court stated, however, that the due process guarantees of the ICRA created a statutory exception to the sovereign immunity doctrine. The court thus rejected the government's claim that sovereign immunity barred review of its actions in removing from office a member of the business council because they were performed as part of their official duties.

II. ANALYSIS OF TRIBAL COURT DECISION-MAKING

As the previous discussion of cases indicates, decisions of numerous tribes have been reported. Overall, the cases reflect sophisticated legal decision-making that incorporates both federal legal standards as well as tribal standards, norms and customs. Virtually every case cites significant legal precedent and/or tribal norms as the backdrop of the decision. Thus, regardless of the result reached in a specific case, courts are recognizing and citing legal tradition. The courts are not simply rendering a decision without a thorough analysis of the law and facts. Applicable and analogous case law is being reviewed. In the civil rights arena, individual tribal constitutional requirements as well as the federal ICRA are being addressed. As such, tribal court judges are demonstrating a complete understanding of the role of the courts in maintaining continuity and stability within the tribes.

Moreover, as the cases demonstrate, tribal court judges have not hesitated to hold tribal governmental officials accountable for conduct that violates the civil rights of tribal members. In fact, a review of the cases alleging due process violations show that more times than not the court has found the government liable for constitutional violations. In nine cases, the courts found due process violations or that the plaintiff was entitled to proceed with the claims. In six cases, the courts rejected the claims. Two cases resulted in a determination by the court that the plaintiff had failed to exhaust administrative remedies. In another case, the court asked for an advisory opinion regarding the due process concerns at issue. One case resulted in a determination of qualified immunity on the part of the individual government actors.

Similarly, of the eight cases alleging equal protection violations, four courts found such a violation and three courts found no violation of the right. In one case, the court declined to reach the equal protection question because the complaining party failed to produce any evidence on the claim. Here too, the tribal courts are demonstrating that where tribal governments are infringing on the civil rights of their members, the court will not hesitate to hold them accountable.

In the context of the rights of criminal defendants, courts more often than not found that the defendants' rights had not been violated. In eleven cases, the courts found that the governmental actor, usually the police, did not violate the rights of the accused. In four cases, the court found violations. In one case, the court found it lacked jurisdiction over the claim.

As the cases demonstrate, tribal courts are willing to protect the rights guaranteed by the ICRA or tribal constitutions. The courts have overturned and invalidated tribal statutes. They have reversed decisions by housing authorities and election boards when necessary. Appellate tribal courts have been willing to reverse judgments of the trial court. The courts have enjoined elections and proscribed procedures that tribal governments must follow. In short, tribal courts have given enforcement powers to

the ICRA and other constitutional guarantees.

Even where tribal courts have found in favor of tribal government, however, the courts have not blindly condoned governmental action. The cases evince a thorough and impartial analysis of the facts and law. The courts have studied the situation to reach their result, and the courts seem to be striking an appropriate balance between the claims of citizens and tribal governments. Indeed, these cases are at least as detailed as a number of their state and federal court counterparts.

As with all governmental conduct, however, the doctrine of sovereign immunity has barred a number of suits against tribal governments. Those decisions generally have also been well-reasoned. Tribal courts consistantly have recognized that waivers should be narrowly interpreted. Just as is found among the feribes are supported by statutory cites, case precedent and policy considerations.

CONCLUSION

The cases discussed in this memorandum make clear that tribal courts are protecting the rights of tribal members and upholding important principles of judicial review. The courts are attempting to meld tribal custom and norms with applicable legal doctrines. The decisions show impartiality and careful thought. Although the courts are fledgling and require greater resources to develop in their sophistication, it is clear that people in Indian country can safely turn to the courts when they feel their rights

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By

Sandra Day O'Connor
Associate Justice, Supreme Court of the United States

"Lessons from the Third Sovereign: Indian Tribal Courts"

Today, in the United States, we have three types of sovereign entities -- the Federal government, the States, and the Indian tribes. Each of the three sovereigns has its own judicial system, and each plays an important role in the administration of justice in this country. The part played by the tribal courts is expanding. As of 1992, there were about 170 tribal courts, with jurisdiction encompassing a total of perhaps one million Americans.

Most of the tribal courts that exist today date from the Indian Reorganization Act of 1934. Before the Act, tribal judicial systems were based around the Courts of Indian Offenses, which were set up in the 1880's by the federal Office of Indian Affairs. Passage of the Indian Reorganization Act allowed the tribes to organize their governments, by drafting their own constitutions, adopting their own laws through tribal councils, and setting up their own court systems. By that time, however, enormous disruptions in customary Native American life had been wrought by factors such as forced migration, settlement on the reservations, the allotment system, and the imposition of unfamiliar Anglo-American institutions. Consequently, in 1934, most tribes had only a dim memory of traditional dispute resolution systems and were not in a position to recreate historical forms of justice.

Swift replacement of the current systems by traditional dispute-settling institutions was not possible. Therefore, while a few tribes, such as the New Mexico Pueblos, have "traditional courts" based on Indian custom, most modern reservation judicial systems do not trace their roots to traditional Indian fora for dispute resolution. Rather, because the tribes were familiar with the regulations and procedures of the Bureau of Indian Affairs, that model provided the framework for most of the tribal courts. Nevertheless, many tribes today attempt to incorporate traditional tribal values, symbols, and customs into their courtrooms and decisions. Some tribal courts, in proceedings that otherwise differ little from what would be seen in State or Federal court, have incorporated traditional features of Indian dispute-resolution to try to infuse the proceedings with values of consensus and community. For example, the placement of litigants and court personnel in a circle aspires to minimize the appearance of hierarchy and highlight the participation and needs

of the entire group in place of any one individual.

The tribal courts, while relatively young, are developing in leaps and bounds. For example, many tribes are working to revise their tribal constitutions and to codify their civil, regulatory, and criminal laws to provide greater guidance and predictability in tribal justice. At the same time, tribes have expanded the use of traditional law. Many tribal codes now combine unique tribal law with adapted State and Federal law principles. The number of law-trained Native Americans has increased. Both State and Federal courts continue to recognize the tribal courts as important fora for resolution of reservation-based claims involving both Indians and non-Indians.

Tribal courts today face significant challenges. They must work to satisfy the sometimes-competing demands of those inside and outside the tribal communities. But while the challenges are great, the effective operation of tribal courts are essential to promote the sovereignty and self-governance of the Indian tribes. As the Court on which I serve has recognized, "Tribal courts play a vital role in tribal self-government, and the Federal Government has consistently encouraged their development." Iowa Mut. Ins. Co. v. LaPlante, 480 U. S. 9 (1987).

To fulfill their role as an essential branch of tribal government, the tribal courts must provide a forum that commands the respect of both the tribal community and of non-tribal courts, governments, and litigants. To do so, these courts need to be perceived as both fair and principled. And at the same time the courts seek to satisfy these conditions, they strive to embody tribal values - values that, at times, suggest the use of different methods than those used in the Anglo-American, adversarial, common-law tradition.

While tribal courts now include within their jurisdiction a broad range of issues, they naturally take a particular interest in the issues which are most pressing to the population which they serve. Issues related to the family, and to the control of natural resources such as land, water, oil, fish, and timber, are of particular interest to the tribal courts, both because important tribal traditions are implicated and because these issues have a vital and recurring impact on the welfare of the community.

In addressing the matters that come before them, the decision-making process by tribal courts need not, and does not always, replicate the process undertaken in State and Federal courts. Tribal courts often act more quickly, and more informally, than do their counterparts. The factors considered to reach a decision, the procedures used, and the punishment or resolution arrived at, may differ in reflection of tribal values. Tribal court judges frequently are tribal members who seek to

infuse cultural values into the process.

While tribal customs and beliefs vary, of course, from tribe to tribe, some general patterns emerge. In place of the Anglo-American system's emphasis on punishment and deterrence, with a "win-lose" approach that often drives parties to adopt extreme adversarial positions, some tribal judicial systems seek to achieve a restorative justice, with emphasis on restitution rather than retribution and on keeping harmonious relations among the members of the community. To further these traditional Native American values, tribal courts may employ inclusive discussion and creative problem-solving. The focus on traditional values in contemporary circumstances has permitted tribal courts to conceive of alternatives to conventional adversarial processes.

The development of different methods of solving disputes in tribal legal systems provides the tribal courts with a way both to incorporate traditional values and to hold up an example to the nation about the possibilities of alternative dispute resolution. New methods have much to offer to the tribal communities, and much to teach the other court systems operating in the United States. For about the last fifteen years, in recognition of the plain fact that the adversarial process is often not the best means to a fair outcome, both the State and Federal systems have turned with increasing interest to the possibilities offered by mediation, arbitration, and other forms of alternative dispute resolution. In many situations, alternative methods offer a quicker, more personal, and more efficient way of arriving at an answer for the parties' difficulties.

The special strengths of the tribal courts - their proximity to the people served, the closeness of the relations among the parties and the court, their often greater flexibility and informality - give tribal courts special opportunities to develop alternative methods of dispute resolution. Many of the issues which come most frequently to tribal courts lend themselves to alternative methods of resolution. For example, vital issues touching on domestic relations, child custody, probate, tort, and criminal prosecutions, may be solved more satisfactorily using a non-adversarial method. A cooperative process is particularly useful where family issues, particularly related to children, are involved, because the process helps the parties to work together to arrive at a fair and workable solution. An adversarial process, in contrast, may worsen the strains between members of the family, and create new conflicts to fuel the old. Too, family problems lend themselves to methods of resolution shaped by the particular character of individual tribal courts, because family issues - involving child custody, juvenile crimes, marriage, and inheritance - are ones where tradition provides a critical guidance for social behavior.

Many tribal courts have already developed methods that meet the needs of their communities and use the underlying traditions and values to the extent possible. A good example is the Navajo Peacemaker Court, which was formed in 1982 by the Judicial Conference of the Navajo Nation to provide a forum for traditional mediation. The Navajo Peacemaker Court is now an active, modern legal institution which incorporates traditional Navajo concepts into a judicial process for dispute resolution. The process is directed by a mediator, who acts to guide and encourage parties to resolve their dispute. The process relies on parties' participation and commitment to reaching a solution, rather than on the imposition of a judgment by an impersonal decisionmaker. The Navajo Peacemaker Court successfully blends beneficial aspects of both Anglo-American and Indian traditions.

The Northwest Intertribal Court System, a consortium of 15 tribes in the Pacific Northwest, was set up in 1979 to provide court services and personnel to the individual tribal courts of member tribes. Several of the member tribes have supplemented their formal tribal court system with Peacemaker programs - programs that are based on traditional values of consensus and respectful attention to individuals.

The Indian communities' interest in the development of alternatives for dispute resolution has led to the development of the Indian Dispute Resolution Services, a group formed about six years ago to provide training in conflict resolution. That organization is helping Indian communities to settle unresolved disputes around the county and to provide fair and timely outcomes for parties.

Mediation can be effective not only within a tribal community, but also between the tribe and other groups. The Native American Heritage Commission and the Community Relations Service of the United States Department of Justice have collaborated on several mediation cases involving the repatriation of Indian remains. Some mediations took place between tribes and developers who had discovered remains at construction sites; others took place between tribes and universities that wanted the remains for academic research. Mediation worked to settle successfully the many conflicts that arose over the proper treatment and assignment of such ancestral remains and funerary objects.

The development of methods of alternative dispute resolution may help tribal courts to expand the exercise of their authority over more civil cases. Historically, the great majority of cases heard in tribal courts involves criminal matters, with relatively few civil disputes decided. This might reflect the time and expense required for civil cases, the courts' reluctance to handle civil cases because of a lack of familiarity or advanced legal training, or perhaps because tribal courts serve a less

litigious community. Development of alternative methods of dispute resolution allows the tribal courts to take advantage of their strengths in order to provide efficient and fair resolution of such conflicts.

It is to be hoped that the tribal courts will continue to explore additional possibilities for alternative methods of dispute resolution. These methods need not be limited in scope to disputes within a tribe, but could be used also to resolve conflicts between one tribe and another , and between a tribe and the State and Federal government, political units, private investors, or contractors. At its best, such a method would provide a cooperative, relaxed forum for the conclusion of disputes, with use of a process that would include all interested parties to ensure their involvement and their consent; and, at the same time, offer important practical advantages by accomplishing its tasks more agreeably, more quickly, and less expensively than the adversarial mode. By expanding such techniques, the tribal courts may set out the paradigm for other courts to follow.

While tribal courts seek to incorporate the best elements of their own customs into the courts' procedures and decisions, the tribal courts have also sought to include useful aspects of the Anglo-American tradition. For example, more and more tribal judicial systems have established mechanisms to ensure the effective appealability of decisions to higher courts. Too, some tribes have sought to provide tribal judiciaries with the authority to conduct review of regulations and ordinances promulgated by the tribal council. And one of the most important initiatives is the move to ensure judicial independence for tribal judges. Tribal courts are often subject to the complete control of the tribal councils, whose powers often include the ability to select and remove judges. Therefore, the courts may be perceived as a subordinate arm of the councils rather than as a separate and equal branch of government. The existence of such control is not conducive to neutral adjudication on the merits and can threaten the integrity of the tribal judiciary. Some tribes, like the Cheyenne River Sioux Tribe in South Dakota, have amended their constitutions to provide for formal separation of powers.

A vital improvement made by tribal judicial systems is the growing number of law-trained, well-prepared people participating in the system, both as lawyers and judges. Many tribal judges have taken steps to craft ethical guidelines and to institute tribal bar requirements for the lawyers who practice before them, and have participated themselves in further training for the task of judging. Both lawyers and judges must knowledgeable and principled if the tribal judicial systems are to engender confidence in the fairness and integrity of their courts. Whether in tribal court, state court, or federal court, the

exercise of a court's jurisdiction is a serious matter, and all persons - Indian and non-Indian - who come before a court are entitled to just and reasoned proceedings.

The judicial systems of the three sovereigns - the Indian tribes, the federal government, and the States - have much to teach one another. While each system will develop along different lines, each can take the best from the others. Just as "a single courageous State may, if its citizens choose, serve as a laboratory," New State Ice Co. v. Liebmann, 285 U. S. 310, 311 (1931) (Brandeis, J., dissenting), for the development of laws, the experiments and examples provided by the various Indian tribes and their courts may offer models for the entire nation to follow. To give but one example, the Navajo Peacemaker Court has been studied not only by officials within this country, but also from Australia, New Zealand, Canada, and South Africa, for possible use. The Indian tribal courts' development of further methods of dispute resolution will provide a model from which the Federal and State courts can benefit as they seek to encompass alternatives to the Anglo-American adversarial model. And, while tribal courts currently seek to expand the role of traditional law in their judicial systems, they may well choose to incorporate some of the features of the Anglo-American system, such as access to an effective appeal and the independence of the judiciary.

The role of tribal courts continues to expand, and these courts have an increasingly important role to play in the administration of the laws of our nation. The three sovereigns can learn from each other, and the strengths and weaknesses of the different systems provide models for courts to consider. Whether tribal court, state court, or federal court, we must all strive to make the dispensation of justice in this country as fair, efficient, and principled as we can.

HISTORY

CJY-55-85, July 25, 1985.
ACAP-101-69, April 15, 1969.
Revision note. Reworded for grammatical content, statutory form, and clarity.

§ 502. Spelling of "Navajo"

All use of the name "Navajo" shall use the spelling "j", not "h".

HISTORY

CJY-55-85, July 25, 1985.
ACAP-101-69, April 15, 1969.
Revision note. Reworded for grammatical content, statutory form, and clarity.

Subchapter 2. Navajo Sovereign Immunity Act

HISTORY

Redesignation. Sections 351-355 were redesignated §§551-555 for numerical consistency.

§ 551. Establishment

There is established the Navajo Sovereign Immunity Act.

HISTORY

CMY-42-80, May 6, 1980.
Revision note. Slightly reworded for purposes of statutory form.

§ 552. Definitions

For the purposes of this subchapter, "Navajo Nation" means:

A. The Navajo Nation Council;
B. The President, Navajo Nation;
C. The Vice-President, Navajo Nation;
D. The Delegates to the Navajo Nation Council;
E. The Certified Chapters of the Navajo Nation;
F. The Grazing Committees of the Navajo Nation;
G. The Land Boards of the Navajo Nation;
H. The Executive Branch of the Navajo Nation government;
I. The Judicial Branch of the Navajo Nation government;
J. The Commissions of the Navajo Nation government;
K. The Committees of the Navajo Nation Council;
L. The Legislative Secretary of the Navajo Nation Council;
M. The Enterprises of the Navajo Nation;
N. Navajo Community College.

HISTORY

CMY-28-88, May 6, 1988.
CMY-42-80, May 6, 1980.

§ 553. General principles of sovereign immunity

A. The Navajo Nation is a sovereign nation which is immune from suit.

B. Sovereign immunity is an inherent attribute of the Navajo Nation as a sovereign nation and is neither judicially created by any court, including the Courts of the Navajo Nation, nor derived from nor bestowed upon the Navajo Nation by any other nation or government.

C. The Courts of the Navajo Nation are created by the Navajo Nation Council within the government of the Navajo Nation and the jurisdiction and powers of the courts of the Navajo Nation, particularly with regard to suits against the Navajo Nation, are derived from and limited by the Navajo Nation Council as the governing body of the Navajo Nation.

D. The special authority of the Congress of the United States relating to Indian affairs derives from and is consistent with the recognition and fulfillment of its unique trust obligations to protect and preserve the inherent attributes of Indian tribal self-government.

E. The Navajo Nation Council has enacted the Navajo Nation Bill of Rights in recognition of the interests and rights of the People of the Navajo Nation, from whom the sovereignty of the Navajo Nation derives, as express self-limitations upon the exercise of its sovereign powers and has provided herein for specific remedies and redress for individuals from the government of the Navajo Nation as only the governing body of the Navajo Nation is empowered and responsible to determine on behalf of the People of the Navajo Nation.

F. Neither the President, Navajo Nation, the Vice-President, Navajo Nation, nor the delegates to the Navajo Nation Council may be subpoenaed or otherwise compelled to appear or testify in the Courts of the Navajo Nation or any proceeding which is under the jurisdiction of the Courts of the Navajo Nation concerning any matter involving such official's actions pursuant to his/her official duties.

HISTORY

CMY-28-88, May 6, 1988.
CMY-42-80, May 6, 1980.

§ 554. Exceptions to the general principles of sovereign immunity; purpose and intent

A. The purpose and intent of the Navajo Sovereign Immunity Act is to balance the interest of the individual parties in obtaining the benefits and just redress to which they are entitled under the law in accordance with orderly process of the Navajo government, while at the same time protecting the legitimate public interest in securing the purpose and benefits of their public funds and assets, and the ability of

their government to function without undue interference in furtherance of the general welfare and the greatest good of all people. All of the provisions of this Act shall be applied as hereinafter set forth in order to carry out this stated purpose and intent of the Navajo Nation Council, as the governing body of the Navajo Nation.

B. The Navajo Nation may be sued in the Courts of the Navajo Nation when explicitly authorized by applicable federal law.

C. The Navajo Nation may be sued only in the Courts of the Navajo Nation when explicitly authorized by Resolution of the Navajo Nation Council.

D. Any exception to the immunity of the Navajo Nation and assumption of liability pursuant to this Act does not apply in circumstances in which such liability has been or is hereafter assumed by third parties, including any other governmental body or agency, nor for which the Navajo Nation has been or is hereafter indemnified or held harmless by such parties, to the extent of such assumption or indemnification of liability. Nor does any liability assumed by the Navajo Nation pursuant to this Act extend to any party or parties as third party beneficiary or otherwise, other than the party or parties to whom such liability is expressly assumed, and then only to the extent, circumstances and conditions specified thereby.

E. Any liability of a public entity or public officer, employee or agent assumed pursuant to this Act is subject to any other immunity of that public entity or person and is subject to any defense which would be available to the public entity or person if they were private entities and/or persons.

1. A public entity is not liable for any injury or damage resulting from an act or omission of any public officer, employee or agent if that party is not liable; nor for the actions or omissions of public officers, employees or agents which are determined to be contrary to or without authorization or otherwise outside or beyond the course and scope of such officer's, employee's or agent's authority.

2. This section does not immunize a public officer, employee or agent from individual liability, not within Navajo Nation insurance coverage, for the full measure of the recovery applicable to a person in the private sector, if it is established that such conduct was outside the scope of his or her employment and/or authority.

3. Volunteers duly authorized by the Navajo Nation or any political sub-division thereof, in performing any of their authorized functions or duties or training for such functions or duties, shall have the same degree of responsibility for their actions and enjoy the same immunities as officers and employees of the Navajo Nation and its governmental entities performing similar work.

F. The Navajo Nation may be sued only in the Courts of the Navajo Nation with respect to any claim which is within the express coverage and not excluded by either commercial liability insurance carried by the Navajo Nation or an established Navajo Nation self-insured and/or other claims program of the Navajo Nation government, approved and adopted pursuant to the laws of the Navajo Nation and further, subject to the following provisions and limitation:

1. No judgment, order or award pertaining to any claims permitted hereunder shall be for more than the limits of valid and collectable liability insurance policies carried by the Navajo Nation covering each such claim and in force at the time of such judgment, including deductible amounts to the extent appropriated by the Navajo Nation Council; nor for more than the amount of coverage provided for each such claim under established claim reserves as appropriated by the Navajo Nation Council, or otherwise established pursuant to any self-insured liability and/or other Navajo Nation government claims program, approved and adopted pursuant to the laws of the Navajo Nation;

2. Any such judgment, order or award may only be satisfied pursuant to the express provisions of the policy(ies) of liability insurance and/or established self-insured or government claims program of the Navajo Nation which are in effect at the time of each such judgment, order or award. Regardless of the existence of applicable and collectible commercial insurance coverage at the time any cause of action arises or suit is filed against the Navajo Nation, in no event shall any funds or other property of the Navajo Nation be liable for satisfaction of any judgment against the Navajo Nation and/or other insureds thereunder, beyond the limits of any amounts specifically appropriated and/or reserved therefor at the time of judgment, which shall be modified by law in accordance with such limitation of funds. This limitation shall apply to any deductible or retained liability or otherwise resulting from any inability or insolvency occurring any time prior to entry of such judgment;

3. No cause of action shall lie and no judgment may be entered or awarded on any claim for punitive or exemplary damages against the Navajo Nation; nor against any officer, employee or agent of the Navajo Nation acting within the course and scope of the authority of such office, employment or agency;

4. Notwithstanding any provisions of this subsection (F), there shall be no exception to the sovereign immunity of public entities, officials, employees or agents of the Navajo Nation from claims for injury or damage alleged to have been sustained by:

a. Policy decisions or the exercise of discretion made by a public official, employee or agent in the exercise or judgment or discretion vested in the entity or individual;

b. A decision made in good faith and without gross negligence in carrying out the law, except that this provision does not immunize a public entity, officer, employee or agent from liability for false arrest, false imprisonment or malicious prosecution;

c. Legislative or Judicial action or inaction or administrative action or inaction of a legislative or judicial nature, such as adopting or failure to adopt a law or by failing to enforce a law;

d. Issuance, denial, suspension or revocation of, or the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization, nor by the termination or reduction of benefits under a public assistance program; if the public entity, officer, employee or agent of the Navajo Nation is authorized by law to determine whether or not such authorization or benefits should be issued, denied, suspended or revoked;

e. Probation, parole, furlough or release from confinement of a prisoner or other detainee or from the terms and conditions or the revocation thereof, except upon a showing of gross negligence;

f. Any injury or damage caused by an escaping or escaped person or prisoner, a person resisting arrest or by a prisoner to himself or herself, or to any other prisoner, except upon showing of gross negligence;

g. The enumeration of the above immunities shall not be construed to waive any other immunities, nor to assume any liability except as explicitly provided in this Act.

5. Subject to all other provisions of this Act, the express coverage of any commercial liability policy insuring the Navajo Nation or of any self-insurance program established by the Navajo Nation, for sums which the Navajo Nation as insured shall become legally obligated to pay as damage because of personal injury and/or property damages shall include liability for such actual monetary loss and damage which is established by clear and convincing evidence, to be the direct and proximate result of the wrongful deprivation or impairment of civil rights as set forth in Chapter 1 of Title 1 of the Navajo Nation Code, the Bill of Rights of the Navajo Nation. In the sound exercise of judicial discretion, the Courts of the Navajo Nation may, to the extent deemed proper and appropriate in any action for damages for wrongful deprivation or impairment of civil rights as provided herein, award necessary costs of suit and/or reasonable fees;

based upon time and value, incurred for legal representation; or require each or any party thereto, to bear their own respective costs and/or legal fees incurred therein.

G. Any officer, employee or agent of the Navajo Nation may be sued in the Courts of the Navajo Nation to compel him/her to perform his/her responsibility under the expressly applicable laws of the United States and of the Navajo Nation, which shall include the Bill of Rights of the Navajo Nation, as set forth in Chapter 1, Title 1, Navajo Nation Code.

1. Relief awarded by the Courts of the Navajo Nation under this subsection (G) shall be limited to declaratory or prospective mandamus or injunctive relief and in accordance with the express provisions of the laws of the United States and the Navajo Nation establishing the responsibility for such performance. The Courts may further, in the exercise of judicial discretion, award necessary costs of suit and/or reasonable fees for legal representation, in the same manner and to the same extent provided in paragraph (5) subsection (F) hereof.

2. No relief as provided under this subsection (G) may be awarded by the Courts of the Navajo Nation without actual notice to the defendant(s), nor before the time provided in this Act for answering complaints, motions or orders to show cause, nor without opportunity for full hearing of all defenses and objection thereto, in accordance with all provisions of this Act all other applicable law(s).

3. This subsection (G) shall not apply to the President of the Navajo Nation, the Vice-President of the Navajo Nation, or the delegates to the Navajo Nation Council.

H. Contracted or otherwise retained counsel and other attorneys employed by the Navajo Nation may be sued for malpractice when authorized by the Government Services Committee of the Navajo Nation Council.

I. The Navajo Nation may be sued by Navajo contractors and/or their sureties on construction development or reclamation contracts, provided:

1. The contractor's contract is properly approved by the appropriate Committee of the Navajo Nation Council.

2. The contract is to be performed by a Navajo contractor as defined herein and is performed within the territorial jurisdiction of the Navajo Nation.

3. Damages against the Navajo Nation under the consent to suit granted by the Navajo Nation to Navajo contractors and/or their sureties shall be limited to damages claimed under applicable principles of contract damage law, including damages necessary to com-

pensate for fulfilling the obligations under the bond, which shall include properly authorized change orders and properly authorized performance under owner directives to proceed done under protest, but shall not include:

a. Punitive damages;

b. Damages from claims arising in tort;

c. Damages caused by delays in performance due to governmental review and approval procedures of the Navajo Nation or other governmental entity having the right to review and/or approve the contract or project; or

d. Damages caused by delay, contract modification, or contract termination of, due to delay in or failure to receive matching funds for the contract or project.

4. Damages against the Navajo Nation claimed above shall be limited to the dollar amount of the contract including properly approved change orders.

5. The Navajo Nation shall be subject to suit under this subsection (I) only in the Courts of the Navajo Nation. In determining the Navajo Nation's obligations under this subsection (I), the Courts of the Navajo Nation shall not give any preclusive effect against the Navajo Nation of any determination by any judicial or quasi-judicial body except the Courts of the Navajo Nation.

6. Navajo contractor shall mean any contractor entitled to a priority number one, number two or number three pursuant to the Navajo Nation Business Preference Law.

HISTORY

CJY-40-92, July 24, 1992.
CMY-28-88, May 6, 1988.
CD-60-86, December 11, 1986.
CJY-55-85, July 25, 1985.
CMY-42-80, May 6, 1980.

§ 555. Procedure with respect to actions authorized by this subchapter

A. Any person or party desiring to institute suit against the Navajo Nation or any officer, employee or agent of the Navajo Nation as authorized by this subchapter shall, as a jurisdictional condition precedent provide notice to the President of the Navajo Nation and the Attorney General of the Navajo Nation, as provided herein.

1. Such notices shall be sent by registered mail, addressed to the main administrative offices of the President of the Navajo Nation and of the Attorney General of the Navajo Nation, return receipts requested. The time of such notice shall commence to run only from

the date following actual delivery of both notices as evidenced upon such receipts, and filed together with such notices with the Court in which such action is subsequently to be commenced. The President of the Navajo Nation and the Attorney General of the Navajo Nation shall ensure the availability, during all regular office hours, of office staff personnel duly authorized to accept and receipt for delivery of such notices provided herein and their receipt thereof shall not waive the assertion of any appropriate defense pertaining to the validity of such notice or service.

2. Such notices shall state the name of each prospective plaintiff; the identity of each prospective defendant; the nature of all claims and relief which will be sought, and the correct address, name and telephone number of each prospective plaintiff's attorney or counselor (if any).

3. No action shall be accepted for filing against the Navajo Nation or any officer, employee or agent of the Navajo Nation unless the plaintiff has filed proof of compliance with this subsection by service of the notices as required by this subsection at least thirty (30) days prior to the date of which the compliant or any other action is proposed to be filed with such Court.

B. In any action against the Navajo Nation or any officer, employee or agent of the Navajo Nation, the time for responding to valid service of any summons and complaint shall be sixty (60) days; to valid service of any order to show cause not less than thirty (30) days; and to valid service of any motion, not less than twenty (20) days. Any claim against the Navajo Nation or any public entity, officer, employee or agent thereof, which is filed pursuant to this Act, is deemed generally denied sixty (60) days after valid service of the complaint, unless the claimant or claimant's attorney or counsel filing the complaint is advised of acceptance or of a specific or otherwise limited denial in writing or by responsive pleading filed before the expiration of sixty (60) days; and any such claim shall otherwise proceed in the same manner as upon the filing of such general denial thereof. These time periods may not be shortened by Rule of Court or Judicial Order, but shall be extended by any longer period provided by other applicable law, rule or order of Court.

C. Any person or party filing a complaint against the Navajo Nation or any officer, employee or agent of the Navajo Nation shall serve by registered mail, return receipt requested, a copy of this complaint together with summons duly issued, upon the President of the Navajo Nation and the Attorney General of the Navajo Nation. Service of summons and complaint against any officer, employee or agent of the Navajo Nation shall be made by any means authorized under the Rules

of the Courts of the Navajo Nation, provided that the time for response thereto shall be as provided herein and service upon such parties shall not be affected by such required service upon the President of the Navajo Nation and the Attorney General of the Navajo Nation.

D. In any action in which any claim is asserted against the Navajo Nation or any public entity thereof, upon written demand of the Navajo Nation Department of Justice, made at or before the time of answering, served upon the opposing party and filed with the Court where the action is pending, the place of trial of such action shall be changed to Window Rock, Navajo Nation (Arizona).

HISTORY

CJY-55-85, July 25, 1985.
CMY-42-80, May 6, 1980.

THE TULALIP TRIBES

Board of Directors:
Stanley G. Jones Sr., Scho Hallem *Tribal Chairman*
Donald C. Hatch Jr., Spat-ub-kud *Vice-Chairman*
Dawn E. Simpson, *Secretary*
Herman A. Williams Jr., *Treasurer*
Calvin Taylor, *Board Member*
Les Parks, *Board Member*
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6700 TOTEM BEACH ROAD
MARYSVILLE, WA 98271-9715
(360) 651-4000
FAX (360) 651-4032

The Tulalip Tribes are the successors in interest to the Snohomish, Snoqualmie and Skykomish tribes and other tribes and bands signatory to the Treaty of Point Elliot.

TESTIMONY OF THE TULALIP TRIBES OF WASHINGTON

PRESENTED BY
DONALD C. HATCH, JR. "*Spat-ub-kud*"
VICE-CHAIRMAN

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON TRIBAL SOVEREIGN IMMUNITY

SEPTEMBER 24, 1996

106 DIRKSEN S.O.B.
WASHINGTON, D.C. 20515

Good morning, Mr. Chairman and members of the Committee. I am Donald Hatch, "Spat-ub-kud", Vice-Chairman of the Tulalip Tribes of Washington. I am here to testify in opposition to the language which was included as section 329 in H. R. 3662, as reported by the Senate Subcommittee on Interior Appropriations. This language would penalize Indian tribes which may have disputes with non-Indian reservation residents and neighbors. The Tulalip Tribes enjoys an excellent relationship with our neighboring jurisdictions, Snohomish County and the Cities of Marysville and Everett, and believes that such language would only serve to detract from the great strides in Federal Indian policy and law which have been made over the course of the last 30 years.

The Tulalip Tribes and Snohomish County share a long history of coordinated land use and resources planing and permitting. This encompasses the development of Comprehensive Plans, permitting, watershed planning, forestry, transportation and solid waste management issues. Considering that roughly 50% of the land area on the Tulalip Reservation is in non-Indian ownership and 80% of the population is non-Indian, it is only natural that a relationship has existed for some time to govern reservation affairs.

The Tribes and County currently have a shared permit review process regarding development proposals on non-Indian lands. Following submittal of an application, the County forwards a copy of the application to the Tribe for comment. The application is then reviewed by appropriate Tribal Departments and comments are forwarded to the County. For a period of 15 years, the County has largely been able to address Tribal concerns, because decisions were based on a Comprehensive Plan jointly adopted in 1972. At that time, there was a clear division of permitting responsibility with the County regulating non-Indian property and the Tribe regulating Indian property on the Reservation.

In the mid-eighties, the Tribe recognized the inadequacy of the 1972 Plan and adopted a Planning Enabling resolution to develop a new Comprehensive Plan that would meet the unique needs of the Tribe and Reservation community. The Resolution created a Planning Commission and charged it with the development of the Comprehensive Plan. The Tulalip Planning Commission is unique in that it represents both the Indian and non-Indian population residing on the Reservation. Their decisions on land use issues have been largely unanimous.

Snohomish County has not yet adopted the Tulalip Comprehensive Plan for the Reservation, but the Tribe and County are currently developing an inter-local agreement which would allow the Tribal Plan to govern land development applications through a joint permit review process. While the agreement is being finalized, the Tribe has begun review of subdivision and rezone proposals on non-Indian lands parallel to County review of those proposals. Despite the current differences in the Plans utilized by the County and the Tribe, both parties are optimistic that an agreement will be

reached.

The Tribe and the County have an exceptional relationship with respect to transportation planning on the Reservation. Numerous projects, ranging from a freeway interchange and various road projects to a pedestrian over-crossing, were constructed through coordinated efforts. The County also allows the Tribe to use road mitigation funds collected under a County Road Mitigation Ordinance.

The Tribes participate in the County's Growth Management planning efforts with representation on numerous committees. The Tribe is, or has been, a member of the following committees: Snohomish County Tomorrow, a policy-making forum of County and City representatives; the Planning Advisory Committee, a group of County, City, and Tribal planners providing technical assistance regarding Growth Management Act issues; Rural Forum, a group making policy recommendations to the County Council regarding rural lands policy; Snohomish County Forestry Advisory Committee, charged with designating resource lands and developing policies and regulations; the Solid Waste Advisory Committee, developing policy on solid waste disposal; and the Quilceda-Allen Watershed Committee. Tribal membership on this bodies represent or represented ongoing Tribal involvement in the County's effort to plan under the Growth Management Act and, in part, directly affected the non-Indian and, to a lesser extend, Indian lands.

Over the last three years, the Tribe has worked with local, county and state governments to identify gaps in the public health system and to increase capacity. We have developed a community dialogue based on mutual respect and understanding. Tulalip has a contract with the Washington State Department of health to provide health and wellness education; and another contract with the Department of Social and Health Services to provide Mental health Service.

The Tulalip Tribes works in conjunction with the Snohomish County Public Health Office to expand the capacity of the Public Health System and to identify gaps in service to both Indian and non-Indian people in Snohomish County. These efforts include sewage treatment, water delivery, immunization programs, health assessment, data collection, preventive health, and education and mental health services.

Personal health care is provided on the reservation to Tulalip tribal members, members of other tribes, and individuals residing in Snohomish County. Specialty services and primary care are purchased from medical practitioners in Snohomish and King County, providing over $4 million to local business each year.

One of Tulalip's highest priorities is to increase the health status of all citizens residing in Snohomish County. This has been

accommplished by negotiation and a spirit of mutual cooperation between the Tulalip Tribes, Snohomish County and the State of Washington, not through legislated punitive action.

The Tribes cooperate with the cities of Marysville and Everett on water and sewer delivery systems that benefit all concerned in the area. We have just completed an agreement with the City of Marysville on a water delivery system to the reservation for the business park the Tribe is developing.

The Tribes and the State of Washington are working together on the possible state retrocession of PL 83-280 jurisdiction over the Tulalip Indian Reservation. The Snohomish County Sheriff's Office currently sub-contracts a PL 93-638 contract for law enforcement services on the Tulalip Indian Reservation. This contract is supplemented with revenue generated by the Tulalip Casino. The Tribes and the County Sheriff's Office have been discussing the possibility of cross-deputizing their respective law enforcement officers, and are going to begin coordinating ordinances to helping a number of law enforcement issues that need to be resolved. The Marysville Police Department and Marysville Fire District also receive funds from the Tulalip Casino to offset increased services created by the Casino.

The Tribes have been working with the citizens of Hat Island in the development of shellfish beds for cultivation and harvest. The Tribes have been conducting shellfish population studies on their lands. The Tribe have been working with the land owners who are interested in working with the Tribes and want to learn more about shellfish resources on their tide lands. Some of the land owners have agreed to allow tribal members to harvest shellfish from their property. The Tribes have agreed to postpone any shellfish harvest until we have reached a cooperative agreement with the Hat Island Property Owners Association.

We are working with the city of Everett to restore a 'story pole' that is almost 75 years old. This 'story pole' was carved by Tulalip Chief William Shelton and then he donated it to the City of Everett in 1923. The 'story pole' has begun to deteriorate at its base. City engineers and private citizens have noticed this, but did not know how to repair it. Over the past few months, an Everett couple have taken a special interest in having the 'story pole' preserved for future generations. They went to the Everett City Council for help in raising funds to restore the 'story pole'. The Everett City Council appropriated $12,000 for the restoration, and then the Council approached the Tulalip Tribes for spiritual and technical assistance in restoring the pole. It was then that a Tulalip Master Carver donated his time to the restoration of the 'story pole'.

The Tulalip Tribes, the City of Everett, and private citizens throughout Snohomish County have all come together to save and

preserve a landmark and a piece of history for our future generations.

We are building a community Boys and Girls Club for all youth in the Marysville/Tulalip area to enjoy. The Tulalip facility of the Boys and Girls Club will be the first of its kind on an Indian reservation in the State of Washington, and one of eight such facilities on Indian reservations across the country. The Tulalip facility is being touted as a showcase for other reservation Boys and Girls Clubs.

This facility is fast becoming a reality through the cooperative efforts and funding from Department of Housing and Urban Development competitive grant awards totaling $525,000; the Boys and Girls Club of America National Headquarters contribution of $75,000; and from revenue generated by the Tulalip Casino Charity Tables in the amount of $600,000. We are also soliciting private donations from tribal members, tribal employees and community members.

The Tulalip Boys and Girls Club is a prime example of the Tulalip Tribes, the Marysville School District, the Boys and Girls Club of America, the Department of Housing and Urban Development, and Indian and non-Indian individuals coming together to fulfill a dream which has positive influences on everyone in the community.

Several Tulalip Tribal Members and Board Members serve on the boards of several organizations throughout Snohomish County and the State of Washington. It is the intent of the Tulalip Tribes to establish and maintain congenial and productive relationships with as many of our neighbors as possible. Examples of our commitment are: Chairman Stan Jones is on the Board of Directors of the First Heritage Bank; I am a member of the School Board for the Marysville School District, which also serves the reservation; I am also a member of the Washington Inter-Scholastic Athletic Association; we have two members on the Marysville Tulalip Chamber of Commerce Board of Directors; and a tribal member has jointed the local rotary.

The Tulalip Tribes in going out of its way to be a responsible corporate member of the community by providing jobs, treating all fairly, working on a vast array of issues in the community to make it a better place to live and work.

Therefore, Mr. Chairman, the Tulalip Tribes finds it extremely difficult to understand why legislation such as section 329 would be considered by this or any other legislative body. We have found that sitting down and talking with all concerned resolves the issues in a satisfactory manner.

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2010 Massachusetts Ave., NW
Second Floor
Washington, DC 20036
202.466.7767
202.466.7797 *facsimile*

Statement of W. Ron Allen

President, National Congress of American Indians

Before the Senate Committee on Indian Affairs

Regarding Indian Tribal Sovereign Immunity

24 September 1996

I. Introduction

Good morning Chairman McCain, Vice Chairman Inouye, and members of the committee. I am W. Ron Allen, Chairman of the Jamestown S'Klallam Tribe located in Washington State, and President of the National Congress of American Indians (NCAI).

On behalf of our member tribes, I am pleased to appear before you today to present testimony on tribal sovereign immunity and congressional proposals to waive that immunity by statute.

II. Tribal Sovereign Immunity

Indian tribes are independent, political communities retaining our original rights in matters of local self-government. [1] This authority extends to tribal members and tribal territories, [2] and to the activities of non-members who enter consensual relationships with the tribe or with tribal members. [3]

Simply restating the principle of immunity is not sufficient. Any discussion of sovereign immunity must benefit from a thorough understanding of "sovereignty" itself. As a fundamental legal principle, sovereign entities such as Indian tribes possess the inherent right to govern and to self-government on their own territory.

In the 18th century when this republic was forged, the colonies followed the practices of the British Crown and treated Indian tribes as foreign nations,

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1 *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

2 *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991).

3 *Montana v. United States*, 101 S.Ct. 1245 (1981).

recognizing tribal sovereign authority over internal affairs. The policy of recognizing the sovereign status of Indian nations is expressed in several provisions of the U.S. Constitution, including the grant of authority to the congress of the exclusive power to legislate in the realm of Indian affairs; and the article making treaties (including Indian treaties) the "supreme law of the land".

Early decisions of the U.S. Supreme Court reinforced the recognition of tribal sovereignty. In his famous "Cherokee trilogy" of cases, Chief Justice John Marshall established that though tribes may not be properly termed "foreign states" they are nonetheless "states" meaning distinct, independent political communities. [4]

The Court has also held that though no longer possessing the "full attributes" of sovereignty, Indian tribes remain "a separate people with the power of regulating their internal and social relation. [5] Tribes have the power to make their own laws in internal matters [6] and to enforce those laws in their own forums. [7]

General principles have evolved in the realm of Indian affairs are that Indian tribes have inherent, rather than derived or derivative, power over its affairs and are free to act unless restricted by federal action. In addition, states are precluded from interfering in issues of tribal self-government.

Tribal sovereignty necessarily brings with it a general immunity from lawsuits that can be waived for specific purposes as I discuss below. Because Indian tribes retain inherent powers of sovereignty, tribes enjoy a common-law immunity from suit. [8]

This immunity from suit is enjoyed by the three major sovereign entities in the United States. Tribal sovereign immunity is similar to that of the United States, and can only be diminished with federal consent through a deliberate act of Congress. The Eleventh Amendment protects states from suit, and the United States is also protected by suit.

IV. The Federal-Tribal Relationship

Since the earliest days of the Republic, Indian tribes have had their sovereign status

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[4] *Cherokee v. Georgia*, 30 U.S. (5 Pet.) 1 (1931); *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[5] *United States v. Kagama*, 118 U.S. 375, 381-82 (1886).

[6] *Raff v. Burney*, 168 U.S. 218 (1897).

[7] *Williams v. Lee*, 358 U.S. 217 (1959).

[8] *United States v. Wheeler*, 435 U.S. 313 (1978).

recognized judicially, legislatively and by the executive branch in various decisions, statutes and executive actions. This recognition brings with it not only the well-established right to assert jurisdiction and regulate persons and activities within the territorial boundaries of the sovereign, but also the well-settled principle that sovereigns do not have the right to assert jurisdiction and regulate other sovereigns.

Indian tribes, in short, enjoy all the characteristics and attributes of sovereignty not explicitly withdrawn by treaty of statute.

V. Sovereign Immunity Crucial to Tribal Survival

A. Immunity in general

No government (federal, state or tribal) can operate effectively faced with the prospect of potential plaintiffs filing crippling and resource-draining actions each time it takes official action. [9]

It has long been recognized that Indian tribes have the same immunity from suit at common law enjoyed by other sovereigns. [10]

Of these three sovereigns, tribal governments are indisputably least likely to survive the avalanche of lawsuits that would surely follow an abrogation of its immunity. Unlike the United States, the states and cities, Indian tribes could not survive a flurry of lawsuits that the abrogation of immunity would bring. Unlike other governments in the U.S. that can absorb large judgments and pass along their cost to the taxpayers, Indian tribes do not have that luxury.

Combined with endemic and abject poverty and the lack of a tax base, Indian country does not have the "deep pockets" that plaintiffs attorneys depend on to satisfy judgments.

The notion that tribal immunity ought to be waived contradicts and works against the well-settled federal principle of encouraging business and economic development on Indian lands. Since the dawning of the Era of Self-Determination with President Richard Nixon in 1970, a number of federal initiatives have attempted to foster development in Indian country. [11]

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[9] The immunity from suit of the United States has been waived with regard to certain contract actions in the Tucker Act, P.L. 28 U.S.C. Sec. 1491; and in certain tort actions by the 1946 Federal Tort Claims Act, P.L. 79-601, 60 Stat. 842. Nearly all states have affected a similar limited waiver of sovereign immunity through statute or court decision.

[10] *Turner v. United States*, 248 U.S. 354 (1919); *see also United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506 (1940).

[11] *See far example* the Indian Self-Determination and Education Assistance Act of 1975; the Indian Financing Act of 1974; the Indian Gaming Regulatory Act of 1988; and the Self-Governance Act of 1994, among others).

As the number of Indian and non-Indian businesses and entities have increased in their contacts, the potential for disastrous lawsuits has also increased. These are suits the tribes can ill-afford. Any efforts to boost investment, jobs, and businesses in Indian country would be offset and overwhelmed by an abrogation of tribal sovereign immunity.

B. Culture and Tribal Self-determination

The ability of any Indian tribe to rebuild its economy, its governing structure, and to recapture its cultural traditions is heavily dependent on the availability of tribal revenues. Salvaging nearly-lost languages, practicing our own religions and preserving our cultures all depend on our successes in generating and protecting tribally-generated revenues. These accomplishments would not be possible without our immunity from suit.

C. The Myth of Unqualified Immunity

To those that oppose the defense of sovereign immunity, let me remind the committee that tribal immunity is not automatic and it is not unqualified. Rather, tribal immunity may be *waived* by the tribes themselves for discreet purposes or by the United States as part of its "superior and plenary" authority to limit, modify, or eliminate completely the powers of local self-government tribes possess. [12] Any waiver must be unequivocally expressed.[13]

Indian tribes may and often do, of course, choose to waive their immunity — often as part of a commercial, consensual relationship with a non-Indian business interest. Inherent in the nature of any contract is a consensual relationship that seeks to serve the interests of both contracting parties, while adjusting business risk between them. Common terms in business contracts include price, quantity, and obligations as well as provisions regarding choice of law, choice of forum, and, if a sovereign entity is involved, whether and to what extent the sovereign's immunity will be waived for purposes of remedies.

These same notions are at play in *any* consensual relationship involving Indian tribal governments ranging from customers of tribal gaming establishments, to financial lenders wishing to do business with the tribe, to private property owners and residents of Indian reservations.

Tribal immunity may also be waived pursuant to federal statute. The 1934 Indian Reorganization Act ("IRA") [14] permitted tribes to create both governmental (under section 16) and corporate (under section 17) entities to carry on official and commercial functions.

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[12] *Santa Clara Pueblo v. Martinez, supra*, at 56.

[13] *United States v. Testan*, 424 U.S. 392 (1976).

[14] 25 U.S.C. Section 477, et seq.

Acknowledging the distinction between official and commercial activities, the bifurcated IRA framework includes an *optional* waiver of immunity provision available to section 17 tribal corporations. This option, known as a "sue or be sued" clause, may be exercised by tribes in their discretion. It is crucial to note that the provision is only available for a section 17 corporate charter, not a section 16 governmental charter.

Increasingly, the courts are holding that waivers of sovereign immunity under section 17 apply *only* to the corporate functions of a tribe — not its section 16 governmental functions. These decisions make eminent practical sense: by limiting liability to the property of the corporate entity, tribal governments can attract and maintain outside investment and non-Indian businesses without exposing all tribal assets to potential legal actions. [15]

The immunity may also be limited by the United States, pursuant to Congress' "plenary authority" to limit, modify, or eliminate completely the powers of local self-government tribes possess. [16] The Congress did enact such a limitation in the 1968 Indian Civil Rights Act ("ICRA") which provides for federal court review and federal *habeas corpus* relief for tribal decisions resulting in custodial detention of Indians and non-Indians. Here too, the Supreme Court held that the Congress did *not* intend a general waiver of the tribal sovereign immunity. Any such Congressional limitation must be specific, unequivocal, and strictly construed. [17]

Absent possible tribal waivers or unequivocal limitations by the U.S. Congress, the courts have consistently held that tribal sovereign immunity is *absolute*. [18]

VI. Section 329 - Recipe for Paralysis and Destruction

Mr. Chairman, earlier in the appropriations process, an amendment was proposed to the FY1997 Interior and Related Agencies Appropriations bill (H.R. 3662) that would have struck at the heart of the sovereignty of Indian governments around the nation.

This amendment, known as "Section 329", purported to waive tribal sovereign immunity for any instance where "the action or *proposed* actions...impact or *threaten* to impact" the ownership or use of private property interests on or off the reservation, and subject Indian tribes and tribal officials to the jurisdiction of state and federal courts for appropriate remedies including

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[15] *Atkinson v. Haldane*, 569 P.2d 151 (Alaska, 1977); *Boe v. Fort Belknap Indian Community*, 445 F. Supp. 462 (D. Mont. 1978).

[16] *Santa Clara v. Martinez, supra*, at 56.

[17] *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

[18] *See United States v. U.S. Fidelity and Guaranty, Co.*, "(w)ithout Congressional authorization...Indian nations are exempt from suit", at 512.

injunctive relief and damages.

By its very terms, section 329 would stifle the ability of any tribal government to even *propose* official actions lest they be sued for injunctive or other relief in state or federal courts.

The operation of section 329 would cripple tribal governments and bring government operations to a grinding halt. Section 329 is practically unnecessary, and constitutionally suspect, and I trust that this committee and this Congress will not allow the special relationship between the United States and Indian nations be violated by subjecting Indian tribes to lawsuits in state and federal courts.

Mr. Chairman, I thank you for this opportunity and would be very happy to answer any questions you may have at this point.

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MILLE LACS BAND OF CHIPPEWA INDIANS
Executive Branch of Tribal Government

Before the

UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

Statement of

MARGE ANDERSON
Chief Executive, Mille Lacs Band of Ojibwe

on

Tribal Sovereign Immunity

October 8, 1996

INTRODUCTION

I thank the Chairman, Mr. McCain, the Vice Chairman who initiated the hearing, Mr. Inouye, and the members of the Committee on Indian Affairs of the United States Senate for the opportunity to submit this testimony for the record regarding Indian tribal sovereign immunity.

Never before in modern Congressional history have Indian peoples been subjected to the numbers and viciousness of attacks as witnessed in the 104th Congress.

Never before have such attacks been made without even the attempt to provide those people most intimately affected--we, the First Americans--with even minimal notice and opportunity to be heard.

Never before have so many attempts been made to circumvent the normal and due legislative process and provide this Committee, the Senate Committee on Indian Affairs, the respect deserved by it as the empowered Senate committee of jurisdiction.

Never before in modern legislative history have Indian peoples needed this Committee and its noble leadership to stand between us and the ugly perfidy of an embittered few.

Thank you for standing up for principle, for due process, and for the rights of Indian peoples.

That is exactly what this issue entails: principle, due process and human rights. All guaranteed by law and legal documents, the Constitution and constitutional process, by rule and by reality.

SOVEREIGNTY

Sovereign immunity flows from the core concept of "sovereignty," a touchstone term to Indian peoples and a word seemingly foreign to non-Indian Americans.

Various dictionaries define "sovereignty" as the "supremacy of authority or rule, as exercised by a sovereign or a sovereign state," "the self-sufficient source of political power, from which all specific political powers are derived," "the necessary existence of the state and that right and power which necessarily follow," "the right of a state to self-government."

Yet for Native American peoples the concept is not so much defined as defining: of our self governance, self sufficiency and self determination.

Sovereignty not only lies at the heart of federal Indian policy. It is the heart. It establishes dignity and boundaries to

Indian country. It both flows from and into government-to-government respect and relationships. It bespeaks of the 1990's "empowerment" and the centuries old quest for life-giving economic development on lands largely stripped and cast aside as useless by non-Indians.

Sovereignty is found early in the Constitution (Article I, Section 8). It is interpreted in the earliest days of the United States by our earliest Chief Justice. It is embraced even earlier in the hundreds of treaties with American Indians. And it has been embroiled in every controversy since. Thus, to tear and strain and slash at it now--by those who piously say they are "conservatives" --bespeaks of the great lengths they are willing to go, even betraying their ideology to "conserve," to enrich their landed friends, all non-Indians.

Unfortunately for Indian peoples, what is so basic to Indian definition and design, ways and traditions, beliefs and identity, is simply unknown to the majority Americans. Almost all non-Indian Americans and their elected leaders (even in Washington) are wholly ignorant of "sovereignty." They hear the word and think "Kings and Queens," royalty and crown jewels, tea taxes and George III. At best to most it fosters a faint harkening to something old, outdated and uninteresting.

Notwithstanding its lack of note within majority America, it is enshrined in the founding documents of America, the treaties with my people and the words and rulings of both the congressional and judicial branches of U.S. federal government.

SOVEREIGN IMMUNITY

I will not re-trace for you the origin and scope of the limited protection from suit afforded sovereigns, or note the precedents and judicial give-and-take accorded tribal sovereign immunity. Others, both expert tribal lawyers such as Susan Williams and Doug Endreson and esteemed tribal leaders such as Rhonda Swaney, Henry Cagey, Bill Anoatubby, Jesse Taken Alive, Herb Yazzie, Don Hatch and Ron Allen have honorably done that, and more. The record is full and favorable to tribal sovereign immunity.[1]

However, I would like to add my voice to those many as they underscore the absolute, real-life importance of tribal sovereign immunity in America as it approaches the 21st century. For Indian people and non-Indian people alike.

As stated by the Supreme Court in Oklahoma Tax Comm'n v. Potawatomi Tribe, 498 U.S. 505, at 510 (1991):

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. . . . Congress has consistently reiterated its approval of the immunity doctrine [in Acts which] reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development."

Make no mistake. "Indian self-government," "tribal self-sufficiency and economic development" are exactly what are at stake here.

Associate Solicitor Robert T. Anderson states in his testimony to the Committee:

> Thus, tribes are sovereign nations and possess all powers of government, except those which have been expressly extinguished by Congress or which the Supreme Court has ruled are inconsistent with overriding national interests. Tribes can adopt and operate under their chosen form of government; levy taxes; license and regulate activities; define conditions of tribal membership; exclude persons from tribal territories; zone; make and enforce laws, both civil and criminal; and establish tribal courts of law.
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> . . .Since tribal civil jurisdiction concerns those matters which are linked most intimately with tribal identity, the exercise of broad tribal civil jurisdiction is essential to the maintenance of a vigorous tribal government.

Tribal sovereign immunity therefore is crucial to "vigorous tribal government." To diminish it would allow or perhaps invite a flood of resource-draining lawsuits, swamping state and federal courts, breaking the already stretched budgets of Indian governments, crippling economic development, opening Indian governments to attacks by non-Indians in historically hostile non-Indian state courts, allowing for direct, hostile involvement in sovereign tribal affairs by states and non-Indians who have economic and jurisdictional interests at conflict with Indian peoples.

These perils are not hypothetical. We have centuries of proof. The painful cases are written in Indian blood. They are witnessed by tens of millions of acres of stolen Indian land.

They are punctuated by billions of dollars of burglarized Indian mineral, water and timber rights.

OPPOSITION TESTIMONY

Just as the perils are not hypothetical, so too they are not merely historical.

And just as the perils are real and current, they center around land. Our opponents call it "property." We all know what they are talking about: Money.

Money and wealth, land and resources, all to be taken from Indian peoples. And usually in the name of "fairness" or "a level playing field."

The testimony of those who proudly proclaim the need to subvert or eliminate tribal sovereign immunity (and some have devoted much of their professional lives to anti-Indian causes) is largely highlighted by three approaches:

First, they ignore critical facts and even centuries of history and rafts of legal documents. When talking of property, or property based rights, they almost always begin tracing "ownership" after ownership was transferred out of Indian hands by hook or crook. According to their phraseology, the non-Indian owners are "innocent" victims, who should not have to adhere to "antiquated" treaties.

Second, like so many before them, they generously offer up Indian rights and the future of Indian children to non-Indian encroachers, as if Indian rights and Indian people were mere chaff from parched rice--just fluff to the wind.

They gloss over our sovereignty with mindless disinterest, dismissing it and all it represents with the ease of a forgotten afterthought.

Third, they piously and paternalistically promote their subversion of tribal sovereign immunity as a necessary means of achieving "true" Indian economic development, expecting us and the Committee to ignore two obvious points: Subversion of sovereign immunity necessarily leads to loss of Indian property and resources (the antithesis of economic development), and the benefactors of such "true" economic development are usually not Indians but the non-Indian promoters themselves.

CONCLUSION

Therefore, I ask this Committee as it reviews the testimony of those who would subvert our sovereignty to 1) remember the missing facts and history, 2) oppose the fast and easy offering up of Indian rights--especially by those non-Indians who would benefit, and 3) on matters of Indian economic development, listen to Indian leaders who must struggle daily, as you do, to provide wisely for our people.

Again, I thank you for all you do on behalf of Indian peoples.

Let me conclude with the words of the Associate Solicitor:

> Tribes are one of three sovereigns recognized as such under the United States Constitution and possess inherent powers of self-governance. This governmental status has been recognized in an unbroken line of Supreme Court cases dating to the earliest days of the Republic. Any erosion of tribal sovereign immunity would undermine one of the most fundamental principles of government.

[1] **There are six points I would like to underscore:**

First, tribes are sovereigns whose existence predates by centuries the formation of the United States of America, and even the arrival of Europeans in this land. We have the inherent right to govern ourselves, and have held this right for thousands of years before Europeans first came to this land. Indian tribes are "distinct, independent political communities, retaining their original natural rights .... The very term 'nation,' so generally applied to them, means a 'people distinct from others.' The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties." Chief Justice Marshall in Worcester v. Georgia, 6 Pet. 538, 559 (1832).

Before the coming of the Europeans, the tribes were self-governing sovereign political communities. McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172 (1973).

"As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by" its provisions. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

The powers of Indian tribes are, in general, "inherent powers of a limited sovereignty which has never been extinguished." F. Cohen, Handbook of Federal Indian Law 122 (1945).

"Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory .... [They] are a good deal more than 'private, voluntary organizations.' United States v. Mazurie, 419 U.S. 544, 557.

"Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." U.S. v. Wheeler, 435 U.S. 313, 323 (1978).

"That Congress has in certain ways regulated the manner and extent of the tribal power of self-government does not mean that Congress is the source of that power." Wheeler, at 328.

Second, the recognition of the pre-existing sovereign status of tribes is also found in the U.S. Constitution in the Indian Commerce and Supremacy clauses. Through these clauses, the Constitution proclaims the preeminence of the federal government in dealing with tribes and projects Indian treaties as the supreme law of the land.

Third, the treaty making process itself is recognition of tribal sovereignty. Treaties are, at their essence, a special type of contract. They are special in part in that they are contracts between sovereign nations.

Fourth, the special, separate and sovereign nature of Indian nations is further evidenced by the fact that U.S. citizenship was not extended to Indian people in general until 1924. 8 U.S.C. S 1401 (a) (2).

Fifth, because tribal sovereignty predates the Constitution, the courts have held that the Bill of Rights and Fourteenth Amendment do not apply to tribal governments and, in response, Congress passed the Indian Civil Rights Act of 1968, 25 U.S.C. S 1302, which imposed similar, but not identical restrictions to those contained in the Bill of Rights and the Fourteenth Amendment. However, acknowledging separate and sovereign status, Congress modified them significantly in recognition of the unique political, cultural, and economic needs of tribal governments. For example, the act does not prohibit the establishment of religion, nor does it require jury trials in civil cases, nor does it require the appointment of counsel for indigents in criminal cases.

Further, the Double Jeopardy Clause of the Constitution, U.S.C.A. Const. Amend. 5, bars the government from trying the same defendant twice for the same crime. The U.S. Supreme Court has previously held that the clause does not bar separate prosecutions for the same offense by separate sovereigns - the federal government and states. Moore v. Illinois, 14 How. 13, 19-20. In Wheeler, the Supreme Court also held that the Double Jeopardy Clause does not bar separate prosecutions for the same offense by the federal government and tribes, because they are separate sovereigns. Wheeler, at 329-330.

Finally, sovereign immunity is not a new concept, and the acknowledgment of tribal sovereignty is not a partisan position. President Nixon, who had been Vice-President during the tribal termination era (1953-1968), initiated the present federal policy towards Indian peoples -- Self-Determination -- in 1970 when he proclaimed, "This, then, must be the goal of any new national policy toward the Indian people: to strengthen the Indian sense of autonomy without threatening his sense of community." Message from the President of the United States, 1970, "Recommendations for Indian Policy" (Government Printing Office, Washington, DC).

Moreover, in a 1983 policy statement, President Reagan reaffirmed this policy of promoting tribal self-determination, stating, "This administration intends to restore tribal governments to their rightful place among governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs." President's Statement on Indian Policy, Pub. Papers 96, 99 (1984).

MILLE LACS BAND OF CHIPPEWA INDIANS
Executive Branch of Tribal Government

September 12, 1996

The Honorable John McCain, Chairman
Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington DC 20510

The Honorable Daniel K. Inouye, Vice Chairman
Committee on Indian Affairs
United States Senate
838 Hart Senate Office Building
Washington DC 20510

Dear Senators McCain and Inouye:

It is my understanding that the Senate Committee on Indian Affairs intends to hold a hearing on September 24 on the issue of "tribal sovereign immunity'. On behalf of the Mille Lacs Band of Ojibwe Indians, I respectfully request the opportunity to present testimony at that hearing. If this is not possible, then I will be submitting a longer written statement on behalf of the Mille Lacs Band.

It is my view that sovereign immunity is one of the most fundamental aspects of the sovereign status of any governmental entity. Sovereign immunity precludes tribal governments, like state governments and the federal government, from being subjected to frivolous, time-consuming lawsuits. Sovereign immunity protects tribal assets from the perils of the many entities who seek to attack and impoverish tribal governments.

The immunity of the sovereign protects the programs of the elderly, the young, and the sick. Many people on the reservation have heart conditions, arthritis, and are on kidney dialysis. Of the 1.8 million Native Americans in the country, 603,00 live below the poverty line. Most of those are children under the age of five. Sovereign immunity protects the funds that the Congress appropriates for those programs from being judicially attacked.

One hundred thousand American Indians are homeless or underhoused. Sovereign immunity protects those housing programs and the money the Congress has appropriated to build houses on the reservations.

HCR 67, Box 194, Onamia, Minnesota 56359 (612) 532-4181 FAX# (612) 532-4209

Indians have the highest rate of fetal alcohol syndrome, diabetes, and tuberculosis of any group nationwide. Sovereign immunity protects our health dollars from the whims of judicial caprice.

As a doctrine, sovereign immunity is enjoyed by virtually all governments in the United States. It is not possible for a tribe to be self-governing, self-determined, and sovereign if sovereign immunity ceases to exist. By the same token, neither can any Member of Congress be a supporter of self-governance, self-determination, and tribal sovereignty while actively seeking to diminish tribal sovereign immunity through legislation. I believe that both of you are indeed supporter of self-governance, self-determination, and sovereignty, and that you will do your best to assist us in fighting the efforts of those who are not our friends to legislate us out of existence as governments.

In closing, it is my position that tribes must be prudent and responsible in their use of sovereign immunity. In those limited cases when justice can only be served by a tribe's willingness to waive its sovereign immunity and allow itself to be sued, then the tribe should by all means do so. However, as responsible governments, the decision to waive sovereign immunity must be left to the tribes.

Thank you for considering the position of the Mille Lacs Band, and as I mentioned earlier, I am available to testify upon your request. If you have any questions, please contact myself or Melanie Benjamin at (320)532-4181.

With warmest regards,

MARGE ANDERSON
Chief Executive

TESTIMONY OF THE CHEYENNE RIVER SIOUX TRIBE
BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS
CONCERNING TRIBAL SOVEREIGN IMMUNITY AND SECTION 329
OF THE 1997 INTERIOR APPROPRIATIONS BILL

October 4, 1996

Mr. Chairman and Members of the Committee, thank you for the opportunity to offer testimony on behalf of the Tribe on the principle of tribal sovereign immunity and on the integral function which sovereign immunity serves in empowering Indian tribal governments and in advancing tribal self-determination.

Long before the first The Great Sioux Nation and other Native American Nations were formed by the collective will of Native Americans to come together to form tribal societies and communities. Thus, Native American sovereignty and sovereign immunity predate the existence of the United States. From the beginning, relationships between Native American Nations were treated with respect in their relationships with the U.S.

From its infancy, the United States has formally recognized Indian Nations as governing bodies. In fact, during the Revolutionary War, the Oneida Nation directly assisted the Continental Army with food and other necessities of life. Native American forms of government contributed to both the Articles of Confederacy and to the United States' Constitution.

The more than 500 federally-recognized tribes within the United States range in population and tribal land base from very small to very large. Despite this diversity, the common thread shared by all of these Indigenous Nations is their sovereignty which inheres in the exercise of governmental authority over their members and all others who have consensual relations with them.

Recently, Congress formally declared its reaffirmation of the sovereign status of tribes in the 1994 "Federally Recognized Indian Tribe List Act." There, Congress acknowledged that "the United States has a trust responsibility to recognized Indian tribes . . . and recognize[d] the sovereignty of those tribes." In this Act, Congress validated the authority of the Secretary of the Interior to maintain a list of acknowledged tribes. In publishing this list, the Secretary has consistently indicated that listed tribes possess "the immunities and privileges available to other federally acknowledged Indian tribes by virtue of their government-to-government relationship with the United States, as well as the responsibilities, powers, limitations and obligations of such tribes. See also, 55 I.D. 14 (Powers of Indian Tribes).

The foundation of the government-to-government relationship between Indian tribes and the United States is found in the U.S. Constitution. For example, the federal courts have frequently stated that article I, Section 8, clause 3, the federal government's authority to regulate commerce with Indian tribes, is the source of Congress' power over tribes. In 1831, in Cherokee Nation v. Georgia, 30 U S. (5 Pet.) 1 (1831), Chief Justice John Marshall examined the relationship between Indian nations and the United States and concluded that tribes were neither states nor foreign nations. Justice Marshall characterized Indian Nations as "domestic, dependent nations," possessing attributes of sovereignty and yet dependent upon the protection of the United States. Cherokee Nation v. Georgia, 30 U S. (5 Pet.) 1 (1831).

The Supreme Court's holding in Cherokee Nation must, of course, be read against the background of the United States' solemn pledge to protect Indian Nations, which was frequently set forth in early Indian treaties. See, e.g., Art. III, Treaty with the Cherokee, 1785, (7 Stat. 18). The following year, Chief Justice Marshall ruled that the dependent status of Indian Nations had not divested tribal governments of their sovereignty and that Georgia had no jurisdiction in Cherokee territory. Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

Accordingly, the United States has recognized -- since Lewis and Clark first traveled up the Missouri -- that the constituent Tribes of the Great Sioux Nation are sovereign nations, possessing all the powers of government, except those which have been expressly extinguished by Congress or which the Supreme Court has ruled are inconsistent with overriding national interests. Great Sioux Nation Tribes have operated under their

chosen form of government for centuries. The authority of Native American governments includes: the power to levy taxes, the power to license and regulate activities; the power to define conditions of tribal membership; the power to exclude persons from tribal territories; zone; the power to make and enforce laws, both civil and criminal; and the power to establish tribal courts of law.

Since 1978, Native American Nations have been divested of tribal criminal jurisdiction of criminal jurisdiction over non-Indians. Felony jurisdiction on the reservation is the domain of the United States since the enactment of the Major Crimes Act in the 1880's. 18 U.S.C. § 1153 et seq. With the exclusion of enumerated "major crimes," a tribe can prosecute Indians, both tribal members and nonmembers. However, tribes lack criminal jurisdiction over the misdemeanor offenses of non-Indians. States lack criminal jurisdiction over tribal members in Indian country; with the solitary exception of Public Law 280 states whose criminal laws apply on the reservation.

Tribal civil jurisdiction is considerably more complex, as it is defined by Indian Nations and their courts, not by federal statutes. Since tribal civil jurisdiction concerns situations which are intimately bound together with tribal identity. Hence, the exercise of broad tribal civil jurisdiction is essential to the maintenance of a vigorous tribal government. The Supreme Court has indicated that tribes generally cannot regulate the activities of non-Indians, with the caveat that tribes retain authority over non-Indians who enter consensual relationships with the tribe or tribal members or whose activities otherwise directly affect the political integrity, economic security, or health or welfare of the tribe. Montana v. United States, 450 U.S. 544, 565-66 (1980).

At the Senate Committee on Indian Affairs' hearing Tuesday September 24, 1996, Larry Long, an attorney in the South Dakota Attorney General's Office testified that South Dakota was unable to sue tribal officials for ultra vires acts in either their individual or official capacities. The Cheyenne River Sioux Tribe found this incredibly puzzling since the State of South Dakota itself sued the Chairman of the Cheyenne River Sioux Tribe and the Director of the Tribal Game, Fish and Parks Department. See South Dakota, in its own behalf, and as parens patriae, Appellee, v. Gregg Bourland, personally and as Chairman of the Cheyenne River Sioux Tribe; and Dennis Rousseau, personally and as Director of Cheyenne River Sioux Tribe Game Fish and Parks, Appellants , in November 1993, after remand from the Supreme Court, the Eighth Circuit issued an unpublished per curiam opinion summarily affirming the District Court, South Dakota v. Bourland, 13 F.3d 264 (1993); but we then granted Bourland and Rousseau's petition for rehearing by the panel, see 1994 WL 605890 (8th Cir. 1994) on remand from the United States Supreme Court, South Dakota v. Bourland, 113 S. Ct. 2309 (1993), reversing 949 F.2d 984 (8th Cir. 1991), op.vac. and mandate recalled, 997 F.2d 512 (8th Cir. 1993). Hence, contrary to South Dakota's testimony, the patent availability of suits against tribal officials in their personal and official capacities clearly illustrates that there is no need for Congress to enact a broad waiver of tribal sovereign immunity.

At the hearing, a rancher doing business on the Cheyenne River Indian Reservation gave testimony in which he bitterly complained about the Tribe's business license fee and tribal laws and regulations. He noted that his grandparents homesteaded the ranch in 1908 and thus, he argued, he should be free from tribal laws and regulations. However, in Buster v. Wright, 135 F. 947, 958 (8th Cir. 1905), the United States' Eighth Circuit Court of Appeals held:

> The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns, and that the Secretary of the Interior and his subordinates may lawfully enforce those laws by closing the business of those who violate them, and thereby preventing the continuance of that violation.

Id. Similarly, individuals who reside upon lands opened to homesteading by Congress in 1908, are subject to the laws governing their consensual relations with tribal members and are also subject to tribal civil jurisdiction where their conduct directly affects the political integrity, economic security, or health or welfare of the tribe and its members. Buster v. Wright, supra; Montana, supra, 450 U.S. 544, 565-66; see also City of Timber Lake, et

al. v. Cheyenne River Sioux Tribe; Gregg J. Bourland in his official capacity as Tribal Chairman; and Marvin LeCompte in his official capacity as Chief of Police of the Cheyenne River Sioux Tribe, 10 F.3d 554 (8th Cir. 1993); cert. den. 114 S.Ct. 2741 (1994).

The retention of significant tribal powers of legislative authority is matched by expansive tribal court jurisdiction over civil matters, as evidenced in subsequent Supreme Court rulings. Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16, 18 (1987) tribal courts best qualified to interpret and apply tribal law; tribal authority over activities of non-Indians on reservation land an important part of tribal sovereignty); National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985) (requiring plaintiffs to exhaust tribal court remedies; exercise of jurisdiction over non-Indians presents federal question, reviewable by federal court). The reservation of jurisdiction to tribal courts over civil matters arising within Indian country springs from the pre-existing government authority of Indian tribes and is maintained by the United States' respect for the solemn government-to-government relationship between Indian tribes and the United States.

The United States has repeatedly affirmed its recognition that states should not have judicial authority over Indian tribes. Consequently, tribal justice systems remain the most appropriate forum for the adjudication of disputes affecting tribes, as well as those affecting individual and property rights. Congress acknowledged the importance of tribal courts in passing the 1992 Indian Tribal Justice Support Act, 25 U.S.C. section 3601(6), although to date, no funds have been directly appropriated for its implementation.

Despite limited funding, Great Sioux Nation Tribes have developed systems to meet the growing demands of tribal communities and changing tribal economies. However, the truth is that most Indian Nations do not have the resources or revenues to develop the justice systems they envision. Accordingly, through the Dakota Territory Chairmen's Association, the Great Sioux Nation Tribes have requested funding from the Department of Justice for a Sioux Nation Supreme Court. Final Sioux Nation Supreme Court Proposal submitted to D.O.J. in September, 1996.

Sovereign immunity is a corollary to the tribal sovereign powers of legislative and judicial authority. Since a sovereign can mandate laws and create courts to interpret and apply these laws, it follows that a sovereign cannot be sued absent its consent. See, e.g., Clement v. LeCompte, Chy. Riv. Sx. Ct. Appls. Appeal No. 93-009-A (1994)(discussion of tribal law begins at p.4) a true and accurate copy is attached hereto and incorporated herein as if fully set forth below. Where Indian tribes contract to perform federal functions under the Indian Self-Determination Act, the Federal Tort Claims Act system is available in certain circumstances to redress alleged grievances by individuals affected by those operations. It is important to note, however, that Congress established this system without waiving tribal sovereign immunity. It is well established that the doctrine of sovereign immunity applies to Indian tribes Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (citations omitted), as it does to state and federal governments. See also Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 172-73 (1977). Most recently, the Supreme Court in Oklahoma Tax Comm'n v. Potawatomi Tribe, 498 U.S. 505 (1991), stated:

> A doctrine of Indian tribal sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. . . . Congress has consistently reiterated its approval of the immunity doctrine [in Acts which reflect Congress' desire to promote the goal of Indian self-government, including its 'overriding goal of encouraging tribal self-sufficiency and economic development.

498 U.S. at 510 (citations omitted). In that case, the Supreme Court concluded that, "Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity." Id. Thus, Indian tribal sovereign immunity retains its vitality. It is noteworthy that the Cheyenne River Sioux Tribe amended its Constitution in June, 1992, creating a separation of powers between the Tribal Council and Tribal Courts. In addition, the Cheyenne River Sioux Court of Appeals has long held that claims of violations of the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq., will be heard on the merits by the Tribal Courts. Moreover, in the Tribal Law and Order Code, Tribal judges may only be removed for cause, after having notice, the opportunity to be heard and the right to be represented by counsel during any such proceeding.

Tribes can grant partial waivers of their sovereign immunity when it is necessary for practical reasons for them to do so, e.g., water rights agreements, mineral leases, and other commercial enterprises. There are limitations on the types of activities for which tribes can waive sovereign immunity, as is true with state and federal waivers.

Tribes, like states and the federal government, are cautious about waiving their sovereign immunity. This is because such waivers frustrate the ideals of tribal self-government, tribal self-sufficiency and tribal economic development. Envelopment of tribal sovereign immunity in a blanket waiver would allow anyone, Indian or non-Indian, who believes that a proposed tribal action might affect his or her property interests to sue the tribe and tribal officials in state or federal court to halt the tribe's action and to recover damages for any harm the court finds that the tribal action produced. This would open the floodgates to state and federal courts with litigation concerning matters historically reserved to tribal courts, or that have been resolved through the political process or through actions for injunctive relief in the federal courts.

Non-Indians who have chosen to live in Indian country would scorn tribal courts and tribal governments and seek to have Congress empower the courts, in favor of those who have historically been hostile to tribal interests. Indeed, it would offer non-Indian neighbors of tribes new opportunities to take control of tribal affairs. Such a sweeping abbreviation of tribal sovereignty would threaten the very future of tribal sovereignty. In fact, this possibility echoes the Termination Era.

Currently, tribal and federal law concerning tribal sovereign immunity prevents disgruntled tribal members from forcing the tribe to litigate disputes in other courts prior to the exhaustion of their tribal remedies. Were tribal members and non-Indians permitted to sue tribes in state courts, state courts would have the authority to interfere in the conduct of internal tribal government. It would also abort the development of tribal court jurisprudence, increasing the chances of generating inconsistent decisions.

Defending lawsuits against tribal governments and tribal officials would place a tremendous financial burden on tribes. Of course, the costs of defending litigation in non-tribal forums would be substantially higher than defending them in tribal courts. In addition, the constant threat of impending lawsuits would "chill" tribal governmental activities in general and could paralyze tribal economic development.

There must be no tie between the acceptance/receipt of federal funds and waivers of tribal sovereign immunity. Tribes which accept federally appropriated funds have already agreed to numerous conditions prior to the receipt of federal grant funds. Thus, the broad waiver of tribal sovereign immunity sought by non-Indians against tribes is unnecessary. When the United States lives up to its trust responsibility to Indian Nations by funding tribal governments, the United States should not and must not attach burdensome and conditions impairing sovereignty to such federal funding.

The Great Sioux Nation Tribes and all other Indian Nations, which possess inherent powers of self-government, are one of three types of sovereigns recognized as such under the United States Constitution, i.e., the several states, the several Indian Nations, and the United States. As noted above, the governmental status of the Great Sioux Nation Tribes, and all other Indian Nations, has been recognized in Treaties, executive Proclamations as well as in an unbroken line of Supreme Court cases dating to the earliest days of the Republic. Any erosion of tribal sovereign immunity would undermine one of the most fundamental principles of government and debilitate the sacred trust relationship between the United States, the Great Sioux Nation Tribes, and all other Indian Nations.

Respectfully submitted,

Gregg J. Bourland
Tribal Chairman
Cheyenne River Sioux Tribe

IN THE COURT OF APPEALS
OF THE CHEYENNE RIVER SIOUX TRIBE

TINA CLEMENT,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 93-009-A
	)	
VERNA LECOMPTE, et al.,	)	MEMORANDUM OPINION
	)	AND ORDER
	)	
Defendants.	)	

PER CURIAM (Before Chief Justice Pommersheim and Associate Justices Dupris and Clinton)

This appeal raises the validity of a preliminary injunction issued by the Cheyenne River Sioux Superior Court enjoining the Defendants from taking any further action regarding the allocation of grazing rights to Tribal Range Unit 126 pursuant to the Tribal Grazing Ordinance, Ordinance 15, as amended August 26, 1993. Contesting the allocation of this range unit to Defendants Verna LeCompte and Monte LeCompte, the Plaintiff filed a protest with the United States Department of the Interior, as authorized in Ordinance 15 and Article IV, Section 1 of the Cheyenne River Sioux Constitution, and also filed on October 27, 1993 a request with the Cheyenne River Sioux Superior Court for a temporary restraining order. Named as Defendants in the Complaint ultimately filed with the Superior Court on November 9, 1993 were Verna and Monte LeCompte, who are mother and son and the putative recipients of the grazing permit to Tribal Range 126 under the action of the Tribal Council; the Cheyenne River Sioux Tribe (Tribe), presumably as owner of much of the land comprising Tribal Range Unit 126 and as the sovereign government primarily responsible for allocating the range unit; Russell McClure, Superintendent, Bureau of Indian Affairs, Cheyenne River Sioux Agency; and Jerry Jaeger, Area Director, United States Department of the Interior, Bureau of Indian Affairs.

The Superior Court granted the temporary restraining order on October 28, 1993. In *Brehmer* v. *White Wolf*, No. 93-008 (1993), this Court dismissed the Defendants' attempted interlocutory appeal of the temporary restraining order for lack of jurisdiction, but nevertheless vacated the temporary restraining order utilizing its supervisory powers over the lower courts on the ground that no action

had been properly filed in the Superior Court since no complaint directed to the Superior Court had been filed with the request for the temporary restraining order. Rather the Plaintiff had filed in the Superior Court a copy of the Complaint and Protest it had filed with Defendant McClure together with her request for temporary restraining order. This Court ruled that due to the technical noncompliance of the Plaintiff with the Cheyenne River Sioux Rules of Civil Procedure, no action formally had been filed in the Superior Court and the lower court therefore lacked authority to issue a temporary restraining order even though its action may have been in conformity with informal practices sometimes employed by that court. This Court nevertheless granted the parties leave to amend their filings before the hearing on the motion for preliminary injunction to correct this rather technical, curable error by the Plaintiff.

On October 29, 1993, Defendant Russell McClure denied the Plaintiff's Complaint and Protest, finding no material violation of the Cheyenne River Sioux Tribe's Grazing Code in the allocation of Range Unit 126 to Defendants Verna and Monte LeCompte. This Court is informed that an appeal of that decision to the Area Director is presently pending.

Curing the technical defect noted by this Court in its decision in *Brehmer v. White Wolf*, the Plaintiff filed a complaint with the Superior Court on or about November 9, 1993. The Complaint incorporated by reference the Complaint and Protest filed with Defendant McClure. This protest asserted a number of claimed legal violations of the Tribal Grazing Ordinance in the allocation of Tribal Range Unit 126 to Defendants Verna and Monte LeCompte. These claims included alleged violations of preference requirements, Defendant Monte LeCompte's alleged violation of the residency requirement necessary for preference, lack of present livestock ownership by Verna and Monte LeCompte, alleged disqualifying outstanding delinquency in fee payments by Defendant Verna LeCompte, alleged fraudulent misrepresentations in the LeComptes' application, and political unfairness resulting from the fact that Defendants Verna and Monte LeCompte are the mother and brother of Tribal Council member Rocky LeCompte. While asserting numerous alleged substantive violations of the Tribal Grazing Ordinance, Plaintiff Tina Clement's basic complaint is that her present grazing permit to use Tribal Grazing Unit 126 was not renewed by the Tribal Council despite the fact that the Plaintiff made improvements to the unit, arguably without the express written authorization required by federal law, and while the Plaintiff had extensive investments in and livestock grazing on the grazing unit in question.

On November 9, 1993, a hearing on the application for preliminary injunction was conducted by the Superior Court, the Honorable B.J. Jones presiding as specially designated tribal judge. The Superior Court issued a written preliminary

injunction dated November 19, 1993 enjoining the Defendants from taking any further action regarding the allocation of grazing privileges on Tribal Range Unit 126 and requiring the Plaintiff to post bond in the form of a personal check covering the cost of the temporary use of the range unit for a period of one year. While the Order Granting Preliminary Injunction specifically found that the Superior Court had subject matter jurisdiction over the case based on provisions of the Grazing Code that provided that "all land disputes" are to be resolved by the tribal courts, the court did not purport to resolve the Defendants' claims of sovereign immunity and inability to join a necessary and indispensable party. Rather, the Order provided:

> 7. Decision on the Tribe's motion to dismiss on the grounds of sovereign immunity and indispensability is deferred until Nov. 30, 1993; the Tribe's brief on its motion to stay before the Court of Appeals will be considered the Tribe's opening brief on these issues, Plaintiffs may file a responsive brief on Nov. 23, 1993, and the Tribe may file a reply brief on Nov. 30, 1993.

Without waiting for the disposition of these defenses in the trial court, Defendant Cheyenne River Sioux Tribe ("Tribe") filed on November 19, 1993 a Notice of Appeal, Designation of Record, and a Motion to Stay Preliminary Injunction Pending Appeal. On November 22, 1993, the Tribe filed an Amended Motion to Stay Preliminary Injunction Pending Appeal.

The basis of the Tribe's interlocutory appeal was that the Superior Court cannot properly hear this case due to lack of jurisdiction, the sovereign immunity of the Tribe and its officers, inability to join the Cheyenne River Sioux Tribe as a necessary and indispensable party, the nonjusticability of the issue due to the exclusive commitment of the questions raised first to the Tribal Council and then to the Secretary of the Interior under the Tribal Grazing Ordinance, and the failure of the Plaintiff to exhaust her administrative remedies with the Secretary of the Interior before filing suit in tribal courts. In its Amended Motion to Stay Preliminary Injunction Pending Appeal, the Tribe asserted that the Plaintiffs "cannot possibly succeed on the merits as the Tribe has sovereign immunity and is an indispensable party to the action" and further claims that the Tribe will suffer irreparable injury to "its authority to administer tribal lands" from the preliminary injunction while the Plaintiff will suffer no legally cognizable harm since her grazing permit expired on November 1, 1993. The Plaintiff pointed out that she had significant investments and improvements to the grazing unit and will be required to remove cattle currently located on Grazing Unit 126, if the preliminary injunction is vacated.

On November, 24, 1993, this Court entertained argument from the parties on the Amended Motion to Stay Preliminary Injunction Pending Appeal by telephonic

conference call and declined to enter a stay of the order. In addition this Court stayed the appeal of the preliminary injunction until December 6, 1993 in order to permit the Superior Court the first opportunity to rule on the asserted defenses of sovereign immunity and indispensability.

On November 29, 1993, Special Tribal Court Judge B.J. Jones sitting in the Superior Court issued a lengthy supplemental Memorandum Decision denying the Tribe's Motion to Dismiss based on the defenses outlined above. In particular, Judge Jones ruled that while the federal government had not waived the Tribe's sovereign immunity, the Tribe "has effected a limited waiver of its immunity from suit by enacting Sec. 15-7-1(14)" of the Tribal Grazing Code, the provision that indicates that "[a]ll land disputes" are to be resolved by the tribal courts. Since Judge Jones found that the Tribe could be sued in tribal court, he found he did not need to resolve the Tribe indispensability defense. This Court disagrees and for that reason reverses the grant of preliminary injunction and remands to the Superior Court with directions to dismiss the action under Rule 19 of the Cheyenne River Sioux Rules of Civil Procedure.

Since the sovereign immunity and indispensability defenses asserted by the Tribe constitute a complete defense to this action requiring its dismissal, the Court need not resolve the other defenses of lack of jurisdiction, nonjusticability, and the failure to exhaust administrative remedies and will not comment thereon except insofar as they are implicated in the sovereign immunity and indispensability defenses.

SOVEREIGN IMMUNITY

It is an axiomatic proposition of federal Indian law that Indian tribes, like all other sovereigns, possess sovereign immunity which prevents their being sued without their consent. *E.g. Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-60 (1978). Indian tribes possess sovereign immunity because they are sovereigns predating the Constitution, United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-13 (1940); *Turner v. United States*, 248 U.S. 354 (1919), and because such immunity is necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy. See generally, F. Cohen, Handbook of Federal Indian Law 324-28 (1982); Note, In Defense of Tribal Sovereign Immunity, 95 Harv. L. Rev. 1058, 1073 (1982).

Tribal sovereign immunity derives from two independent sources. First, Indian tribes, like all other sovereigns, are possessed of an inherent sovereignty which prevents their being sued without their consent. As the court noted in *Bottomly v.*

Passamaquoddy Tribe, 599 F.2d 1061 (1st Cir. 1979), "one aspect of a tribe's sovereignty is its immunity from suit." Second, the cases also indicate that since the United States often holds Indian land and certain other assets in trust for the tribe, the tribe is a derivative beneficiary as the sovereign immunity of the federal government and therefore cannot be sued without Congressional consent. *E.g. United States v. United States Fidelity & Guaranty Co.*, 309 U.S. at 512-13; *Blue Legs v. EPA*, 867 F.2d 1094 (8th Cir. 1989). The sovereign immunity of the Cheyenne River Sioux Tribe deriving both from its aboriginal sovereignty and from its protection by the United States continues unless Congress has expressly authorized suit against the tribe or the tribe has otherwise voluntarily waived its sovereign immunity or otherwise consented to suit.

The parties do not disagree that the Cheyenne River Sioux Tribe is possessed of sovereignty, one aspect of which is its immunity from suit. They disagree, rather, as to whether that immunity has been waived or otherwise abrogated. As indicated by the dual sources of tribal sovereign immunity, the sovereign immunity of an Indian Tribe may be waived either by an express authorization by Congress acting pursuant to its broad powers under the Indian commerce clause of article I, section 8, clause 3 of the United States Constitution or by an express tribal waiver of sovereign immunity or express consent to suit. *American Indian Agr. Credit v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985). The general standard utilized by other courts to determine whether such an express waiver has been adopted is that such a waiver "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58; *see generally, American Indian Agr. Credit v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (collecting cases).

In this case, the Superior Court found that Congress had not in any way waived the Tribe's immunity from suit. Plaintiff does not disagree with that finding. Rather, Plaintiff rests her right to sue the Tribe on her claims that (1) the tribe has waived of sovereign immunity by enacting section 15-7-1(14) of the Cheyenne River Sioux Tribe Grazing Code and (2) that this Court's decision in *LeCompte v. Jewett*, No. 85-012-A, 12 Ind. L. Rep. 6025 (Chey. Riv. Sx. Tr. Ct. of App. 1985) held that where a claim is made that tribal authorities had exceeded their authority, the aggrieved party would have an implied remedy for injunctive and declaratory relief in tribal courts in the absence of a statutory remedy. While the Superior Court accepted the first of Plaintiff's argument but not the second, this Court rejects each as a matter of law and therefore finds that the Tribe is immune from suit by the Plaintiff in this action.

Section 15-7-1(14) of the Cheyenne River Sioux Tribal Grazing Ordinance provides in full, "[a]ll land disputes will be settled in Tribal Court." The Superior Court

relied on this language, stating:

> The only question is whether the Council has unequivocally expressed its intent to allow this court to review its issuance of grazing permits. This court finds that the Tribe has effected a limited waiver of its immunity from suit by enacting Sec. 15-7-1(14). That waiver of immunity permits this court to review council action in approving grazing permits only when the dispute in question is not a matter left to the sole discretion of the council in the grazing ordinance or the tribal constitution.

Thus, in arriving at its finding of a waiver of sovereign immunity the Superior Court applied the conventional standard generally employed where waiver of sovereign immunity is claimed and demanded that the waiver must be "unequivocally expressed."

If this Court were to adopt that standard, it believes there would be much force to the Superior Court's finding. The provisions of section 15-7-1(14) are found in a tribal grazing code which basically allocates the use of *tribal* lands. The Tribe argues that the grant of jurisdiction contained in section 15-7-1(14) is limited to the resolution of private disputes, such as fencing or trespass actions, or to suits brought by the tribe, such as grazing fee delinquency actions. The tribe cites portions of the legislative history of the 1988 version of the Tribal Grazing Code to support that distinction. This Court does not find those arguments persuasive. First, by its express terms, section 15-7-1(14) refers to *all*, not *some*, land disputes under the Tribal Grazing Code and certainly a sizable proportion of those disputes will involve the Tribe, either as a primary party defendant or as an indispensable party in a case involving the use or allocation of tribal lands. Thus, while not specifically referring to either the Tribe or to tribal sovereign immunity, the context of the language employed in section 15-7-1(14) indicates that the Council attempted to "unequivocally" express an intent to permit the Tribe to be sued for injunctive or declaratory relief in tribal land disputes arising under the Tribal Grazing Ordinance. Second, legislative history offered by the Tribe does not seem to prove the distinction that the Tribe offers. Specifically, the Tribe called this Court's attention to a discussion between then Chairman Wayne Ducheneaux and Representative Clown over the meaning of this language. In this discussion then Chairman Ducheneaux clearly drew a distinction between the initial awarding of the range unit and "a dispute as to trespass or something like that after the unit is issued, then that will go to Tribal Court." Tribal Council Minutes, Oct. 17, 1988 at 5. Then Representative Clown asked whether the language in question "doesn't mean the awarding of the range unit?" Then Chairman Ducheneaux advised him that it did not, at least under his understanding of the language.

The Plaintiff attempted to counteract the effect of this discussion by offering an affidavit of Wayne Ducheneaux, signed November 23, 1993, to the effect that "the legislative intent of the Cheyenne River Sioux Tribe Grazing Ordinance, Title XV, [Section 15-7-1(14)] dealing with the resolving of all disputes in Tribal Court was to utilize the Tribal Court system as a forum for the resolution of any and all disputes regarding Range Units." The Tribe properly points out that offering *later* interpretation or reinterpretation of earlier legislative events by participants therein constitutes an inappropriate approach to establishing the legislative history of a statute or ordinance and this Court therefore rejects the information contained in the proffered affidavit for this reason. Nevertheless, looking only at the portions of the Tribal Council Minutes offered by the Tribe, it does not appear that they demonstrate the conclusion for which they were offered. The distinction drawn in those Minutes by then Chairman Ducheneaux was between the initial allocation of range units and subsequent disputes about the land. This distinction is not the same as a distinction between cases in which the tribe is named as a party defendant and those in which it is not. In ruling on the motion to dismiss, Special Judge B.J. Jones drew a similar but not identical distinction to the one offered by then Chairman Ducheneaux during the debate on the 1988 version of the Tribal Grazing Permit. The Superior Court indicated that section 15-7-1(14) constituted a limited waiver of sovereign immunity which only "permits this Court to review council action in approving grazing permits only when the dispute in question is not a matter left to the sole discretion of the council in the grazing ordinance or the tribal constitution." Sl. Op. at 8 (referencing section 15-2-3, Cheyenne River Sioux Grazing Code). Thus, the Superior Court found that it did "not have the authority to order the Council to award the unit to the Plaintiff" but it claimed the power "to find that the Council abused its discretion in awarding RU 126 and to remand this matter to the Council for a review and clarification of its reasoning in the letting of RU 126." *Id.* at 8-9. Furthermore, the Tribe conceded at oral argument that some trespass actions, such as those involving boundary disputes, might necessarily implicate the Tribe as an indispensable party, but it argued that most of the tribal land disputes, including trespass actions, arising under the Tribal Grazing Code would likely be cases involving private disputes between the permittee and another private trespasser or other private disputes such as fencing disputes. The difficulty with this argument is that the plain language of section 15-7-1(14) does not refer to some, or even the predominant, type of land disputes, but rather includes "*[a]ll* land disputes."

Were this Court to apply the conventional "unequivocally expressed" test for waiver of sovereign immunity, it would be tempted to agree with the Superior Court's finding that section 15-7-1(14) constitutes an unequivocal expression, notwithstanding its lack of express reference to either the Tribe or tribal sovereign immunity. This case is not, as argued by the Tribe, "strikingly similar" to the failed

argument in *Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578, 2583 (1991)(federal law did not waive state sovereign immunity under the eleventh amendment in suits by federally recognized Indian tribes or communities). In *Noatak*, the statute involved was 28 U.S.C. § 1362, a general grant of civil jurisdiction over federal question cases brought by certain Indian tribes. By contrast, section 15-7-1(14) is a specific grant of jurisdiction over *all* land disputes found in a tribal ordinance specifically allocating the use of *tribal* land. The necessary involvement of tribe as an indispensable party in some, perhaps many, of these actions is clear from the context of this case in a fashion that the Court in *Noatak* found lacking for state defendants under section 1362.

The problem with the Superior Court's finding that section 15-7-1(14) constituted a waiver of tribal sovereign immunity, however, is that it totally ignored another vital provision of the laws of the Cheyenne River Sioux Tribe, specifically section 1-8-4 of the Cheyenne River Sioux Tribe Law and Order Code. Section 1-8-4 provides:

> Sec. 1-8-4 Sovereign Immunity
>
> Except as required by federal law, or the Constitution and By-Laws of the Cheyenne River Sioux Tribe, or specifically waived by a resolution or ordinance of the Tribal Council specifically referring to such, the Cheyenne River Sioux Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties.

It is not surprising that the Superior Court failed to note this important provision of Cheyenne River Sioux tribal law since it was not cited to this Court by either party in their briefs in this appeal, although it was briefly noted in the Tribe's brief in *Brehmer v. White Wolf* and the Tribe did mention it at the very close of its oral arguments. This provision, however, is central to the resolution of this case. Section 1-8-4 is contained in the "General Provisions" section of the Law and Order Code which provides several general provisions including several different sections involving rules or principles of construction. This Court understands section 1-8-4 to operate as a rule of construction, providing a *higher* standard than the convention "unequivocally expressed" standard for the finding of a waiver of sovereign immunity. Section 1-8-4 requires that any waiver of sovereign immunity specifically refer to that concept.

As *Noatak* indicates, a waiver of sovereign immunity under the "unequivocally expressed" standard might be found if either the language, context, or legislative history of the statute plainly and unequivocally indicates a legislative

intent to waive sovereign immunity. As already indicated, on that standard, section 15-7-1(14) might qualify as an unequivocal waiver of tribal sovereign immunity given its all embracing language and the context in which that language is found. By contrast, the provisions of section 1-8-4, specifically require *more* than merely an unequivocal expression. This statutory rule of construction, which must be read into any and all ordinances passed by the Tribal Council of the Cheyenne River Sioux Tribe, plainly requires that any purported waiver of sovereign immunity must *specifically refer* to sovereign immunity on the face of statute. However else section 15-7-1(14) might be construed, it is plain the section contains no language whatsoever reflecting an express reference to or waiver of sovereign immunity. The language therefore cannot be found to constitute a waiver of sovereign immunity consistently with section 1-8-4. The Superior Court therefore erred in construing section 15-7-1(14) as a limited waiver of sovereign immunity.

The Plaintiff, however, notes that the tribal courts previously have entertained a dispute over allocation of a tribal grazing unit. Specifically, she directs the Court's attention to the decision of the Cheyenne River Sioux Tribal Superior Court in *Gunville v. Frazier*, No. C-011-89 (Chey. Riv. Sx. Sup. Ct., Sept. 18, 1989). The *Gunville* case is clearly distinguishable on a number of grounds. First, the Tribe was not named as a party defendant in that action. Second, the Tribal Council specifically referred that particular dispute involving the allocation of a tribal grazing unit to the tribal courts. Third, based on the Superior Court's Findings of Fact and Conclusions of Law, no one seems to have raised the question of the failure to join the tribe as an indispensable party to action. Thus, while *Gunville* may indicate that section 15-7-1(14) grants tribal courts *jurisdiction* over claimed legal violations in the allocation of tribal range units, it cannot hold that the Tribe has no available sovereign immunity or indispensable party defenses in such litigation since those questions were never presented in the *Gunville* case.

The Plaintiff's second argument based on *LeCompte v. Jewett*, No. 85-012-A, 12 Ind. L. Rep. 6025 (Chey. Riv. Sx. Tr. Ct. of App. 1985), is equally unavailing. In *LeCompte*, this Court held that "[a]s a matter of tribal law, . . . the Indian people of the Cheyenne River Indian Reservation intended that the people should have a right to a tribal judicial forum to judicially review the actions of the tribal council." *LeCompte v. Jewett*, Sl. Op. at 7. Thus, the Court specifically held that the Plaintiffs in an election dispute had an implied remedy in tribal court for injunctive and declaratory relief against certain named tribal officials where they claimed that the actions of the defendants violated the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302, or the Constitution or laws of the Cheyenne River Sioux Tribe. The suit in *LeCompte*, however, was filed against tribal officials seeking injunctive and declaratory relief, rather than, as here, against the Tribe. Furthermore, since tribal land was not involved in the election dispute at issue in *LeCompte*, there was no

argument, as here, that the Tribe constituted a necessary and indispensable party to the action. Plaintiff, nevertheless, directs the Court's attention to language in the *LeCompte* opinion indicating that "both the 1968 Indian Civil Rights Act and the Constitution of the Cheyenne River Sioux Tribe waived such sovereign immunity in Tribal Court." *Id.* While one certainly could read some of the broader language in *LeCompte* as indicating that the Indian Civil Rights Act of 1968 and the Constitution and By-Laws of the Cheyenne River Sioux Tribe had impliedly abrogated tribal sovereign immunity in *tribal forums* where the only remedies sought were declaratory or injunctive relief, any such broad statements constituted dicta and were unnecessary to the decision. Rather, this Court understands *LeCompte v. Jewett* to mirror as a matter of tribal law, the classic distinction drawn by federal courts between suits against the federal government or states and suits against federal or state officials seeking to conform their official conduct to the dictates of constitutional or statutory law. While suits against the federal government or the states are barred by federal sovereign immunity and the eleventh amendment, *see e.g. Testan v. United States*, 424 U.S. 392 (1976)(federal sovereign immunity); *Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578 (1991)(state eleventh amendment immunity), injunctive or declaratory suits against federal or state officers for violation of federal law are classically permitted and are not deemed barred by sovereign immunity. *E.g. Ex parte Young*, 209 U.S. 123 (1908). In *LeCompte*, the plaintiff had sued tribal officials seeking only injunctive and declaratory relief. This Court's holding that such a suit was not barred by tribal sovereign immunity either as a matter of federal or tribal law, can only properly be read as authorizing *tribal officials* to be sued to enforce conformity to federal and tribal law. *LeCompte* could not and did not hold that the Tribe itself had waived sovereign immunity and could be sued in a land dispute of the type presented in the present case.

Indeed, in *LeCompte*, this Court also relied on section 1-8-4, which draws precisely the same distinction drawn here. Section 1-8-4 expressly indicates that the "Tribe shall be immune from suit in any civil action," while indicating that "its officers and employees [shall be] *immune from suit for any liability* arising from the performance of their official duties." The difference in language clearly indicates that, "[e]xcept as required by federal law, or the Constitution and By-Laws of the Cheyenne River Sioux Tribe, presumably most notably in claims of takings of property without just compensation, the Tribe has the traditional absolute immunity from suits of all types, while tribal employees are only immune from damage liability, rather than injunctive and declaratory relief, for actions taken in their official capacity. While perhaps containing some excessively broad dicta, *LeCompte* should not be read as providing anything more than an implied injunctive or declaratory relief action against *tribal officials* for actions taken in violation of the federal or tribal law. It did not hold that any such action could be

filed directly against the Tribe as a named party defendant. This Court's decision finding the Tribe immune from suit in this action should not be read as a ruling that no judicial forum should be available to the Plaintiff. The result in this case only reflects the fact that the Tribal Council, while perhaps intending to create such a forum, has not taken appropriate steps in conformity with section 1-8-4 of the Cheyenne River Sioux Tribal Law and Order Code to effectively waive tribal sovereign immunity and permit such a suit.

NECESSARY AND INDISPENSABLE PARTY

The Tribe's successful assertion of the defense of sovereign immunity does not automatically mean that the case must be dismissed in a case such as the present one, where the plaintiff has filed suit against multiple defendants, only one of which, the Tribe, is entitled to assert a sovereign immunity defense. In such cases, the litigation generally can proceed against the other parties not entitled to an immunity defense unless the court determines that the immune party constitutes an indispensable party. If the immune party constitutes an indispensable party, the court must dismiss the action in its entirety. *E.g Keweenah Bay Indian Community v. Michigan*, No. 93-1118, 1993 WL 51333 (6th Cir. 1993). *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2993 (1993). Given the Superior Court's decision rejecting the Tribe's sovereign immunity defense, it did not address the indispensability of the Tribe in a detailed fashion. In light of this Court's determination that Plaintiff cannot sue the Tribe due to tribal sovereign immunity, this Court must determine whether the Tribe constitutes an indispensable party, as argued by the Tribe.

Rule 19 of the Cheyenne River Sioux Rules of Civil Procedure governs necessary and indispensable parties and is identical to the language of Rule 19 of the Federal Rules of Civil Procedure. The basic test to be applied under Rule 19 was fully described in the Sixth Circuit's recent decision in *Keweenah Bay Indian Community* in the course of interpreting the federal version of Rule 19:

> This court has previously stated that the resolution of the question of joinder under Rule 19, and thus of dismissal for failure to join an indispensable party under Rule 12(b)(7), involves a three-step process. *Local 670 v. International Union, United Rubber, Cork, Linoleum and Plastic Workers of America*, 822 F.2d 613, 618 (6th Cir. 1987), cert. denied, 484 U.S. 1019 (1988). The court must first determine whether a person is necessary to the action and should be joined if possible. Rule 19(a) describes this initial analysis as follows:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave the parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

If the court finds that the absent person or entity falls within either one of these provisions, the party is thus one to be joined if feasible. The court must then consider steps two and three: the issues of personal jurisdiction and indispensability. As this court recognizes:

> If personal jurisdiction is present, the party shall be joined; however, in the absence of personal jurisdiction (or if venue as to the joined party is improper), the party cannot properly be brought before the court. If such is the case, the court proceeds to the third step, which involves an analysis of the factors set forth in Rule 19(b) to determine whether the court may proceed without the absent party or, to the contrary, must dismiss the case due to the indispensability of that party. The four factors set forth in Rule 19(b) include: first, to what extent a judgment rendered in the person's absence might be prejudicial to [the person] or to those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
>
> The rule is not to be applied in a rigid manner but should instead be governed by the practicalities of the individual case. This court has noted that "ideally all [the]

> parties would be before the court. Yet Rule 19 calls for a pragmatic approach; simply because some forms of relief might not be available due to the absence of certain parties, the entire suit should not be dismissed if meaningful relief can still be accorded."

Id. at 618 (quoting *Smith v. United Bhd. of Carpenters and Joiners of America*, 685 F.2d 164, 166 (6th Cir. 1982) (other citations omitted).

Applying this three step analysis leads directly to the conclusion that the Tribe constitutes an indispensable party within the meaning of Rule 19(b) of the Cheyenne River Sioux Rules of Civil Procedure and that the action cannot proceed without the Tribe and therefore must be dismissed pursuant to Rule 12(b)(7) of the Cheyenne River Sioux Rules of Civil Procedure. In this case, the basic dispute centers on the allocation of Tribal Range Unit 126 comprised substantially of tribally owned land by the Cheyenne River Sioux Tribal Council. The only official tribal defendant named in the Complaint is the Cheyenne River Sioux Tribe. The Tribe therefore constitutes a necessary party within the meaning of Rule 19(a) both because complete relief cannot be afforded to the Plaintiff in a case contesting the allocation of use of tribal land in the absence of the actual owner of the land, the Tribe, being joined as a party and because the Tribe owns the land constituting Tribal Range Unit 126 and its absense both would impair its ability to protect its interest in its lands and would pose a substantial risk of subjecting the other federal defendants to multiple or inconsistent legal obligations should the tribal courts take a different approach to the allocation of that range unit than taken by either the Tribal Council or the Secretary of the Interior. There is therefore little doubt that the Tribe constitutes a necessary party.

In order to qualify for dismissal under Rule 12(b)(7), the party who cannot be joined must not only constitute a necessary party, but also must qualify as an indispensable party within the meaning of Rule 19(b) of the Cheyenne River Sioux Rules of Civil Procedure. As *Keweenah Bay Indian Community* indicates, a necessary party must be joined if feasible. Here the bar to joinder of the Tribe is not lack of personal jurisdiction but sovereign immunity of the Tribe and the consequent lack of subject matter jurisdiction over any claim brought directly against the Tribe. Since the tribe cannot be joined, the only remaining question is that third prong -- indispensability. Rule 19(b) provides that the court in making a determination of indispensability must "determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable." Rule 19(b) further directs the court in making a determination of indispensability to consider four separate factors:

> The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by shaping of relief; or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Considering these four factors, it is quite clear in the instant case that the Tribe constitutes an indispensable party and that the action must be dismissed based on the inability of the Plaintiff to join the Tribe as a party defendant. As noted above, the Tribe owns much of the land comprising Tribal Grazing Unit 126. As an owner of the land, it is entitled to the revenue from the tribal grazing program. Indeed, the Court was informed at oral argument that almost one-quarter of the tribal budget derives from revenues generated by the tribal grazing program. As the owner of the land in question, the Tribe's interest in the land and the revenues derived therefrom would be seriously prejudiced if the tribal courts were to determine, as requested by the Plaintiff, the legality of the allocation of its lands without joining it as a party. Thus, the first fact points heavily in favor of finding indispensability. Second, since the basic dispute in this case involves *tribal* decisions about the allocation of its grazing lands made by the Tribal Council, it is difficult to see how the tribal courts could fashion or limit available relief in a manner which would mitigate or eliminate the prejudice caused by the Tribe's nonparticipation in the action. For Plaintiff to prevail and secure any relief at all for her claimed violations of the Tribal Grazing Code the tribal courts would be required to issue an order that would somehow affect the Tribe and the allocation of its land use in a very direct manner, either by actually ordering a reallocation of Tribal Grazing Unit 126 (which the Superior Court disclaimed any power to do) or by declaring the Tribal Council's award of the unit to Defendants Verna and Monte LeCompte illegal and sending the matter back to the Tribe for reconsideration by the Tribal Council. Either way, the Tribe's interest in the litigation are directly implicated and the tribal courts could not fashion relief in a fashion which could disentangle those interests from those of the remaining defendants. Thus, the second factor also weighs heavily in favor of a finding of indispensability. Third, since the Tribe as an absent party would not be bound by any judgment against the remaining defendants finding legal difficulties with the allocation of Tribal Grazing Unit 126 to the LeComptes, the tribal courts could not provide any form of relief which would adequately redress the claimed violations of tribal law asserted by the Plaintiff. Thus, like the first two factors, the third weighs heavily in favor of a finding of indispensability. Finally, as more fully developed below, while the Plaintiff argues that she should be entitled to a remedy *in tribal courts*, a finding of indispensability

will not leave Plaintiff Tina Clement wholly without an adequate remedy elsewhere than tribal courts. Thus, all four factors weigh heavily in favor of finding that the Tribe constitutes an indispensable party without the joinder of which this litigation cannot proceed.

This conclusion is perfectly consistent with most of the cases which have considered problems of indispensable parties in cases involving adjudications of the title to or allocation of tribal land. Since Indian tribes are sovereign governments still possessed of their original sovereign immunity, it is a frequent occurence that third parties contesting an Indian tribe's claim of ownership to or allocation of the use of tribal land or other resources cannot sue the tribe to adjudicate their alleged competing claim. In such cases, the courts invariably find not only that the Tribe is immune from suit under tribal sovereign immunity, but also that the inability to join the tribe as a party to an action involving claimed tribal lands or resources, bars the action from proceeding on the grounds of the indispensability of the Tribe. *E.g. Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2993 (1993); *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 532, 540 (9th Cir. 1987); *Wichita and Affiliated Tribes of Oklahoma, v. Hodel*, 788 F.2d 765 (D.C. Cir. 1986); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975), cert. denied, 425 U.S. 903(1976); *Tewa Teseque v. Morton*, 498 F.2d 240 (10th Cir. 1974); *see generally, Shields v. Barrow*, 58 U.S. (17 How.) 129 (1854). Similarly, many other courts in cases not involving tribal lands or resources have concluded that actions must be dismissed because Indian tribes who successfully asserted sovereign immunity defenses also constituted indispensable parties to the litigation. *E.g. The United Keetoowah Band of Cherokee Indians v. Mankiller*, Sl. Op. No. 93-5064 (10th Cir., Aug. 12, 1993); *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991); *Enterprise Mgt. Consultants v. United States ex rel. Hodel*, 883 F.2d 890 (10th Cir. 1989); *Lucero v. Lujan*, 788 F. Supp. 1180, 1183 (D. N.M. 1982); *Elk Nation v. Lujan*, Sl. Op. No. Civ. 92-3039 (D. S.D. , June 4, 1993). Indeed, Plaintiff has cited no cases and the the Court is unaware of any precedents that suggest that Indian tribes who cannot be joined as party defendants due to sovereign immunity do not constitute indispensable parties where tribal interests, such as the ownership or use of tribal lands or resources, are at issue in the litigation. For good reason, the Plaintiff therefore conceded in her brief that the Tribe constituted an indispensable party, but argued that she had properly joined the Tribe as a party defendant and claimed that the suit was not barred by tribal sovereignty. Since this Court has rejected the Plaintiff's argument that the Tribe has waived its sovereign immunity, the conclusion is inescapable that the action must be dismissed for inability to join an indispensable party.

PLAINTIFF'S AVAILABLE REMEDIES

A. **Need for Available Remedies**

In the classic case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), Chief Justice Marshall offered the following insight:

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.
>
> In the 3d vol. of his commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.
>
> "In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."
>
> And afterwards, p. 109, of the same vol. he says, "I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

Of course, Chief Justice Marshall's comments in *Marbury* stated an aspirational goal, rather than a legal reality. At the time, the federal government had not waived sovereign immunity over any claims and would not do so for many claims until it enacted the initial statute creating the Court of Claims in 1855. Act of Feb. 24, 1855, 10 Stat. 612; Act of Mar. 3, 1863, 12 Stat. 765; *see generally Gordon v. United States*, 2 Wall. 561 (1865); *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962); Richardson, History, Jurisdiction, and Practice of the Court of Claims, 17 Ct. Cl. 3, 3-4

(1882). Furthermore, for Indian claims, generally available remedies were even longer in coming. The general damage claim statute now found in 28 U.S.C. § 1505 was not enacted until 1946 and Congress has never enacted any general waiver of sovereign immunity which would permit Indian tribes to seek possession of lands of which they claim the United States illegally deprived them.

Precisely the same goal that Chief Justice Marshall set for the then relatively young federal government is also a worthy objective for tribal governments. This objective is important not only in the context of the western system of jurisprudence, but perhaps even more so in the context of cultural fidelity to Lakota principles of equity and fairness. *Bloomberg v. Dreamer,* Oglala Sioux Civ. Ap. 90-348 at 5-6 (Oglala Sup. Ct. 1991) (holding that both due process and Lakota tradition require a hearing before attempting to remove anyone from the Pine Ridge Reservation). This is especially so where, as here, the alleged violations owe their origin to actions of the Tribe itself through the actions of its Tribal Council.

As the Plaintiff properly notes, this Court's decision in *LeCompte v. Jewett* reiterated as a matter of tribal law this emphasis on providing the people of the Cheyenne River Sioux Tribe a remedy in tribal courts for violations of their legal rights even by tribal officials. The court suggested that by adopting the Constitution and By-Laws of the Cheyenne River Sioux Tribe, the people of the Cheyenne River Sioux Reservation intended to afford a judicial remedy in the tribal courts for violation of their legal rights. Presumably the court's reference was to Article IV, Section 1(k) of the Constitution of the Cheyenne River Sioux Tribe which authorizes the Tribal Council "to establish courts for the adjudication of claims and disputes arising among members of the tribe . . . ." The tribal officers sued in *LeCompte* were tribal members, but the case did not involve a suit directly against the Tribe as a named defendant. For this reason, the Court held in *LeCompte* that an implied cause of action for injunctive or declaratory relief existed in the tribal courts against tribal officials who violated the any of the peoples' legal rights. That provision has since been supplemented to reenforce the point made by this Court in *LeCompte* by the recent amendment to the By-Laws of the Cheyenne River Sioux Tribe which provides that "[t]he tribal courts shall have jurisdiction over claims and disputes arising on the reservation." Art. V, sec. 1(c), By-Laws of the Cheyenne River Sioux Tribe.

Unfortunately for the Plaintiff in this action, however, litigation will not lie against the Tribe as a named party under tribal law unless and until the Tribal Council affirmatively enacts an ordinance or other legislation expressly waiving tribal sovereign immunity in injunctive or declaratory relief cases such as the instant one. To carry out the intent of the Constitution and By-Laws of the Cheyenne River Sioux Tribe as announced in *LeCompte*, perhaps the Tribal Council should enact

such a blanket waiver which would provide a judicial forum in the tribal courts to aggrieved parties such as the Plaintiff. However, unless and until the Tribal Council acts in conformity with section 1-8-4 to provide such a forum for suits against the Tribe, at least for injunctive and declaratory relief, this Court cannot create such a remedy consistent with notions of separation of powers, tribal sovereignty, and tribal sovereign immunity.

The Court notes that many sovereigns have waived sovereign immunity in a variety of contexts like the present one without in any way diminishing their sovereignty. For example, the federal government, which like all sovereigns is immune from suit without its consent, has enacted a variety of statutes under which it consents to suit of various kinds. For example, under 28 U.S.C. § 2410, the United States has consented to suits to quiet title to lands in which it claims an interest and for certain other purposes. Under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80, the United States has waived sovereign immunity and consented to certain damage suits for injury or loss of property, or personal injury or death caused by the negligent act or omission of any employee of the federal government. Similarly, under the Tucker Act, 28 U.S.C. §§ 1491, 1346(a), and the Indian Tucker Act, 28 U.S.C. § 1505, the federal government has consented various types of suits over liabilities not sounding in tort. Similarly, most states have tort claims statutes under which they waive their sovereign immunity for damages claims arising from personal injury, loss of property, or death caused by acts or omissions of state employees. For example, Article III, section 27 of the South Dakota Constitution provides that "the Legislature shall direct by law in what manner and in what courts suits may be brought against the state." The South Dakota legislature has authorized certain suits to be brought against the state. S. Dak. Compiled Laws, Ch. 3-21. Waiving sovereign immunity therefore is not seen by most other western sovereigns as synonmous with a waiver of sovereignty. Rather, reflecting the notion advanced by Chief Justice Marshall in *Marbury* that there can be no legal right without an effective judicial remedy, the trend in the United States is for most sovereigns to waive their sovereign immunity to provide such an effective remedy. Indeed, even in *Marbury*, Chief Justice Marshall noted that English practice permitted the sovereign to be "sued in the respectful form of a petition, and [the crown] never fails to comply with the judgment of his court." The very essence of the sovereignty which the people of this reservation vested in the Tribal Council under the tribal constitution means that the Tribal Council, not this Court, must decide whether, when, and how the Tribe can be sued in its own forums. Until it does so, the Plaintiff is without any effective remedy in tribal courts.

B. Existing Remedies

To suggest that the Plaintiff lacks a remedy in tribal courts is not to suggest

that the Plaintiff was left entirely bereft of any remedies for what she claimed to be the illegal and arbitrary actions of the Tribal Council in allocating Tribal Range Unit 126. She did have at least two separate remedial opportunities, both of which she fully invoked.

First, while not expressly required by the Tribal Grazing Code, the Tribal Council in allocating the tribal grazing permits, afforded any aggrieved party a special opportuntity to protest its proposed decisions before finally allocating tribal range units. The Court is informed that Tina Clement unsuccessfully filed such a protest and raised many of the claims asserted in the tribal courts. Certainly, the availability of remedies before the Tribal Council constitutes an effective provision of some sort of forum, even if not an independent judicial forum. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978), the Supreme Court noted that "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies." Citing *United States v. Mazurie*, 419 U.S. 544 (1975).

Second, under the express terms of Article VIII, Section 3 of the Constitution of the Cheyenne River Sioux Tribe, the people of the reservation have made allocation of tribal grazing permits subject to approval of the Secretary of the Interior. In *Martinez*, the Supreme Court also recognized the important of federal administrative review in providing a forum for the redress of claims against Indian tribes:

> By the terms of its Constitution, adopted in 1935and approved by the Secretary of the Interior in accordance with the Indian Reorganization Act of 1934, 25 U. S. C. § 476, judicial authority in the Santa Clara Pueblo is vested in its tribal council. Many tribal constitutions adopted pursuant to 25 U. S. C. § 476, though not that of the Santa Clara Pueblo, include provisions requiring that tribal ordinances not be given effect until the Department of Interior gives its approval. See 1 American Indian Policy Review Commission, supra n. 19, at 187-188; 1961 Hearings 95. In these instances, persons aggrieved by tribal laws may, in addition to pursuing tribal remedies, be able to seek relief from the Department of the Interior.

Id. at n. 22. The Plaintiff has unsuccessfully filed a Complaint and Protest raising precisely the same claims asserted in the tribal courts with Defendant Russell McClure, Superintendent, Bureau of Indian Affairs, Cheyenne River Sioux Agency. After Defendant McClure rejected Plaintiff's protests in an opinion letter dated October 29, 1993, the Plaintiff further pursued her administrative appeal remdies with Defendant Jerry Jaeger, Area Director, United States Department of the Interior, Bureau of Indian Affairs. This administrative appeal is still pending. Thus, this

Court's decision finding that Plaintiff has no available remedy in tribal courts has not left the Plaintiff bereft of any forum to provide remedies for the serious legal claims raised in her Complaint. Under the current law of the Cheyenne River Sioux Tribe, her initial forum was with the Tribal Council and she thereafter could and has raised her legal claims within the Department of the Interior, which might ultimately lead to federal court review.

The essential dicta of *LeCompte* that the people of the Cheyenne River Sioux Tribe expect their tribal Constitution to protect their rights is *not* abridged in the slightest by the Court's decision in this case. In fact, in contrast to the dispute in *LeCompte* in which the tribal constitution did *not* specify any administrative or judicial review, the tribal constitution in the instant case does. Article VIII, Section 3 of the Constitution of the Cheyenne River Sioux Tribe specifically authorizes Bureau of Indian Affair administrative (and therefore potentially federal judicial) review of the Tribal Council's decision to grant a grazing permit to another applicant. Such review ultimately accords with both the thrust of the *LeCompte* decision and the federal government's trust responsbility to the Cheyenne River Sioux Tribe and its members. In the absence of such review, the broad and compelling dicta of *LeCompte* would indeed be effectively muted. Fortunately, that is neither the result nor the intended legacy of this case.

In light of this Court's decisions on the questions of sovereign immunity and indispensability, the Court finds it unnecessary to address the Tribe's claims of lack of jurisdiction, nonjusticiability, and failure to exhaust administrative remedies.

By reason of the foregoing, the Superior Court's grant of a preliminary injunction must be reversed and the case remanded to the Superior Court with directions to dismiss the action pursuant to Rule 12(b)(7) of the Cheyenne River Sioux Rules of Civil Procedure due to the inability to join the Cheyenne River Sioux Tribe as an indispensable party on account of the Tribe's sovereign immunity.

The case is reversed and remanded with directions to dismiss.

Entered this 12th day of Janucry, 1994

Frank Pommersheim	Everett Dupris	Robert N. Clinton
Chief Justice	Associate Justice	Associate Justice

BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS

STATEMENT OF
ROBERT N. CLINTON

ON PROPOSED LEGISLATION RELATED TO WAIVERS OF TRIBAL SOVEREIGN IMMUNITY TO FACILITATE ADJUDICATION OF TRIBAL DISPUTES IN FEDERAL & STATE COURTS

My name is Robert N. Clinton. I serve as the Wiley B. Rutledge Professor of Law of the University of Iowa College of Law, as an Affiliated Faculty Member with the University of Iowa American Indian and Native Studies Program, as Chief Justice of the Winnebago Supreme Court of the Winnebago Tribe of Nebraska, and as an Associate Justice of the Cheyenne River Sioux Tribal Court of Appeals of the Cheyenne River Sioux Tribe in South Dakota. I have taught, studied and written in the field of federal Indian law for over twenty years, including participation in the authorship of *Felix Cohen's Handbook of Federal Indian Law* (1982 ed.), Robert N. Clinton, Nell Jessup Newton, and Monroe E. Price, *American Indian Law: Cases and Materials* (1991), and numerous law review articles. Additionally, I regularly teach and have written in the fields of constitutional law and federal court jurisdiction. I also had had the privilege and honor of serving various tribal communities as part of tribal appellate courts for the last five years. Since these hearings will touch on issues of fairness to non-Indians and nonmembers of Indian tribes, I should note for the record that I am non-Indian.

I present this written testimony at the request of the Senate Committee on Indian Affairs and I appreciate the kind invitation to speak to the important subject matter addressed in these hearings, a matter central to the survival of tribes as sovereign entities and to their courts as effective instruments of legal justice. Before presenting my views on the subject of this hearing, I must emphasize that the positions and ideas contained in this Statement are solely my own views and

do not reflect the position of any of the governmental institutions, courts, or tribes which I serve.

This statement is offered to express in the strongest possible terms opposition to any legislation of the type that was contained in proposed section 329 of the Senate's Fiscal Year 1997 Interior Appropriations Bill. The proposed legislation constitutes one of the greatest recent threats to and assaults on the sovereignty of Indian tribes and to the tradition of local tribal control of tribal matters. Both the sovereignty of Indian tribes and their long tradition of local tribal control of matters affecting the reservation have long been guaranteed to tribes by treaties and other understandings solemnly entered into by the United States government. The essence of that sovereignty and tradition of local governance is the tribal right to govern all persons and property located within the Indian reservation, including those of nonmembers (with the exception of criminal jurisdiction), under laws adopted by tribal governing authorities and enforced through tribal courts. The central purpose of the proposed legislation that forms the subject of this hearing appears to be to by-pass these legitimate tribal forums in favor of civil litigation in state or federal courts. Yet, traditionally federal and state courts have been barred from entertaining most such cases as a result of deliberate jurisdictional limitations found in federal Indian law designed to protect both the tribal sovereignty and the jurisdiction of the tribal courts and by doctrines of tribal sovereign immunity which are a direct result of the recognized sovereignty of the Indian tribes. The proposed legislation seeks to diminish tribal sovereignty by eliminating these long-standing jurisdictional protections of federal Indian law which properly direct reservation based cases to tribal courts and by involuntarily waiving for the tribes their sovereign immunity. For reasons explained below, this proposed legislation is totally at odds with the long history of federal recognition of and treaty obligations to protect tribal sovereignty and may also be constitutionally infirm. The proposed legislation therefore constitutes both bad law and bad policy.

Tribal Sovereignty Over Nonmembers

The sovereignty of Indian tribes has long been recognized. Article I, section 8, clause 3 of the United States Constitution recognizes that sovereignty by listing Indian tribes in the company of two other major sovereigns, foreign nations and states of the Union. The federal courts have long recognized Indian tribes as "state[s]," that is as sovereign political units which, while not states of the union,

nevertheless constitute "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The United States has held that such Indian tribal sovereignty constitutes a backdrop against which all Indian treaties and other federal actions creating Indian country must be examined. *E.g. McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973).

Sometimes Indian tribal sovereignty and its scope are expressly stated in treaties and other times the sovereignty of the tribe is merely implied as an essential attribute of tribal status in Indian country. For example, article 5 of the Treaty of New Echota with the Cherokee Nation, Dec. 29, 1835, 7 Stat. 478, guarantees that the federal government would "secure to the Cherokee nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people *or such persons as have connected themselves with them.*" Similarly, article III of the Treaty of Dancing Rabbit Creek with the Choctaw Nation, Sept. 27, 1830, 7 Stat. 333, expressly provides that "[t]he Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of *all* persons and property that may be within their limits . . ., so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People or their descendants . . . ." In short, an essential attribute of the tribal sovereignty guaranteed to all Indian tribes by the government-to-government relations long maintained, by treaty or otherwise, between the federal government and the tribes is the right to govern *all* persons and property of their reservation, including such nonmembers who may reside on or otherwise frequent reservation lands, with the single exception of criminal jurisdiction over non-Indians according to the federal cases.

Accordingly, the United States Supreme Court, while limiting the tribes' criminal jurisdiction over non-Indians, has long recognized the right of Indian tribes to exercise substantial regulatory authority and adjudicatory subject matter jurisdiction over both members and nonmembers for cases arising in Indian country, including civil cases affecting contract rights or the ownership or use of private property. *E.g. Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832) (non-Indian missionaries not subject to state regulatory jurisdiction for activities within Cherokee Nation since the governance of the Cherokee territory legally rested primarily with the Cherokee Nation); *Williams v. Lee*, 358 U.S. 217 (1959) (non-Indian merchant doing business on the Navajo reservation could not legally

enforce legal claims against Navajo tribal members in state court and must resort to tribal courts); *United States v. Mazurie*, 419 U.S. 544 (1975) (tribes possess "a certain degree of independent authority over matters that affect the internal and social relations of tribal life," including the licensing of the sale of alcohol by a non-Indian owned tavern on the reservation); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983) (tribal authorities, rather than the state, had exclusive authority to regulate hunting and fishing by both members and nonmembers within the reservation); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985) (recognizing tribal court jurisdiction over nonmembers for reservation activities and suggesting that "the existence and extent of a tribal court's jurisdiction [requires] a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodies in treaties and elsewhere, and administrative or judicial decisions); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (same). As the United States Supreme Court emphasized in *National Farmer's Union,* resort in such cases should always be *first and foremost* to the tribal courts, which, by reason of their local understanding of the reservation context and culture, their expertise in interpreting and enforcing tribal law and custom, and their general proximity to the primary governing authority of the reservation, the tribal government, can offer the greatest expertise in the adjudicatory process.

As suggested in *Williams v. Lee*, 358 U.S. 217 (1959), the essence of tribal sovereignty has always been "the right of reservation Indians to make their own laws and be ruled by them." Tribal courts constitute the front lines of and the most important daily manifestation of that sovereignty. As *Williams v. Lee* demonstrates, this point is true for both tribal members and nonmembers alike regarding reservation related matters. It is through the tribal courts that tribal laws are enforced and interpreted in individual cases. Consequently, the tribal courts generally represent the single most important institution for effectuating tribal governmental authority and sovereignty. Tribal courts constitute the one tribal governmental institution with which both tribal members and nonmembers will most likely have any contact. Tribal courts therefore represent the central, essential mechanism through which tribal laws are applied to the persons and property of the reservation governed by the tribe.

By seeking to by-pass the traditional resolution in tribal courts applying tribal law of property and related questions arising on Indian reservations, the

proposed legislation seeks to undermine "the right of reservation Indians to make their own laws and be ruled by them." Since tribal courts are the final authorities on tribal law and federal and state courts generally do not interpret and enforce tribal law, permitting resort to federal or state courts for the resolution of on-reservation disputes involving both members and nonmembers encourages the total by-pass of the tribal substantive and regulatory laws, thereby completely undermining the purposes and sovereignty of tribal governments. Such a step not only violates express treaty provisions, such as those cited above, and the entire tenor and purposes of the government-to-government relationship with the tribes, it represents a significant, and I might add totally inaccurate, federal statement suggesting a fundamental distrust of the fairness and efficiency of tribal governance and of the tribal justice system. While these hearings may hear anecdotal evidence of exceptional problems with tribal justice systems, of the type that might also be offered with reference to exceptional cases in the federal and state justice systems, I would submit that the fundamental reversal in the federal government's traditional discharge of its treaty and other legal obligations to protect tribal sovereignty contemplated by the proposed legislation could be justified, if at all, only on the most compelling record. Such a record would require a thoroughly systematic, exhaustive, and comparative study of the record of the fairness of and efficiency of tribal courts in handling cases involving nonmembers with that of federal and state courts in cases involving Indians. From my experience, the tribal courts would fare far better in any historical study of evenhanded fairness than would federal and state justice systems.

Tribal Courts Constitute Fair, Efficient, and Even-Handed Forums

Having studied federal Indian law for almost a quarter-century and having served on tribal appellate courts for five years, my experience indicates that tribal courts are more scrupulously fair to the interests of non-Indians and nonmembers and more even-handed in their decisionmaking processes than federal and state courts historically have been when Indians have come before such tribunals for adjudication of their interests. As a non-Indian attorney, I would be far happier placing adjudicatory responsibility for my property related interests in most tribal courts, than I would taking the property interests of an Indian in a dispute with a non-Indian before a state court. In my experience, both the juries and the judges in tribal court are far less susceptible to racial bias than are similar decisionmakers in state or federal courts.

While I certainly cannot offer the type of systematic study that should be required for the dramatic reversal in and default of federal legal obligations proposed in the legislation under consideration, my review of the reported tribal court decisions in the *Indian Law Reporter*, which like *Federal Supplement* does not publish every decided case, indicates that non-Indians and nonmembers of tribes are treated quite fairly by tribal courts, sometimes more fairly and efficiently than they might have been treated in state court. Several illustrations will make the point. In *Schwab v. CTEC Construction*, 21 Indian Law Rep. 6027 (Colv. Admin. Ct. 1994), the most notable and obvious case disproving the allegation of bias in the tribal courts, a non-Indian heavy equipment mechanic filed an administrative action for wrongful termination against his construction company employer which worked on various tribal contracts. The employer laid off the worker, who had a satisfactory work record, in order to comply with its understanding of its obligations under a tribal employment rights ordinance which required tribal employment preferences. The tribal court found that the employee never received any notice of a new company employment policy that made him terminable at will and had just purchased a home with a mortgage in reliance on his employment. Notwithstanding the strong tribal employment preference contained in the tribe's ordinances, the Colville Administrative Court, the Honorable Mary T. Wynne presiding,[1] ruled that the employment relationship was not at will and required a showing of cause for termination. The tribal court further found that tribal law only granted preferences in the hiring of new employees and did not require the dismissal of any existing employees. Consequently, the tribal court found that the employer's termination of the employee "because of his [Anglo-Saxon] race directly violates the stated policies of his employment." A clearer example of the fairness and evenhandedness of tribal courts in dealing with competing tribal and non-Indian interests would be hard to find.

In *Clown v. Coast to Coast*, 23 Ind. Law Rep. 6055 (Chy. R. Sx. Ct. App. 1993), a case on which I sat, Coast to Coast, a non-Indian owned creditor, partially prevailed in a collection case against a tribal member. My understanding is that non-Indian creditors routinely and successfully employ tribal courts in such collection matters against tribal members, as have state social service departments for child support collections. In the *Clown* case, the tribal trial judge had been so

[1] While not directly relevant to assessing the opinion, it should be noted that the Honorable Mary T. Wynne is the Chief Judge of the Colville Tribal Court, a former Assistant United States Attorney, an attorney admitted in three states and numerous tribal jurisdictions, a member of the faculty of the National Judicial College, and an enrolled member of the Rosebud Sioux Tribe.

aggressive in her defense of the interests of the non-Indian creditor that she failed to afford procedural fairness to the defendant, a tribal member. The Cheyenne River Sioux Tribal Court of Appeals therefore reversed in part the judgment awarded the non-Indian creditor. Recognizing, however, the delays occasioned by the appeal and the lack of dispute as to one-third of the amount of the judgment, the appellate court took what it recognized was the unusual step of permitting the non-Indian creditor to begin collecting that amount at once, by severing the judgment and affirming as to the undisputed amount. Such flexible and efficient procedures to facilitate rapid collection of the judgment rarely would be found in state or federal court, suggesting that, at least in the *Clown* litigation, the non-Indian creditor was legally permitted to collect at least part of its judgment far more rapidly after the tribal appeal than would have been permitted in most state courts. Neither the behavior of the tribal trial judge nor the appellate court in the *Clown* litigation suggests any bias against nonmembers. Similarly, in *Tri-County Water Ass'n, Inc. v. Miner*, 22 Indian Law. Rep. 6141 (1995), the same court affirmed the award of contract damages against a tribal member to a non-Indian water service utility in a dispute arising out of the undisputed vandalism of the tribal member's water spigot on the defendant's range unit. While the water service utility did not collect all the damages requested in their complaint, it nevertheless was afforded an efficient mechanism to collect those damages to which they were legally entitled from a tribal member.

Tribal appellate courts have also vacated damage awards made to tribal members against non-Indian interests. In *General Motors Acceptance Corp. v. Bitah*, 16 Indian L. Rep. 6002 (Nav. Sup. Ct. 1989), for example, the Navajo Supreme Court vacated a $85,000 damage award against General Motors Acceptance Corporation for fraudulent repossession, taking the highly unusual step of determining that a Navajo jury's award lacked a proper evidentiary basis and finding that the trial court erred in failing to direct a verdict for the non-Indian defendant. As is true of most of these cases, the opinion, written by Justice Raymond Austin,[2] takes almost no account of the tribal membership, race, or ethnicity of the parties. *See also*, *Bighorse v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 15 Indian L. Rep. 6048 (1988) (fairly apportioning negligence, and consequently, damages between Indian and non-

[2] Again, while not relevant to assessing the opinion, it should be noted for the record that the Honorable Raymond Austin is an Associate Justice of the Navajo Supreme Court, has served as a visiting professor at the Stanford Law School and Arizona State University College of Law., and is an enrolled member of the Navajo Nation.

Indian drivers in an automobile/truck accident case to which the tribe was a party defendant under the legal doctrine of *respondeat superior*).

In short, a review of the reported cases in the *Indian Law Reporter*, while admittedly nonsystematic, clearly refutes any notion that non-Indians or nonmembers are treated unfairly or not evenhandedly in tribal courts. Rather, tribal courts approach cases involving competing Indian and non-Indian interests in at least as fair, unbiased, evenhanded and efficient a fashion as many state courts could or would do in like circumstances. The notion that tribal courts provide a lesser or biased system of justice constitutes a demonstrably false myth conjured up out of the racial preconceptions of those who adhere to it. In short, the available published data and the anecdotal evidence with which I am familiar simply will not support, and in fact tends to disprove, the need for any major change in federal Indian policy to facilitate state and federal jurisdiction over claims affecting tribal interests of the type proposed in the legislation under consideration in this hearing.

Involuntarily Waiving Tribal Sovereign Immunity Constitutes an Unnecessary and, Perhaps, Illegal Intrusion on Tribal Sovereignty

The legislation that forms the subject of these hearings proposes to waive tribal sovereign immunity in a broad, ill-defined, and legally indefensible manner. Like all sovereigns, Indian tribes possess an inherent immunity from suit without their consent. In *The Federalist* No. 81, Alexander Hamilton, one of the most important figures in the history of the adoption of the United States Constitution, wrote, "It is inherent in the nature of sovereignty, not to be amenable to suit of an individual *without its consent.*" As reflected by the history of the adoption of the Eleventh Amendment to the United States Constitution, all sovereigns prize and jealously guard their sovereign immunity from suit. The federal courts in a long and unbrokern line of cases have recognized that Indian tribes possess sovereign immunity as part of their inherent sovereignty. *E.g. Oklahoma Tax Comm'n v. Citizens Band of Potawatomi Indian Tribe of Oklahoma,* 490 U.S. 505 (1991*); Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-512 (1940). Like all governments, Indian tribes seek to determine for themselves when and in which courts they will be subject to suit. The proposed legislation, by denying Indian tribes that right and by arrogating to this Congress the paternalistic authority to

make that decision for them, attacks that basic attribute of sovereignty, in this case the sovereignty of the Indian tribes, of which Alexander Hamilton spoke.

There are at least four major problems with the proposed legislation. First, as noted above, there is no need for the statutory change as tribal courts are adequate to handle the litigation in question (without any federal waiver of tribal sovereign immunity) and, yet, surprisingly, they constitute the only court not mentioned in the proposed waiver of sovereign immunity. Second, despite the strong legal tradition that waivers of sovereign immunity are carefully and narrowly drafted and narrowly construed, the proposed waiver constitutes a broad, ill-defined waiver of sovereign immunity that would create broad ambiguity and confusion. Third, despite the fact that most waivers of sovereign immunity waive such immunity for suit only in the courts of the waiving sovereign, this proposed waiver of sovereign immunity waives tribal sovereignty for all courts within the states except tribal courts. Fourth, despite the fact that most waivers of sovereign immunity are made by the sovereign possessing the immunity, this waiver constitutes an intergovernmental waiver of sovereign immunity by which the federal government attempts to waive the sovereignty of a different government, the Indian tribes. The courts recently have looked with great disfavor on such intergovernmental waivers of sovereign immunity. Finally, serious legal doubts exist about the authority and power of Congress to enact the proposed statute waiving sovereign immunity. When one combines the third and fourth flaw noted above, it is apparent that the proposal calls for Congress to waive the sovereign immunity of another government, the Indian tribes, for suits in courts of different sovereigns, the federal and state courts. With good reason, the federal courts have been very skeptical of such wide-ranging waivers of sovereign immunity. This statement will consider each of these flaws in the proposed legislation in order.

As already noted, the tribal courts already can and do handle cases of the type which the proposed legislation seeks to redirect to federal and state courts. While a myth has grown up that tribal sovereign immunity bars any and all actions against tribal officials who might affect property or other rights, nothing could be further from the truth. First, like the federal government and the states, some tribes have enacted limited waivers of tribal sovereign immunity as part of tribal tort claims statutes, employment rights statutes, or the like. *See e.g.*, *Bauer v. Mashantucket Pequot Gaming Enterprise,* 22 Indian Law Rep. 6145 (Mash. Peq. Ct. App. 1994) (Mashentucket Pequot Tribe has enacted tort claims statute governing torts arising from the negligence of its gaming enterprise or its agents or employees). Even where not affirmative tribal ordinance waives sovereign

immunity, the scope of that immunity under tribal law is not always as broad as some assume. While some tribes, and therefore some tribal court decisions, do extend tribal sovereign immunity to cover suits, or at least damage actions, against tribal officials, *e.g. Lovermi v. Miccosukee Tribe of Indians of Florida,* 23 Indian Law Rep. 6090 (Micc. Tr. Ct. 1996), the general trend in recent tribal court decisions has been to permit suits against tribal officials, particularly for injunctive and declaratory relief, and to hold either that the sovereign immunity of the tribe does not extend to tribal officials or that any illegal actions are outside of the scope of their authority and therefore not barred by the defense of sovereign immunity. For example, earlier this year, the Winnebago Supreme Court ruled in *Rave v. Reynolds*, No. 96-01 (Winn. Sup. Ct. 1996), in a case on which I sat as a member of the Court, that the provisions of the Tribal Code of the Winnebago Tribe of Nebraska authorizing suits against tribal officials for acts contrary to tribal law or to the Indian Civil Rights Act of 1968 clearly indicated that under tribal law, as under federal common law, tribal sovereign immunity did not extend to tribal officials. Similarly, in *Thompson v. Cheyenne River Sioux Tribe Board of Police Commissioners*, 23 Indian Law Reporter 6045 (Chy. R. Sx. Ct. App. 1996), the Cheyenne River Sioux Tribal Court of Appeals, in another case in which I sat as a member of the Court, ruled, in accordance with its earlier precedents, that Lakota tradition and tribal law required a forum in which illegal actions by tribal officials could be heard. The decision in *Thompson*, however, went even further than most federal and state courts have generally ruled by holding that under tribal law tribal sovereign immunity did not extend to or bar suits against tribal agencies for injunctive and declaratory relief. Similarly, in *Moran v. Council of the Confederated Salish & Kootenai Tribes*, 22 Indian Law Rep. 6149 (C. S. & K. T. Ct. App. 1995), the Court of Appeals for the Confederated Salish & Kootenai Tribes held that tribal sovereign immunity did not bar suit against the members of the tribal council even though, as in federal or state court, it would have barred suit against the Tribe or the Tribal Council as an institutional defendant. In short, the clear trend in recent tribal court decisions is to permit tribal officials to be sued for violations of applicable federal or tribal law and to refuse to extend tribal sovereign immunity to bar such litigation. Consequently, there is absolutely no need to supply any additional or alternative forum in federal or state courts for such cases, particularly where doing so would violate fundamental understandings and promises that the United States has long made to Indian tribes.

While most waivers of sovereign immunity are quite limited and specific, the proposed legislation is broad, open ended and ill-defined. When federal or state governments waive sovereign immunity, they do not generally do so in the blanket fashion contemplated by the proposed legislation, but, rather, adopt very specific, narrow, carefully tailored statutes that not only clearly specify, delineate, and limit the classes of cases to which the waiver applies, but also carefully limit the courts in which such suits must be filed (including the special creation of governmental claims courts to hear such proceedings), and provide special procedures, including short statutory periods of the filing of such claims denials of jury trials for the adjudication. The proposed legislation contains none of these elements generally associated with the limited waivers of federal or state sovereign immunity and, instead, merely treats the Indian tribe and another *private* party, thereby further denying and marginalizing the sovereignty of the tribes. The waivers of sovereign immunity enacted by the federal government illustrate the point. Under the 28 U.S.C. §§ 1491-1509, the United States has enacted a limited waiver of sovereign immunity for contractual and other claims for damages not arising from torts that directs such cases to a special non-Article III legislative court known as the United States Court of Federal Claims. In that court there is no jury trial. Similarly, like most states and some tribes, Congress has enacted Federal Tort Claims Act (FTCA), codified in relevant part at 28 U.S.C. §§ 1346(b), 2671-2680. Like most state and tribal waivers of sovereign immunity, FTCA contains precise and limited definitions of the causes of action to which the waiver of sovereign immunity applies, including numerous exceptions found in 28 U.S.C. § 2680. Additionally, like many state tort claims statutes, the Federal Tort Claims Act requires prior presentment of the claim and its denial by an agency of the government as a precondition to suit. 28 U.S.C. § 2675(a). Finally, as with virtually all waivers of federal, state, and tribal immunity, these statutes only waive sovereign immunity for suit in the courts of the sovereign whose immunity is waived, not in the courts on another sovereign, as proposed by this legislation. Not only are the federal, state, and tribal statutes waiving sovereign immunity generally narrowly drafted and heavily laden with special procedural safeguards including special tribunals, the courts interpreting waivers of sovereign immunity generally attempt to enforce the tradition of respect for sovereignty by construing any statutory waiver of sovereign immunity quite narrowly. *E.g. United States v. Testan,* 424 U.S. 392 (1976*); United States v. Mitchell*, 445 U.S. 535 (1980) Obviously, the waiver of tribal sovereign immunity contained in the proposed legislation is recklessly far broader, less defined and limited in scope than most federal, state, and tribal waivers of sovereign immunity. Furthermore, it contains

none of the procedural safeguards which sovereign governments commonly include in their waivers of sovereign immunity.

More importantly, the waiver of sovereign immunity found in the proposed legislation attempts to waive tribal sovereign immunity not for suits in the tribes' own forums, the *tribal courts*, but, rather, only for suits in federal and state courts. The most common feature of the federal and state waivers of sovereign immunity noted above, is that they generally waive sovereign immunity only for suits in the sovereign's own courts. Thus, with very few exceptions, the federal government has waived sovereign immunity only for suits in federal, rather than state court. The few exceptions that exist to that principle generally involve very limited situations where the presence of the United States in important litigation central to state interests is necessary to fully adjudicate the controversy, as in the area of water rights. *E.g.* 43 U.S.C. § 666 (the McCarran Amendment consenting suit against the United States in state courts to adjudicate federal water rights as part of a general stream adjudication). The waiver of tribal sovereign immunity attempted in the proposed legislation for federal and state adjudication not only violates federal treaty guarantees and the general principles and traditions of federal Indian law, it cannot be justified based on the type of imperative need that is used to justify extraordinary waivers of sovereign immunity to courts of another sovereign, such as the McCarran Amendment.

Not only does the proposed legislation purport to waive tribal sovereign immunity to the courts of another sovereign, but it purports to have the federal government undertake to mandate such waiver, rather than permitting the tribes to make such decisions. Intergovernmental waivers of sovereign immunity constitute extraordinary governmental actions that must be justified on a compelling showing of governmental power. Just last term, the Supreme Court of the United States declared unconstitutional another such intergovernmental waiver of sovereign immunity, holding that this body lacked constitutional authority to waive the immunity of the states for suit in federal courts. *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). Just as the State of Florida was legally offended and felt its sovereignty significantly impaired by the federal waiver of state sovereignty involved in the *Seminole Tribe* case, so tribes might justifiably believe the waiver of sovereign immunity contained in the proposed legislation undermines their sovereignty and impairs their legal existence as autonomous self-governing states which can enforce their own laws involving reservation matters through their tribal courts or other forums.

Finally, as in *Seminole Tribe*, the waiver of sovereign immunity contained in the proposed legislation combines both an intergovernmental waiver of sovereign immunity with a waiver to the courts of another sovereign, in this case two other sovereigns, the federal government and states. As *Seminole Tribe* demonstrates, it is precisely these types of waivers that have the most far reaching effects and of which the courts properly are the most skeptical. While dicta in some cases suggests a power of Congress to waive tribal sovereign immunity, no case of which I am aware has ever found and sustained the legality of a *federal* waiver of tribal sovereign immunity. Indeed, the courts have worked quite hard to avoid finding that Congress had waived tribal sovereign immunity, perhaps to avoid the necessity of deciding the difficult issue of whether Congress has any power to waive the sovereign immunity of another government, such as the Indian tribes, in the absence of a clear constitutional amendment granting such power expressly or by necessary implication. *E.g. Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). In addition to the fact that the proposed legislation is unnecessary and constitutes a gratuitous affront to the tribal sovereignty solemnly guaranteed to the Indian tribes by the United States, there are reasons to doubt the legality of the waiver of sovereign immunity contained in the proposed legislation.[3]

Conclusion

In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, (1832), Chief Justice John Marshall, one of the greatest Chief Justices of the Supreme Court of the United States, surveyed federal Indian policy from colonial times and wrote:

> Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the [government], to interfere with the internal affairs of the Indians. . . .

While perhaps comparatively less true in the twentieth century particularly with reference to tribal criminal jurisdiction over non-Indians, Chief Justice Marshall's statement captured the long tradition of recognizing tribal sovereignty and protecting the right of tribes to govern their reservations and to apply their laws through their own tribal courts. The proposed legislation constitutes the

[3] Additionally, the section of the proposed legislation purporting to confer jurisdiction on the *state* courts over matters governed by either tribal or state law, might raise serious tenth amendment questions about the power of Congress to affect the jurisdiction of the state courts over matters not within the judicial power of the United States or otherwise the subject of affirmative substantive legislation by Congress.

greatest threat to that legal tradition proposed in many years. It threatens the very existence of tribal courts, which this Congress recently sought to protect and strengthen through the Indian Tribal Justice Act of 1993, Public Law 103-176, 107 Stat. 2004. It undermines the ability of tribal governments to have their courts apply *tribal*, rather than state, law to disputes that arise on their reservation and thereby totally undermines tribal sovereignty. Finally, it affronts and assaults tribal sovereignty by diminishing the force of tribal governance and arrogating to the federal government the decisions as to when, how, and where *tribal* sovereign immunity, a venerable legal doctrine that Alexander Hamilton described as inherent in the nature of sovereignty, will be waived.

As explained in this statement, the proposed legislation therefore is dangerous, offensive to tribes, unnecessary, unjustifiable, and perhaps illegal. It is bad policy and it is poorly drafted. In short, I would suggest it should be overwhelmingly disapproved and that the racial preconceptions that underlie this proposed legislation should be relegated to the dustbin of American history that also mercifully swallowed the institution of slavery.

TESTIMONY OF ROBERT CONGDON, CHARLES ELIAS AND WESLEY JOHNSON
on behalf of the
Towns of Ledyard, North Stonington, and Preston, Connecticut
before the
Senate Committee on Indian Affairs

Introduction

Mr. Chairman, Mr. Vice Chairman, and members of the Committee, thank you for the opportunity to submit this written testimony on the need for legislative action to address problems associated with tribal sovereign immunity. We serve as the top elected officials of three small towns in southeastern Connecticut -- Ledyard, North Stonington, and Preston -- that have witnessed the astonishing growth and success of the Mashantucket Pequot Tribe over this last decade as a result of gaming activities conducted on its lands. With the growth and expansion of the Tribe, problems are now arising as a result of sovereign immunity. The purpose of this testimony is to bring these problems to your attention and request further consideration of this important issue.

Fifteen years ago the Mashantucket Pequot Tribe was not even recognized under federal law. Today, as a result of its hugely successful casino resort, it is the dominant economic force and landowner in the region. For the Towns, standing witness to this growth and success has been both exciting and troubling. We admire the great success of our Indian neighbors, and we are grateful for the economic vitality

their casino has brought to the region. We are greatly concerned, however, over the many problems that are now arising incidental to the Tribe's success and unique status under federal law. These concerns include: 1) the lack of comprehensive environmental review of the Tribe's development activities as required by NEPA and other laws; 2) the Tribe's intention to take extensive landholdings outside of its reservation into trust in violation of federal law and with accompanying damage to the local tax base; 3) the lack of compensation to the Towns for the serious impacts on our communities that result from the Tribe's activities; 4) and the absence of any meaningful mechanism for the Towns to interact with the Tribe to address issues of mutual concern. Another major area of concern is the subject of this hearing, that is the sovereign immunity of the Tribe which insulates it from most forms of legal challenge to its actions. This latter issue is the focus of this testimony.

Background on the Towns and the Tribe

At the outset, we want to provide some background on the Towns and the Tribe. This information is necessary to obtain a perspective on why the sovereign immunity issue is of such concern to us and our constituents.

Ledyard, North Stonington, and Preston are small communities with a combined population of about 25,000. The Towns' combined annual tax revenue is about $25 million. Our Towns are located in what has been, until recently, a predominantly rural, residential setting.

In recent years, the social, economic, and environmental character of our communities has experienced rapid transformation as a result of the opening of the Foxwoods Casino and Resort on the reservation lands of the Mashantucket Pequot Tribe. This facility is claimed by many to be the largest, most successful casino in the world. It operates round the clock, 365 days a year, and on a typical summer weekend day the number of visitors to the Casino (about 60,000) is more than twice the total population of all three towns. In the month of July 1996, the revenues from the Tribe's slot machines alone exceeded $60 million, approximately four times the annual tax revenue of Ledyard, the town in which Foxwoods in located. The Tribe's own officials claim that nowhere in the gambling industry has this level of revenue ever been approached. Annual revenue for the Tribe is estimated to be over $1.3 billion, with profits well in excess of $300 million. The Tribe currently consists of around 350 members.

The Tribe is by far the largest landowner in the region. It owns over 4,500 acres of fee land outside of the boundaries of its 2,210 acre reservation. This property is scattered throughout southeastern Connecticut, and the Tribe has indicated it intends to purchase much more land. The Tribe also is engaged in numerous economic ventures beyond gaming, including resort facilities, a pharmaceutical network, a shipbuilding business, and other ventures.

As the Committee may know, the Towns have been deeply concerned about the conversion of this fee land to trust status, thus diminishing our already small tax base, and the loss of community planning, zoning and environmental controls. This dispute is the subject of litigation now in progress. Our focus today, however, is on sovereign immunity.

Sovereign Immunity Problems

Increasingly, the sovereign immunity of the Tribe is becoming a very real problem not only for the Towns, but also for parties engaged in business transactions with the Tribe, individuals who enter upon Tribal lands, and other parties who have engaged in some form of contact with the Tribe that may require legal recourse. These problems are sure to proliferate.

From the Towns' perspective, we are frequently disadvantaged in negotiations with the Tribe because of the Mashantucket Pequot's refusal to waive voluntarily its immunity from legal challenge. In our ongoing dispute over trust land expansion, for example (which the Towns were forced to obtain a court order to stop), the Tribe adamantly refused to accept any consensus-based agreement that would be fully enforceable by the Towns.[1] Of course, there is little reason for the Towns or any

[1] Only after the Department of the Interior unilaterally negotiated a trust lands agreement, without consulting with the Towns and over our objection, was a partial sovereign immunity waiver agreed to. This waiver is virtually meaningless, however, because of its very limited scope and the fact that the agreement developed by the Department failed to address the Towns' concerns.

other party to enter into agreements with the Tribe if they will not be fully enforceable.

In other areas of land use planning, the Tribe has not been willing to agree to be sued if it does not comply with applicable standards. Thus, we have been reluctant to make exceptions to our zoning requirements to accommodate Mashantucket Pequot development plans because we cannot be sure that the Tribe will not claim that the resulting terms and conditions are unenforceable as a result of sovereign immunity. Indeed, in the past the Tribe has claimed that, as a matter of law, certain Ledyard zoning restrictions cannot be enforced. In short, we simply lack the certainty that over time the Tribe will not assert sovereign immunity in an effort to escape the rules and regulations that apply to other landowners.

An area of general concern relates to public safety and emergency medical services. To one extent or another, each Town has a relationship with the Tribe regarding mutual assistance for fire protection, ambulance and, to a lesser extent, police services. Some of these relationships are formalized in mutual assistance agreements; others are informal and cooperative. While these agreements can, and should, be the best examples of cooperation between neighbors, there is an underlying concern about the Tribe's potential reliance on sovereign immunity to shield not only tribal members and the Tribe from liability, but also those who work for or contract with the Tribe to provide such services. To whom do the Towns turn to gain redress

in the event of tribal negligence or contractual breach with respect to these services? To whom does a fireman turn if injured while providing assistance on tribal lands? Sovereign immunity could be asserted in an effort to preclude such claims.

These are not abstract concerns. In a recent personal injury case, for example, the Tribe stated that it would assert sovereign immunity in a claim for damages arising out of a Casino commuter bus accident. This defense would have been raised by the Tribe's insurance company. What good is such insurance to injured parties if the Tribe's sovereign immunity will be used, even by third parties, to bar such claims?

Visitors to the Tribal lands are now also experiencing sovereign immunity defenses. In 1994, an employee of Foxwoods was injured in a fall on ice in the Casino parking lot. She brought a lawsuit against the Tribe to recover damages. The Tribe successfully asserted sovereign immunity to defeat the claims. In dismissing the case, the court ruled that "the Tribe's immunity from suit extends to commercial activities occurring off the reservation." Romanella v. Hayward, No. 3:95CV726 (Aff'd) (D.Conn 1996). Thus, as the Tribe expands its economic base and undertakes business activities throughout the region it will carry the ability to escape legal challenges arising from its conduct. Clearly, this is an advantage no other business enjoys.

Another problem has arisen in the context of non-Indian entities seeking the shield of tribal sovereign immunity. In a case now pending in State court, a

non-Indian high-tech company has argued that the property which it maintains on the Mashantucket Pequot Reservation is exempt from local taxation because of its location on Indian lands. The legal papers filed by this non-Indian company include a sovereign immunity defense.

The few instances the Towns are aware of in which the Tribe has agreed to waive its immunity offer little reassurance. The Tribe waived its immunity to secure financing for its Casino from investors. And, as noted above, the Tribe agreed to a limited waiver to obtain from the Department of the Interior the now enjoined approval of the transfer of land into trust outside of its reservation. When the Tribe's self-interest is strong enough, it has agreed to such waivers, but in all other circumstances of which we have knowledge there has been no compromise. No waivers are made. The Tribe's dominant political and economic position give it very little motivation to compromise on such issues, and as a result non-Indian entities negotiating with the Tribe are frequently presented with a take it or leave it position on the sovereign immunity issue.

These instances in which sovereign immunity has already been asserted are, we fear, only a portent of more problems to come. Needless to say, there is no practical basis upon which an economic force as powerful and pervasive as the Tribe should be allowed to conduct all of its affairs under the shield of complete immunity from suit. As the Tribe continues to purchase more and more land and expand its business

activities, the unfairness inherent in this doctrine will become increasingly apparent and unjust. Our system of laws cannot tolerate a result in which any party is above the law and outside the system of judicial oversight intended to protect the rights of all citizens and insure a just outcome to legal disputes. Unfortunately, unbridled tribal sovereign immunity gives rise to just such a result.

The Need For Legislation

We are aware that our problems in dealing with tribal sovereign immunity are not unique. Testimony offered at the September 24 hearing confirms the widespread and growing nature of the controversy surrounding unlimited tribal sovereign immunity. It is clear that Congress must thoroughly study this problem and develop legislation that, while deferential to sound principles of tribal sovereignty, establishes a balanced and equitable immunity waiver doctrine.

Contrary to the assertions advanced by the proponents of tribal sovereign immunity at this hearing, such a result can be achieved without undermining the independent, sovereign status of Indian tribes. Standards can, and should, be found to address those instances in business, local and state government, and personal transactions, in which a tribe is required to waive appropriate aspects of its total wall of protection from suit.

Of all the sovereign governmental entities, Indian tribes are alone in claiming far-reaching, if not total, immunity from suit. In most respects, the United States has

waived its immunity. The majority of the States have done so, as have most local governments. The principle embodied in all of these sovereign immunity waivers is simple -- aggrieved parties should have judicial recourse to seek redress for alleged harms they have suffered or to seek to enjoin illegal actions. In the 1990's, the concept of unadulterated immunity of any sovereign is an anachronism.

It was argued at the hearing that there are special reasons Tribes should be treated differently. These arguments cannot be sustained.

It was argued, for example, that an immunity waiver would undermine the goals of Indian self-government and self-sufficiency and economic development. See Robert Anderson Testimony, at 4. A "blanket waiver," it was claimed, would allow any party who believes a proposed tribal action would affect a property interest to file suit to halt this action and recover damages.

We fail to see how stopping a Tribe from conducting a legal wrong or compensating an injured party "undermines Indian self-government and self-sufficiency." To the contrary, we believe a fundamental attribute of sovereignty is for the government entity involved to live up to its obligations and defend its actions on the merits, not to hide from them. In any event, it should be possible to construct an immunity waiver that does not go so far as to expose a tribe to unfair, frivolous lawsuits. It does not follow that a "blanket waiver" is necessary, but neither can the sweeping immunity currently conferred upon tribes be tolerated.

It also is claimed that any such waiver would "flood state and federal courts with litigation over matters that historically have been reserved for tribal courts." It also is argued that "non-Indians who choose to live in Indian country could scorn tribal government and seek to have the courts of the historically hostile non-Indian neighbors of the Tribes empowered to take control of the affairs of the tribe." Id. at 5.

This overbroad statement has no support. The number of cases likely to arise as a result of an appropriately crafted immunity waiver can hardly be expected to swamp the judicial system. Moreover, there is no evidence that federal and state courts today are "hostile" to Indians. To the contrary, case law demonstrates that Tribes are treated fairly and often receive the benefit of the doubt from the courts. Taking cases away from tribal courts is not even the issue, as tribal sovereign immunity frequently prevents cases from being adjudicated even in those forums. Finally, many non-Indians "do not choose to live in Indian country." In Ledyard, for example, many residents have suddenly found themselves surrounded by Tribal lands as a result of the Mashantucket Pequot's aggressive land acquisition practices.

It also was argued that "such lawsuits would place a tremendous financial burden on tribes due simply to the costs of defending litigation in non-tribal forums." Id. The mere threat of such suits, it is argued, "could paralyze economic development for tribes." Id.

We regard this argument not only to be an overstatement of the consequences of a waiver of sovereign immunity but also to beg the question. Private parties, as well as virtually all government entities, are not excused from the need to defend unlawful conduct because of litigation expenses. Certainly the Mashantucket Pequot Tribe, perhaps the wealthiest in the nation, does not lack the ability to defend its actions in court. Relative to small towns like ours, many Indian tribes are in a far better position to support a legal defense of its actions than are we. The Mashantucket Pequot Tribe employs a host of attorneys on staff and as outside counsel. It makes extensive political contributions, and has the ability to retain the most sophisticated professional assistance available. In one month, its slot machine revenues alone are quadruple the size of Ledyard's annual tax revenues. Certainly, with respect to this Tribe and many others engaged in gaming, the "financial burden" argument does not hold water. Overall, however, it is not the "financial ability to defend" which is so important. What is crucial is that simple exposure of tribal interests to the common system of justice will in and of itself lead to more reasonable results, results which are unlikely now in a situation where the tribes are immune from the legal process.

Subjecting government entities, whether they be federal, state, local, or Indian, to judicial review of their actions is an important element of our system of government. Clearly, it encourages better and more responsible decisionmaking, and there is no valid reason to excuse the Tribes from such accountability.

Conclusion

As stated by an Indian tribal court itself: "many sovereigns have waived sovereign immunity in a variety of contexts like the present one without in any way diminishing their sovereignty." Clement v. LeCompte, 22 ILR 6111, 6117 (Cheyenne River Ct. App. Jan. 12, 1994). This is the key principle which should guide future consideration of the tribal sovereign immunity issue. We are certain that appropriate sovereign immunity waiver legislation can be crafted which protects legitimate tribal self-government and self-sufficiency interests. The problems raised by tribal sovereign immunity proponents can be adequately addressed if a full and objective investigation of the concerns on both sides of the issue is undertaken. On behalf of our Towns, we fervently request that your Committee, and other appropriate Committees, continue to review this issue and, based upon that investigation, draft appropriate tribal sovereign immunity waiver legislation. Thank you.

JAMES D. HILL, Esq.
Assistant Professor
School of Justice Studies
Arizona State University
Tempe, Arizona 85287-0403
(602) 965-7038

October 7, 1996

Senator John McCain
Chairman, Senate Committee on Indian Affairs
U.S. Senate
SH-838 Hart Office Building
Washington, D.C. 20510-6450

VIA FACSMILE

RE: Testimony on Sec. 329 HR 3662 Proposed but Withdrawn Provision Providing for Waiver of Tribal Sovereign Immunity

Dear Mr. Chairman:

Please consider this as testimony to be submitted as part of the September 24, 1996 Committee Hearings on the issue of waivers of tribal sovereign immunity in connection with the above referenced matter.

I am James D. Hill, an Assistant Professor in the School of Justice Studies at Arizona State University where I teach environmental law and federal Indian law based courses. I am also an enrolled member of Klamath Indian Tribe of Oregon and am eligible for enrollment in a Paiute-Shoshone Community of California. Prior to coming to Arizona State University I served in a number of capacities, including serving as a staff attorney in the Native American Program of Oregon Legal Services; as a Judicial Clerk for the 7th Judicial District for the State of Oregon; as an assistant criminal prosecutor for Clark County, Washington; as an Assistant Regional Counsel for U.S. EPA, Region 10 (where I also served as lead attorney on Indian issues); and as Sr. Assistant Tribal Attorney for the White Mountain Apache Tribe. I am an active member in the Oregon,

Washington, and Arizona State Bar Associations. I have also served as Chair of the American Bar Association's Native American Natural Resources Committee. I submit this testimony as an individual and in my private capacity.

DESCRIPTION OF THE ISSUE

It is my understanding that there has been significant discussion regarding Congress' taking action to waive tribal sovereign immunity for certain purposes where tribal actions may or do result in adverse impacts upon or cause a reduction in the value of non-Indian owned properties within the borders of Indian reservations, or perhaps more broadly, in Indian country. I further understand that there has been some discussion of subjecting tribes to state court jurisdiction where a non-Indian raises such issues. Finally, it is my understanding that the hearings on this matter are not intended for consideration on any particular proposed federal legislation, but are at this point for an "airing" of the issues. Based upon that understanding, I state the following:

NATURE OF TRIBAL SOVEREIGN IMMUNITY

Tribal, federal and state courts have recognized that tribes, like other sovereigns and the United States of America, share certain characteristics, including that of inherent sovereign immunity. The courts have well established that tribal sovereign immunity, like federal sovereign immunity, is not waived in the absence of clear and express language. It is also well established in existing law that only tribes or Congress may waive that sovereign immunity.

OVERVIEW OF CONGRESS ADDRESSING ISSUES OF TRIBAL SOVEREIGN IMMUNITY

In a sense, it is good that Congress considers the issue of tribal sovereign immunity at this time because the courts have been somewhat confused in recent years as to how

to address that issue. This gives Congress an opportunity to clarify to the courts, by report or otherwise, that *only* by clear and express language is tribal sovereign immunity waived. I encourage that this be done.

Although there has been some discussion addressing the issue of tribes and individual Indians being subject to "statutes of general applicability," judicial opinions, with the exception of one or two cases, have generally addressed the issue of whether specific federal laws abrogate treaty or treaty substitute (executive order or legislatively recognized) rights. Further, federal case law has held that tribes, like states, may not raise the shield of sovereign immunity against the federal government and so issues hinging on "statutes of general applicability" generally do not even get to issues of tribal sovereign immunity. Working under that rule of law, tribes must often rely on the Federal Government's working closely with tribes, as it does with states, in order to resolve disputes rather than seeking monetary or injunctive relief.

The issue of subjecting tribes to suit by private individuals is significantly distinguishable and raises huge questions, including, but not limited to, colonization, cultural and ethnic genocide, federal policy, purposes of sovereign immunity, and tribal survival.

COLONIZATION AND CONGRESSIONAL AUTHORITY

It is of great concern that Congress is considering using its powers and authorities to unilaterally waive tribal sovereign immunity. All three branches of the federal government willing accept that through the "doctrine of discovery" the United States government came to hold "plenary" powers or authorities over the pre-existing sovereign Native American nations. At times, it has unquestioningly attempted to completely destroy Native American tribes, their cultures, and their people. Often, it has simply ignored its treaty obligations that it assumed and bargained for. The allotment and the assimilation

era of the late 1800s and early 1900s and the termination era running from approximately 1945 to 1960 are excellent examples.

Many people believe that gone and repudiated are the days of allotment and assimilation which resulted in the decimation of Indian land holdings, reducing the quantity of then remaining Indian lands by approximately two thirds, and taking approximately eighty percent of the land value, taking Indian children from their homes to "take the Indian out of him," and making criminal the practicing of Native American religions. Many also believe that gone are the days of the federal termination policy, which initially provided that Congress could *unilaterally:* Condemn and sell tribal lands; end the special tribal/federal trust relationship; impose state legislative jurisdiction; impose state judicial authority; impose state taxing authority over both Indian lands and activities; discontinue all "special" federal programs to tribes; discontinue all "special" federal programs to individual Indians; and effectively terminate nearly every aspect of tribal sovereignty over tribal people and tribal lands. These and other federal actions have consistently been upheld in the U.S. courts as authorized pursuant to Congress' "plenary power" over Indian affairs or where not challenged, simply condoned or accepted.

Those federal actions were, as are so many actions directed at Native American nations today (e.g., the Indian Gaming Regulatory Act), taken for the benefit of the non-Indian colonizer without adequate consideration for tribal sovereignty and consent and to the absolute detriment of the Indian nations and people, placing tribal cultural survival and political existence at extreme risk. The proposal that Congress unilaterally abrograte tribal sovereign immunity is of the same nature. Subjecting tribes to such liability poses a grave risk to tribal and cultural survival because even the expense of defending against such actions is not something that many tribes could bear.

Most tribes are, at this time, still trying to meet the basic needs of their people and provide essential governmental services. Diverting resources to defend various suits

would only mean diverting the very scarce resources away from those critical needs, imperiling cultural and political survival. Thus, to the extent that Congress chooses to address the issue of tribal sovereign immunity, it is important that it do so bearing this in mind as well as federal trust obligations, notions of the emerging concepts of international indigenous rights, and other critical factors.

NOTIONS OF SOVEREIGN IMMUNITY IN INDIAN COUNTRY

Sovereign immunity serves numerous purposes in Indian country as it does outside of Indian country. It serves to protect the public (tribal) fisc and to preserve and protect the dignity and functioning of the sovereign. Blanket waivers of sovereign immunity serve to constrain or to chill the free exercise of sovereign governmental functions if its every action is potentially subject to suit. This would especially be the case where tribal governments are concerned because of the budgetary constraints under which Indian tribes attempt to carry out their responsibilities.

Where appropriate, many federal, state, and tribal governments have enacted tort claims acts or provided for other forms of limited waivers of sovereign immunity. At least one tribal court found that, in accordance with its custom, sovereign immunity was not even an appropriate concept under tribal common (customary) law. Further, the courts have found that the federal government has provided for certain waivers of state and tribal sovereign immunity by statute (to the extent limited by the 11th amendment to the Constitution) or by federal constitutional amendments. Although the federal constitution is generally not applicable to tribes for certain purposes as it is to states, Congress, at 25 U.S.C. § 1302(8) (Indian Civil Rights Act), has provided that tribes may not "deprive any person of . . . property without due process of law" as is provided for protection against state and federal actions. In other words, Congress has *already* provided Indians and non-Indians the statutory protections necessary to accomplish the result of protecting non-Indian properties from tribal governmental actions within Indian country to the same extent

that it has provided such protections from federal and state actions. It is not necessary to take further actions to make non-Indians "super-citizens" within Indian country.

Resolution of such issues may be resolved in tribal courts. Additional federal action to unilaterally waive tribal sovereign immunity and to further infringe upon tribal sovereign powers, authorities and functions should not be necessary where tribal courts are functioning entities. If Congress believes that tribal courts are inappropriate venues for resolution of such issues, it should consider enhancing the functioning of tribal courts by providing for additional training and funds for their establishment and management in accordance with the federal policy of tribal self determination . . . strengthening and promoting tribal self sufficiency and control.

Tribal court systems should further be allowed to utilize tribal common law in a manner appropriate to tribal custom or in the manner and to the extent that the tribes have adopted their systems to the American models of jurisprudence.

JUDICIAL FORA FOR ISSUE RESOLUTION

The notion of subjecting tribes to state judicial fora for issue resolution is a throwback to the termination era which was repudiated in the 1970s. It further advocates a notion of racial distrust of tribal systems of governance and belittles the tribal sovereign. Tribal governments should carry the same respect as do the state and federal governments. It is doubtful that Congress would consider delegating federal authority to, or creating judicial authority in, tribal courts where states have infringed upon individual Indian rights (on individual Indian owned properties) in on or off-reservation settings. To Indian nations, the proposal that state courts be granted authority to resolve disputes between Indian nations and reservation resident non-Indian citizens raises the same "flags" of concern. Unless Congress is beyond the precipice of reversing federal Indian policy back toward the debacles of allotment and assimilation or termination policies of the past it is clear that such a proposal is inconsistent with tribal self determination,

indigenous rights, and notions of sovereign dignity. Please consider the following analogy:

> Should a citizen of state B, owning property in state A and believing that state A has infringed upon his or her property values or rights, be able to bring an action against state A in state B's courts in accordance with state B's rules and laws pursuant to federal legislation?

States would clearly consider such an arrangement to be an unconscionable intrusion upon state sovereignty. Further, it is doubtful that such legislation would be acceptable to Congress and even if acceptable perhaps beyond congressional powers pursuant to the 11th amendment of the U.S. Constitution, especially in consideration of the U.S. Supreme Court's recent decision in Seminole Indian Tribe of Florida v. State of Florida. However, since tribes have neither direct representation in Congress as sovereign bodies (as do states) nor are imbued with the states' 11th amendment sovereign protections from congressional waivers of sovereign immunity, such legislation is more likely to be approved and more likely to be subsequently upheld by federal courts.

CONCLUSION

As this is not the time to thoroughly address these matters, but only for an "airing" the significant issues, I do not pretend to attempt a thorough analysis. These are, however, among the considerations with which Congress must concern itself and resolve in accordance with federal Indian policy, indigenous rights (domestic and international) and moral concerns. Congress must recognize that such a proposed action or even its consideration presents a significant departure from stated federal policy of tribal self determination and likely marks another milestone in tribal governmental and cultural survival in their colonized world.

Very respectfully submitted this 7th day of October, 1996.

James D. Hill, Esq.
Assistant Professor
School of Justice Studies

Arizona State University

Seneca Nation of Indians
DEPARTMENT of JUSTICE

October 7, 1996

Honorable John McCain, Chairman
Honorable Daniel K. Inouye, Vice-Chairman
Committee on Indian Affairs
SH-838 Hart Senate Office Building
Washington, D.C. 20510-6450

Re: **Hearing on Proposed Section 329 of FY 1997 Interior Appropriations Bill**

Dear Senators McCain and Inouye:

The Seneca Nation of Indians is submitting this written testimony for inclusion in the record of the September 24, 1996 oversight hearing conducted by the Senate Committee on Indian Affairs on proposed Section 329. The Seneca Nation is submitting this testimony for two reasons: first, to express its strong opposition to the inclusion of Section 329 or any similar provision in an Interior Appropriations bill or other legislation; and second, to correct the most egregious of the misstatements made on the record by Jennifer Coleman, a witness on the fifth panel that testified before the Committee, pertaining to an issue that deeply concerns the Seneca Nation.

The Seneca Nation opposes Section 329 because it would jeopardize tribal sovereignty and self-determination, principles essential to the continuing vitality of tribal governments. Moreover, these principles have been supported by President Clinton, see, e.g., 59 Fed. Reg. 22951 (May 4, 1994) (Memorandum dated April 29, 1994), as well as by several

P.O. Box 231, Salamanca, Seneca Nation, New York 14779 Phone: (716) 945-1790 Fax: (716) 945-6869

presidents before him. See, e.g., 19 Weekly Compilation of Presidential Documents 98 (January 24, 1983) (Reagan statement); Remarks at 46th Annual Convention of NCAI (September 28, 1989) (Bush Statement). Section 329 would undermine these basic principles of Indian law by depriving tribal courts of much of their jurisdiction and by granting a broad waiver of tribal sovereign immunity, thus attacking two of the primary manifestations of tribal sovereignty and the right to tribal self-determination.

It is a basic principle of Indian law and an important aspect of tribal sovereignty that tribes retain exclusive jurisdiction over reservation affairs. E.g., United States v. Wheeler, 435 U.S. 313 (1978). Actions involving tribal regulation or other assertions of tribal civil jurisdiction over property within Indian country should be heard at least in the first instance in tribal court. Even in cases where non-Indian owned fee land is involved (to which Section 329 appears to be addressed), tribal jurisdiction still exists where a non-Indian has entered into a contractual relationship with the tribe, or where the conduct which the tribe seeks to regulate "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana v. United States, 450 U.S. 544, 565 - 66 (1981) (citations omitted). And even those statutes which expressly delegate jurisdiction to states in certain instances, such as Public Law 280, do not deprive the tribes of concurrent jurisdiction in those instances, see, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976).

Moreover, the federal courts have already laid out well-established principles

governing the exercise of tribal jurisdiction.[1] As noted above, the courts have ruled as to when tribal courts have exclusive jurisdiction, when that jurisdiction is concurrent with state or federal jurisdiction, and when tribes have jurisdiction over non-Indians or non-Indian land within Indian country. In addition, the exercise of tribal jurisdiction over non-Indians is subject to review in federal court. National Farmers Union Ins. Co. v. Crow Tribe, 471 U.S. 845 (1985). For Congress to enact a provision such as Section 329 would overturn this entire body of law, and instead of providing an alternative framework would simply deprive the tribal courts of jurisdiction.

The possible ramifications of Section 329 are doubly severe because the provision is so broadly worded; in fact, it threatens to deprive the tribal courts of jurisdiction altogether. The term "private property" could include lease rights or rights-of-way, for example, and almost any action could be said to have an "impact" or "threaten to impact" the ownership or use of private property. Thus, Section 329 could easily be interpreted to subject a tribe to an injunction by a state court against taxation of oil and gas produced from an Indian reservation pursuant to mineral leases with the tribe, in effect overruling the Supreme Court's decision in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1981). Similarly, it could be interpreted

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[1] These principles apply to the Seneca Nation courts, as they do to any other tribal court, notwithstanding Ms. Coleman's implications to the contrary in her prepared testimony (at page 8). See also Constitution of Seneca Nation of Indians of 1848, as amended, Section IV (establishing jurisdiction of Seneca Nation Courts over "all cases arising under this Constitution, the customs or laws of the Nation, and to any case in which the Nation, a member of the Nation or any person or corporate entity residing on, organized on, or doing business on any of the Reservations shall be a party").

to allow a state court to enjoin a tribe from enforcing environmental laws against the owner of a source of air pollution on leased land within a reservation, in contravention of explicit provisions in the Clean Air Act delegating such authority to tribes. See, e.g., 42 U.S.C. § 7601(d)(2)(B).

The Seneca Nation also opposes Section 329 because it would deprive tribes of their right to immunity from suit, a right which has been recognized by the Supreme Court. E.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). The doctrine of tribal sovereign immunity is another important manifestation of the principles of tribal sovereignty and tribal self-determination. As pointed out by the Eighth Circuit in American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1378 (1985), "Indian tribes enjoy immunity because they are sovereigns predating the Constitution" (citations omitted). Accord Guardipee v. Confederated Tribes of the Grand Ronde Community of Oregon, 19 Indian L. Rep. 6111 (Gr. Ronde Tr. Ct., June 11, 1992). Indeed, tribal sovereign immunity serves an important purpose in protecting and promoting Indian tribal self-government. The Supreme Court has recognized that "the common-law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-government" (citations omitted). Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877, 890 (1986). Similarly, in Oklahoma Tax Comm'n v. Citizen Band Potowatomi of Oklahoma, 498 U.S. 505, 510 (1991), the Supreme Court explained that Congress "has consistently reiterated its approval of the immunity doctrine," reflecting its desire to promote

its "goal of Indian self-government, including its 'over-riding goal' of encouraging tribal self-sufficiency and economic development" (citation omitted). Moreover, as the court noted in Martinez, 436 U.S. at 64-65, a finding that Congress waived tribal immunity in federal courts "would also impose serious financial burdens on already 'financially' disadvantaged tribes" (citation omitted). See also Rowland v. Hoopa Valley Tribe, 21 Indian L. Rep. 6087, 6088 (Hoopa Valley Ct. App., Sept. 29, 1992) ("[t]he purpose of sovereign immunity is to preserve the autonomous political existence of the tribes and tribal assets"); Guardipee, 19 Indian L. Rep. at 6111 ("tribal sovereign immunity is necessary to preserve and protect tribal assets from claims and judgments that would soon deplete tribal resources").

In keeping with these principles, it should be up to an individual tribe to determine the circumstances when it should waive its sovereign immunity and when the immunity should be retained. To subject tribes to a blanket waiver of sovereign immunity would expose tribes to limitless lawsuits and by itself would make tribal government untenable. To subject tribes to such lawsuits in state and federal courts would be a reversion to the anti-Indian policies of the allotment and termination periods.

The Seneca Nation also objects to several aspects of the testimony of Ms. Jennifer Coleman, who is a lawyer representing a handful of former lessees of the Seneca Nation in an ongoing dispute with the Nation. Ms. Coleman testified in favor of the curtailment of tribal sovereign immunity, such as would be accomplished by proposed Section 329. Ms. Coleman's statements in support of such a curtailment of tribal sovereign immunity could

not, however, be farther from the truth. Specifically, Ms. Coleman stated in her testimony that Indian Nations enjoy a degree of sovereign immunity from suit greater than that of the state or federal governments. On the contrary, unlike the sovereign immunity of the federal government, which can be waived only by the federal government itself, and unlike the immunity of the states, which it is becoming more and more difficult for the federal government to waive, see, e.g., Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), tribal sovereign immunity can be waived by Congress at will. See, e.g., Martinez, 436 U.S. at 58; John v. City of Salamanca, 845 F.2d 37, 40 (2d Cir.), cert. denied, 488 U.S. 850 (1988). Congress should therefore exercise special care before causing such a large encroachment on tribal sovereignty.

Ms. Coleman appears to base her statements regarding tribal sovereign immunity at least in part on the holding of the Second Circuit in Fluent v. Salamanca Indian Lease Authority, 928 F.2d 542, cert. denied, 502 U.S. 818 (1991), a case which Ms. Coleman's clients brought against the Seneca Nation. In that case, Ms. Coleman's clients challenged not only the validity of the leases under the 1990 Settlement Act but also the constitutionality of the Act itself. What Ms. Coleman neglects to mention is that constitutional challenges of federal statutes must be brought against the federal government, and plaintiffs' failure to sue the United States had nothing whatever to do with the sovereign immunity of the Seneca Nation. Moreover, the Second Circuit dismissed the suit in Fluent not simply because the tribe was an indispensable party and was immune from suit, but also because the Acts on

which plaintiffs relied to support their claim of right to another 99-year lease (the 1875 and 1890 Acts) did not apply to plaintiffs' lease renewals, but only to renewals made previously under those Acts (the leases had already been renewed for periods of 5, 12 and 99 years). It is thus far from clear whether plaintiffs would have won their case, even without the doctrine of tribal sovereign immunity.[2]

Moreover, the now-expired leases that Ms. Coleman's clients and many others held with the Seneca Nation were for unconscionably low rents, as was recognized in the testimony and reports supporting the passage of the Seneca Nation Settlement Act of 1990.[3] Indeed, these unconscionably low rents were the reason for enactment of the settlement legislation. Further, the previous legislation authorizing these leases (the Acts of 1875 and 1890) had been passed by Congress over the objections of the Seneca Nation. Thus, Senator Moynihan testified, in supporting the passage of the 1990 Settlement Act:

> the leases were authorized over the objections of the Senecas, by an act of the 51st Congress, on September 30, 1890. . . . As these leases contained no rent escalation

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[2] The United States has since brought an action in federal district court for ejectment and payment of past rent and mesne profits against Ms. Coleman's clients, who have continued to occupy Seneca Nation property without valid leases, despite four separate opportunities to enter into such leases. United States v. Fluent, No. 95-CV-356-A(H) (W.D.N.Y., complaint filed May 5, 1995); see also Attachment 10 to Coleman Statement. The United States moved for partial summary judgment on the issue of ejectment, and a magistrate granted the motion and issued an order of ejectment on July 9, 1996. The defendants filed objections to the Magistrate's Report on July 19, 1996, and the District Court's decision is still pending.

[3] See, e.g., Testimony of Prof. Laurence M. Hauptman, included as an attachment to this letter.

> provision, over their 99-year duration, some lessees have paid as little as $1 per year for the use of the land.

Cong. Rec. S15427 (daily ed. October 16, 1990). Similarly, both the House and Senate Reports accompanying the 1990 settlement legislation stated,

> The . . . leases were . . . executed without Federal supervision, assistance, or support at extremely low rental rates, many as low as $1 per year, with no provision for escalation of rents. . . . There does not seem to be any disagreement that the rental terms of the current leases are grossly unfair.

H.R. Rep. No. 101-511, 101st Cong., 2d Sess. 5 (1990); H.R. Rep. No. 101-832, 101st Cong., 2d Sess. 4 (1990). See also Protest of the Seneca Nation of Indians Against the Passage of H.R. No. 3080 (June 8, 1874); United States v. Forness, 125 F.2d 928, 941 (2d Cir.), cert. denied, 316 U.S. 694 (1942) (99-year lease at issue had rent of four dollars a year, an amount which "may shock even a calloused conscience"); Attachment 4 to Coleman Statement, at 39 ("Each of the leases [expiring in 1991] provides for an annual payment of three dollars or less").

The Seneca Nation Settlement Act of 1990 and the new leases it authorized should not be used to justify a waiver of tribal sovereign immunity and the further erosion of tribal sovereignty. It should not be forgotten that it was Congress' failure to properly exercise its trust responsibility to the Seneca Nation when it perpetuated "grossly unfair" leases in the 1875 and 1890 Acts, discussed above, that allowed the Nation to be exploited for virtually a century. Congress recognized this fact when it appropriated $35 million for the extinguishment of the Nation's claims against the United States as part of the 1990 Settlement

Act. See 25 U.S.C. §§ 177(a)(6), 1774b(b) and 1774d(b). To use Congress' attempt to remedy past unfairness as a justification for waiving tribal sovereign immunity would be to punish the Seneca Nation -- and all other tribes -- for fighting to end a long injustice and for acting on its own behalf to protect and promote its own interests. If anything, this situation involving the Seneca Nation is an example of why Congress should continue to defend and preserve tribal sovereign immunity. Without it, the Nation would be forced to expend a large portion of the Settlement Act funds to defend its right to negotiate leases that are fair and equitable, thereby negating Congress' attempt to compensate the Nation for past injustice and to promote the future economic self-sufficiency of the Nation and its members. 25 U.S.C. §§ 1774(b)(2) and (6).

Finally, the Seneca Nation believes that since the Committee invited a representative from one side of the Seneca Nation lease dispute to testify at the hearing, the Committee should also have invited a representative of the Nation, on the other side of the dispute, to testify as a witness at the hearing. If the Committee had done so, perhaps Ms. Coleman would have been more careful to check the accuracy of her statements. In any event, the Seneca Nation hopes to be invited as a witness in the future, should there be any further hearings on the subject or on other related matters.

Sincerely yours,

Derril B. Jordan
by DBJ

Derril B. Jordan
Attorney General of the
Seneca Nation of Indians

Testimony on HR 5367, "The Seneca Nation Settlement Act of 1990"

Prepared by

Laurence M. Hauptman
Professor of History
State University of New York
College at New Paltz
New Paltz, New York

For the United States House of Representatives
Subcommittee on Interior and Insular Affairs

September 13, 1990

The approaching expiration of the Salamanca leases on February 19, 1991 brings us together this morning. I should like to thank this subcommittee for inviting me to speak at this hearing to present some of the results of my twenty years of research on this particular subject. I am here to provide background testimony about the history of the leases and to show that the federal government has not carried out its trust responsibilities to the Seneca Nation of Indians with regard to these leases. My testimony will show that, although the nature of the federal-Indian relationship in the case of the Seneca Nation is unique because of the longstanding pre-emptive right to Seneca lands held by the heirs of the Ogden Land Company, this special situation, nevertheless, did not prevent the federal government from carrying out its trust responsibilities towards the Seneca Nation. The unbroken presence of largely do-nothing federal Indian agents, some with vested interests of their own, from the time of the original leases until the 1930s further demonstrates that federal officials rarely carried out their required trust responsibilities. Moreover, the Seneca Nation of Indians "did not sleep on its rights," but frequently protested inequities, including the original congressional confirmation of the leases in 1875 and subsequent delinquencies of lease payments.[1]

To support my testimony, I have undertaken extensive research on Seneca history, including the history of the Seneca leases. I have written or co-edited six books and nearly fifty articles on Native American history and federal and state Indian policies. In 1985–1986, I served as Senior Fellow of the Nelson A. Rockefeller Institute of Government in Albany, New York, where I dealt with a wide variety of New York State-Iroquois Indian issues. One of my public policy studies (Working Paper No. 20) published by the Institute in the Fall, 1985, was entitled "The Historical Background to the Present Day Seneca Nation–Salamanca Lease Controversy.[2]

In the mid-nineteenth century, the Senecas began leasing rights-of-way through portions of their reservations to several railroads, including the Erie Railroad and its component spur

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[1]The Seneca Nation protested the Congressional confirmation of the leases as early as 1874. See Appendix.

[2]Laurence M. Hauptman, "The Historical Background to the Present-Day Seneca Nation–Salamanca Lease Controversy: The First Hundred Years, 1851–1951," Nelson A. Rockefeller Institute of Government, *Working Paper* No. 20 (Fall, 1985). The article has been reprinted in William A. Starna and Christopher Vecsey, Eds., *Iroquois Land Claims* (Syracuse University Press, 1988, pp. 101–122. I have also dealt with the Seneca leases in *The Iroquois Struggle for Survival* (Syracuse, 1986) and in my *Formulating American Indian Policy in New York State, 1970–1986* (Albany, 1988).

lines. White farmers, persons in service occupations for the railroads, and their employees began to occupy tracts of land within the Allegany Reservation. They subsequently leased these reservation lands at low rentals from individual Senecas. Federal officials at the local level and in Washington generally ignored these extra-legal arrangements. By 1866, the Philadelphia Yearly Meeting of Friends reported about this phenomenon and warned of its consequences:

> Their [Senecas'] attention was also called to the large number of white people who occupy their lands, partly attracted thither by the two Rail Roads [sic] which run through them, and the depots erected there; and the danger of their ultimately losing the control or being dispossessed of them.

In this same report, the large white population was described by the Quakers in less than complimentary terms: "many of whom are of low moral character and expose them [the Senecas] to corrupting examples and associations and present temptations which they have not firmness to resist."[3] Federal census records between 1860 and 1870 further indicate that white population on the Allegany reservation grew substantially, in this decade, perhaps because leasing was seen as a means of individual Seneca family survival when their men were away serving the Union during the Civil War.[4]

By 1875, some of the whites had already made sizeable profits by subleasing Indian land; 420 leasing arrangements had been made and the total white investment on the Allegany Reservation had reached $1,359,775. Approximately one-third of this reservation was leased to non-Indians. By 1900, Salamanca's white residents outnumbered the Indian population on Allegany by five to one. To make matters more complicated, an oil and natural gas rush soon took place in and around the Seneca lands. In the 1890s, a non-Indian venture—the Seneca Oil Company—leased parcels of the Allegany Reservation, obtaining a ninety-nine-year lease containing provision for one-eighth royalty to the Indians. The company proceeded to develop these lands and struck oil in 1897. In 1899, 75,695 barrels were produced. On January 1, 1900, the Seneca Oil Company sold its leases to the South Penn Oil Company, a subsidiary of Standard Oil, for $2 million, transferring forty wells producing two hundred barrels a day. With "oil fever" in southwestern New York, pressure for allotting Indian lands reached its zenith in this period, led by Congressman Edward B. Vreeland, a partner in the Seneca Oil Company.[5]

Despite the highly dubious legality of these leases, Congress ignored its federal trust responsibilities towards the Seneca Nation, officially confirming leases in 1875 and extending these original leases for ninety-nine years on September 30, 1890.[6] All of these leases were undervalued and none had accelerator clauses attached to them. These two acts also gave white Salamancans the hope that someday Congress would respond to their lobbying efforts by giving them fee simple title to Seneca lands. It should be noted that bills for the allotment of the Seneca Nation's lands were introduced into both Congress and the New York State Legislature on a regular basis from 1875 to 1914. Partly because of these pressures, the Seneca Nation's Tribal Council reluctantly acquiesced to the Act of 1890 extending the leases to ninety-nine years. In a report on the ninety-nine-year lease in 1892, Seneca leaders C. C. Lay, Harrison

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[3]Society of Friends, Indian Committee of the Philadelphia Yearly Meeting. *A Brief Sketch of the Efforts of the Philadelphia Yearly Meeting of the Religious Society of Friends To Promote the Civilization and Improvement of the Indians....* (Philadelphia, 1966), 20.

[4]United States Bureau of the Census. *The Ninth Census of the United States* (Washington, D.C., 1872), I, 207.

[5]Laurence M. Hauptman, "Senecas and Subdividers: Resistance to Allotment of Indian Lands in New York, 1875–1906," *Prologue* 9 (Summer 1977):106; Thomas S. Abler, "Factional Dispute and Party Conflicts in the Political System of the Seneca Nation (1845–1895): An Ethnohistorical Analysis" (unpublished Ph.D. diss., University of Toronto, 1969), viii, 169–73; Thomas E. Hogan, "A History of the Allegany Reservation 1850–1900" (unpublished M.A. thesis, SUNY Fredonia, 1974), 8; and Hogan, "City in a Quandary: Salamanca and the Allegany Leases," *New York History* 54 (January 1974): 79–101.

[6]18 Stat. 330 (Feb. 19, 1875); 26 Stat. 558 (Sept. 30, 1890).

Halftown and W. C. Hoag explained that they were given assurances by the city fathers of Salamanca that

> ... the white people of Salamanca have no desire for further legislation relating to our lands or to our people, that in their opinion it would not be advisable for our Nation [Seneca] to lease or sell any further lands, and that they will join with us if desired in opposing any further encroachment upon our lands or attempts to change our conditions as a Tribe or Nation, without our consent, either by action of the State Legislature or of Congress.

The Senecas added that, in any further difficulty, they hoped "to find in the people of Salamanca faithful allies and friends." The report contained the names of prominent Salamancans such as E. B. Vreeland, T. H. Dowd, J. S. Whipple and Hudson Ansley who pledged future Salamanca-Seneca harmony.[7] Despite this promise of reconciliation, the four Salamancans listed above and their relatives continued efforts at trying to dispossess the Senecas from their lands for the next half-century.

The Senecas were not saved by a well-meaning Congress carrying out its federal trust responsibilities but by savvy Seneca leaders and their attorneys. The irony is that the Seneca Nation took advantage of its weakness, namely the so-called Ogden Land Company pre-emptive right to Seneca lands and ironically used it to its advantage. On September 12, 1810, David A. Ogden of New York City purchased for himself and his associates the Holland Land Company's interests in Seneca lands in New York. The Ogden Land Company, not a corporation but comprising the heirs of Ogden and his partners, contributed to Seneca suspicions of the motives of white people. Tempered only by the activities of well-meaning Quaker missionaries, the Ogden Land Company continually interfered in Seneca politics throughout the first half of the nineteenth century. As land speculators, the company sought to remove the Indians from New York State in order to profit from the sale of their lands. It pursued this objective through bribery, whiskey, the threat of force, and deliberate misrepresentation of facts. The company was instrumental in one of the most flagrant land swindles in New York history, the Treaty of Buffalo Creek of 1838, in which Iroquois chiefs in New York were prevailed upon to sell the remainder of their reservations in the state to the company. Only after considerable agitation by many of the Indians and their white friends were the Senecas able to sign a second treaty in 1842, the so-called compromise treaty, which returned to the Indians the Allegany and Cattaraugus reservations. It was these events and their impact that caused the political upheaval of 1848 that led to the formation of the Seneca Nation of Indians.[8]

Bitter memories of the actions of the Ogdens and other land speculators lingered in Iroquois country throughout the nineteenth century. Nevertheless (and ironically), the Ogden Land Company's preemptive claim had helped to cloud the issue of allotment and let the Senecas keep their land. The question had been raised about how Congress or the State of New York could partition Seneca land and allow for its sale to whites other than the Ogden Land Company. During the second half of the nineteenth century and well into the twentieth both Washington and Albany, pressured by the white lessees and their political representatives, grappled with the issue of buying out the company's preemptive right. Congressmen and assemblymen repeatedly introduced legislation to extinguish the claim. Despite the government's recognition of the legality of the claim, the Indians questioned whether the Ogden land Company had any right to sell their land at all. At the same time, the Senecas resisted government efforts to extinguish the claim because they believed extinguishment would be the first step in separating them from their land. Meanwhile, the Ogden Land

[7]Report of the Conference Committee to the Council of the Seneca Nation Concerning the Renewal of Leases Upon the Allegany Reservation Submitted April 9, 1892, Special Case File No. 29, Seneca Nation Leases; Elections, 1892–1893, RG 75, National Archives [NA].

[8]Hauptman, "Senecas and Subdividers," 107.

Company held out for more settlement money, demanding more than Congress believed they deserved. In this way, the impasse helped the Senecas hold onto their land base, resist the threat of allotment and survive as a people.[9]

By the first years of the twentieth century, Congressman Edward Vreeland discovered the "magic formula" for convincing a large number, but not a majority, of his budget-minded colleagues of the advantages of allotment. His plan was to have the Seneca Nation itself pay off the Ogden Land Company with part of the $2 million it had obtained in a court decision adjudicating its claims in Kansas. The Seneca reservations would then be divided among individual Indians under an allotment formula that would facilitate land transfer and sales to non-Indians.[10] Vreeland, who was also the president of the major bank in Salamanca, was the chief architect and promoter of allotment of Seneca lands and led the fight in Congress. The favorable climate for allotment that had produced the Dawes Act of 1887 also aided Vreeland in his numerous attempts to secure allotment of Seneca lands. Through effective public relations work and political finesse, he sponsored two bills—H.R. 12270 and H.R. 7262—and managed them successfully through the House of Representatives, but they were defeated in the Senate. Despite Vreeland's failure to secure passage, interest in allotment of Seneca lands continued through World War I.

The longevity and strength of Vreeland's movement to allot Indian lands was, in part, a result of support by influential reform groups, such as the Indian Rights Association and the annual Lake Mohonk Conferences of Friends of the Indian. They viewed allotment as part of their four-point plan of forced assimilation: Christian proselytizing, compulsory education in white American ways and values; the breakup of tribal lands; allotment to individual Indians to instill personal initiative (supposedly required by the free enterprise system); and finally, in return for accepting land-in-severalty, the reward of United States citizenship.[11]

Vreeland was also armed by several studies made by committees of the New York State Legislature, with the most important one headed by James S. Whipple, a Salamanca attorney and friend of Vreeland. In a report of 1888–1889, the Whipple Committee urged the United States government to extinguish the Ogden claim in order to solve the so-called "Indian problem" and begin a "radical uprooting of the whole tribal system, giving to each individual absolute ownership of his share of the land in fee."[12] In this report, which has continued to breed Iroquois resentment toward the New York State government to the present day, Iroquois family life, land claims, lifestyle, and religious practices and traditions were held in contempt to emphasize the "need for the changes in landed patterns and tribal governments."[13]

In the tight-knit power structure of Salamanca politics (which changed little through World War II), the motive for the movement to pass the Vreeland bills was clear. Whipple's son was married to Vreeland's daughter and the congressman's brother served as special counsel for the New York Legislature's Whipple committee investigation. A. W. Ferrin, co-editor of the local newspaper, the *Cattaraugus Republican*, was also the Indian agent for the New York Agency of the Bureau of Indian Affairs (BIA) and was in favor of the legislation.[14] In 1902, on the day his first allotment bill passed the House, Vreeland openly expressed his objective: "I represent 8,000 people who live upon these reservations; who hold ninety-nine-year leases from these Indians, and want to get a title to their lands."[15]

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[9]Ibid.

[10]U.S. Congress, House, *Congressional Record*, 57th Cong., 2d sess., 1902, 36, pt. 1: 337; Edward B. Vreeland to Merrill E. Gates, January 10, 1902, Records of the U.S. Board of Indian Commissioners, 1899–1918, RG 75, NA.

[11]*Proceedings of the Twentieth Annual Meeting of the Lake Mohonk Conference of Friends of the Indian, 1902* (Lake Mohonk, N.Y., 1903), 57–61, 101–6.

[12]New York State, *Assembly Document 51—Report of the Special Committee Appointed by the Assembly of 1888 to Investigate the "Indian Problem" of the State* (Albany, N.Y., 1889), 59–79.

[13]Ibid.

[14]Hauptman, "Senecas and Subdividers," 112.

[15]U.S. Congress, House, *Congressional Record*, 57th Cong., 2d sess., 1902, 36, pt. 1: 337.

While the movement for allotment of Seneca lands had died out by the 1920s, the white leaders at Salamanca, led by the same families as in the 1890s (such as the Vreelands and the Whipples), never completely lost hope of securing title. After a while, many just stopped paying their rents to the Seneca Nation. They took these payments for granted as "inconsequential" obligations, partly because they were infinitesimal and partly because they assumed that the Indians were powerless to force them to pay. By 1939, over 25 percent of the leases within the Allegany Reservation were in default. Moreover, more than two hundred had been delinquent for more than seven years.[16]

After years of seeking redress on nonpayment or on the undervalued nature of the leases, the Seneca Nation finally found a favorable ear at the Public Lands Division of the United States Department of Justice in the 1930s. Charles Cleaves Daniels, a Special Assistant to United States Attorney General Nicholas Biddle and a specialist in Indian law, visited Salamanca in 1934 and soon after prepared a memorandum that suggested it would be proper procedure for the Seneca Nation to cancel delinquent leases. By 1939, the Seneca Nation, with the aid of the Justice Department, cancelled 800 of these delinquent leases.[17]

At the centerpiece of Justice Department and Seneca concern was the "Forness case." The Fornesses, Fred and Jessie, operated a large garage in the commercial center of the city. Under the Seneca Nation formula, the Forness' $4 per year rental of choice commercial property would have been raised to $230 per year. Their lease had been cancelled because they had not paid rent for eleven years. The Justice Department brought the test case on behalf of the Senecas to determine if the Indians had the right to cancel the Forness' lease and other federally authorized leases because of nonpayment. The Justice Department soon won firm support from a powerful ally, Secretary of the Interior Harold L. Ickes, who saw the issue as righting a terrible past wrong done to the Indians. Nominal rentals of one dollar a year and insignificant rentals in the heart of the business district led Ickes to conclude that the "question should be settled in favor of the protection of the Indians' interests and rights in this matter," not simply the acceptance of past rents due with interest. He recommended that the test cases be prosecuted to a final legal conclusion since it would lead other delinquent lessees to negotiate with the Indians for new, more equitable leases.[18]

While preparing the Justice Department's case, Daniels discovered that the Senecas had repeatedly sought to deal with the delinquent leases. In 1911, a full-scale investigation of this situation had been undertaken by the Interior Department. Each year, the Superintendent of the New York Agency prepared a list of delinquent leaseholders. Yet, Washington had not acted to rectify the situation and carry out federal trust responsibilities. In 1931 and 1932, an audit of the books of the Seneca Nation had revealed the seriousness of the problem. Moreover, on several separate occasions prior to the cancellation of the leases, the *Salamanca Republican-Press* had quoted the mayor of the city as urging the prompt payment of rentals.[19]

The Forness case finally reached the United States District Court in 1941. The decision of the lower court rendered by Judge Knight found against the Senecas, but focused largely on the role of BIA Superintendent Charles Berry, rather than on whether the Senecas had the right to cancel delinquent leases.[20] Finally, on January 20, 1942, the Federal Circuit Court of Appeals for

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[16]Arch Merrill, "Salamanca Lease Settlement," *American Indian* [New York City] 1 (Spring 1944): 3.

[17]John Collier to W. K. Harrison, March 4, 1935, Records of the New York Agency, 1938–1949, Box 7, #380, RG 75, NA. "Indian Landlords Insist Palefaces Pay," *Rochester Times-Union*, March 10, 1939; Wilford Crouse, Chairman, "Resolution of the Lease Committee of the Seneca Nation of Indians," May 23, 1939, Records of the New York Agency, 1939–1949, Box 7, #380, RG 75, NA. Seneca Nation Resolution of May, 1940 attached to letter of C. C. Daniels to Charles E. Berry, May 27, 1940, Records of the New York Agency, 1938–1949, Box 7, #380, RG 75, NA.

[18]C.C. Daniels to Charles E. Berry, March 12, March 22, July 3, 1940, Records of the New York Agency, 1938–1949, Box 7, #380, RG 75, NA. Harold Ickes to the Attorney General, May 21, 1940, Records of the New York Agency, 1938–1949, Box 7, #380, RG 75, NA.

[19]C.C. Daniels to Charles E. Berry, March 19, March 28, 1940, Daniels to Frank A. Archambault, June 20, 28, 1940, Records of the New York Agency, 1938–1949, Box 7, #380, RG 75, NA.

[20]37 F. Supp. 337.

the Second Circuit reversed and remanded Judge Knight's earlier decision.[21] Finding against the Fornesses, the higher court restricted the application of state laws, insisting that the lessees were "customarily lax about paying their rent"; that all too frequently in the past they had been in default; and that the Senecas had attempted to cancel leases in the past. In one earlier instance, the Department of the Interior had blocked the Indians because of restrictions regarding the use of tribal funds in hiring an attorney. To the court, the "present action by the Nation, then, represents the culmination of a long struggle by the Indians to enforce their economic rights."[22] The attorneys for Forness and the lessees in Salamanca had argued that the Senecas had no right to cancel the leases since they were procedurally barred by the New York Civil Practice Act. Justice Frank maintained, in overturning an earlier federal district court decision, that the congressional intent in confirming the Salamanca leases in 1890 had to be determined first. Frank had stated: "We cannot believe that Congress intended that, in our times, the rights of American Indians as landlords should be determined by the early 17th century views of Coke—an antique dealer in obsolescent medieval ideal—commenting enthusiastically on the 15th century writings of Littleton, a medieval lawyer."[23] In 1890 when the Salamanca leases had been confirmed, the Congress still had a trust responsibility to Indians as guardians to protect them from exploitation. Thus, since Congress had not permitted application of the New York Civil Practice Act, it did not apply to the circumstances of the case. "State law cannot be invoked to limit the rights in lands granted by the United States to the Indians, because . . . State law does not apply to the Indians except so far as the United States has given its consent."[24]

Even after the United States Supreme Court refused to grant a certiorari hearing to Forness' attorney, the Salamancans persisted in their efforts to resist the implications of the Federal Circuit Court of Appeals' decision, namely to negotiate new leases at higher rates with the Seneca Nation.[25] In retaliation, Daniels advised the Justice and Interior Departments and the Seneca Nation to "give 'em both barrels" since only then would the lawyers and lessees in Salamanca believe that the "government is dead in earnest to secure the protection of its wards without further delay." He added that the "persons whose leases have been cancelled will fall over each other to secure new leases when they realize the danger of delay—paying heavy costs, attorneys' fees and possible loss of their lots."[26]

The Senecas then began eviction proceedings with the support of the Justice and Interior Departments against the hold-out delinquent leaseholders who had refused to negotiate and sign new leases.[27] The City of Salamanca, at the recommendation of their new attorney Henry Manley, the former Assistant Attorney General of New York State, then sought injunctions to stop these evictions. These efforts were denied by judges in both federal and state courts.

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[21] *U.S. v. Forness et al. (Salamanca Trust Co. et al., Intervenors)*, 37 F. Supp. 337 (February 14, 1941), 125 Fed. Rep., 2d Ser., 928 (January 20, 1942). "Our Indian Landlords Finally Get a Break." *New York Times*, January 21, 1942.

[22] 125 Fed. Rep., 2d Ser., 931.

[23] Ibid., 938.

[24] Ibid., 932.

[25] *City of Salamanca et al. v. United States*, 316 U.S. 694 (June 1, 1942). "Defendants File Answers in Indian Lease Cases," *Salamanca Republican-Press*, November 25, 1942; "Knight Dismisses City Suit Against Seneca Nation," *Salamanca Republican-Press*, November 18, 1942; "Salamanca Seeks to Enjoin Indians from Taking Lands," *Buffalo Evening News*, August 28, 1942.

[26] C. C. Daniels quoted in Frank A. Archambault to William Zimmerman, Jr., August 5, 1942; Daniels to Attorney General, August 3, 1942; Records of the New York Agency, 1938–1949, Box 8, #380, RG 75, NA. Daniels had been relentless in his crusade to help the Senecas. C. C. Daniels to C. McFarland, September 10, 1937; to Josephus Daniels, October 12, 1937, December 16, 1937, February 5, 1938, July 15, 1938, September 8, 1939, Josephus Daniels MSS., Microfilm Reel 4, Library of Congress, Manuscript Division, Washington, D.C.

[27] "Local Indian Office Issues Statement Regarding Leases," *Salamanca Republican-Press*, November 5, 1942. William Zimmerman to Charles H. Berry, June 26, 1942, Records of the New York Agency, 1938–1949, Box 8, #380, RG 75, NA.

Through these delay tactics, Manley sought to put economic pressure on the Indians because they needed the $13,000 in rent moneys tied up by the legal dispute.[28]

This Salamanca-Seneca lease war ended in 1944. Eventually, 627 leases were renegotiated upward; however, by that time, an anti-Indian backlash of immense proportions had developed. As early as August 1942, Daniels had seen the potential of a political backlash to the Indian victory in the Forness decision. Looking into his crystal ball, the North Carolinian had predicted that the lessees and their supporters hoped "within three years" to elect a Congress "not in sympathy with the policy of protecting the Indians as the present administration has shown." To Daniels, "they may after numerous failures to do so, have Congress pass an act turning over to the 'tender mercies' of the State, the Indians." He concluded: "The sort of treatment that they would get can be understood when it is remembered that the State became a party against the Government in practically every case brought to protect the 'wards of the nation' from graft and exploitation.[29] Daniels' prediction was almost entirely accurate. Instead of Daniels' estimate of a three-year process, Congress passed the so-called jurisdiction bills (seen by the Senecas as "spite bills" six to eight years later in 1948 and 1950, inspired by the political influence of the New York congressional delegation and its major Senate ally, Hugh Butler of Nebraska.

Instead of investigating the remaining undervalued leases of the Senecas and doing something about them, Congress began a policy of termination, washing its hands of all Indian matters in the postwar years. In the vacuum came the emergence of the New York State Joint Legislative Committee and New York State criminal and civil jurisdiction over Indian affairs. Adding insult to the indignities already faced by the Seneca Nation, Congress, in 1951, passed the Seneca Rental Act. Because the New York Indian Agency was now closed, leaseholders under the provisions of the Act paid their rental money directly to the City of Salamanca; the city would then forward the money to the Seneca Nation. Although this facilitated payment and replaced the role of collection undertaken in the past by the Indian agent, the legislation created the false impression that the city had paramount authority over "its residents" and that the Indians were simply ordinary landowners, not federally recognized Indian nations. Later, in 1969, going against the wishes of the Seneca Nation, New York State created the Seneca Lease Authority.

Until the House hearing of 1985, the federal government abdicated its trust responsibility to the Seneca Nation in regard to the Salamanca leases. Now is the time to rectify the situation by approaching this explosive issue with an even hand and by providing compensatory justice to the Seneca Nation of Indians.

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[28]Daniels to Attorney General, August 3, 12, 1942, Records of the New York Agency, 1938–1949, Box 8, #380, RG 75, NA.

[29]"5-Year Dispute Over Indian Land Leases Is Ended," *Buffalo Evening News*, April 5, 1944, Paul L. Fickinger to C. H. Berry, September 7, 1944, Records of the New York Agency, 1938–1949, Box 8, #380, RG 75, NA. Daniels to Attorney General, August 3, 1942. Daniels' role in the proceeding ended on January 31, 1943.

Stockbridge-Munsee Community

BAND OF THE MOHICAN INDIANS

TRIBAL COUNCIL OFFICES

TESTIMONY
OF
VIRGIL J. MURPHY, PRESIDENT
STOCKBRIDGE-MUNSEE COMMUNITY BAND OF MOHICAN INDIANS

SUBMITTED TO THE
SENATE COMMITTEE ON INDIAN AFFAIRS
FOR THE

HEARING
ON
TRIBAL SOVEREIGN IMMUNITY

SEPTEMBER 24, 1996

Mr. Chairman and Members of the Committee:

My name is Virgil Murphy and I am President of the Stockbridge-Munsee Community Band of Mohican Indians. The Stockbridge-Munsee Tribe is pleased to have this opportunity to present information on tribal sovereign immunity and the right of Indians and non-Indians to be heard in our tribal forums.

Although the Stockbridge-Munsee Tribe was once located in the eastern United States, we were removed from our ancestral lands and today we have a 46,000 acre reservation in central Wisconsin. We have over 1500 tribal members with over 800 members living on the reservation. The Tribe's major economic opportunity has been its small but successful gaming enterprise. As a result of gaming, we are now the largest employer in Shawano County, Wisconsin, employing approximately 500 persons in our gaming facility alone.

On behalf of the Stockbridge-Munsee Tribe, I would like to extend our appreciation to Chairman McCain, Vice-Chairman Inouye and other Committee members who were successful in striking objectionable language from the 1997 Interior Appropriations bill, H.R. 3662. The objectionable provision would have

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subjected any Indian tribe or tribal official acting on behalf of the tribe to state or federal court jurisdiction for suits seeking injunctive relief, damages or other remedies. The provision would have expressly waived tribal sovereign immunity as a defense to such suits. It is our understanding that this hearing was held in connection with this proposal.

It is well established that Tribes possess the common law immunity from suit enjoyed by other sovereign governments.1/ The Congress has consistently reaffirmed the concept of tribal sovereign immunity in its desire to promote the goals of Indian self-government, tribal self-sufficiency and economic development.2/ Most recently, the Congress enacted the Indian Tribal Justice Act, 25 U.S.C. § 3601 et seq., which is intended to provide Indian tribes with funding necessary to strengthen tribal justice systems. The Act recognizes that tribal forums are appropriate for "the adjudication of disputes affecting personal and property rights.3/"

Sovereign immunity is essential to our self-governance and self-determination. We have limited resources but many challenges facing our tribal leaders. If each action contemplated or actually taken by the Tribal Council were subject to suit, we would desperately and quickly deplete those scarce resources. The threat of lawsuits and personal liability for each action taken by the Tribal Council would have a chilling effect on the ability of our elected tribal officials to fulfill their governmental responsibilities. Tribal economic development would come to a halt if each governmental decision aimed at economic self-sufficiency could be challenged.

The sovereign immunity of the Tribe does not prevent tribal members and non-tribal members from receiving due process in our tribal forums. The Stockbridge-Munsee Tribe has created mechanisms by which members and non-members alike are afforded an opportunity for fair resolution of conflicts or disputes involving the Tribe. These mechanisms include the establishment of a tribal court, constitutional "Bill of Rights" provisions, the adoption of an expanded employee rights ordinance and the purchase of public liability insurance.

1/ Oklahoma Tax Commission v. Potawatomi Tribe, 498 U.S. 505 (1991); Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

2/ See e.g., Indian Financing Act of 1974, 25 U.S.C. §1451 et seq. and the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §450, et seq.

3/ 25 U.S.C. § 3601(5).

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Our tribal court was established in 1994 and is open to all persons. The Court consists of a Chief Justice and two Associate Judges who serve for two year terms.4/ While the sovereign immunity of the Tribe and officials acting within their official capacity is preserved within our system, the defense of sovereign immunity is not available in tribal court to officials operating outside the scope of their authority.

The Stockbridge-Munsee Tribe is currently in the process of revising our Constitution. Our revised Constitution contains an extensive "Bill of Rights" section which prohibits the Tribe from taking certain actions in exercising its powers of self-government, including the following:

- making or enforcing any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right to assemble and to petition for a redress of grievances;
- violating the right to be secure against unreasonable search and seizures;
- taking any private property for a public use without just compensation;
- denying any person within its jurisdiction the equal protection of its laws;
- depriving any person of liberty or property without due process of law;

DRAFT

These protected rights parallel the requirements of the federal Indian Civil Rights Act5/ and are available to all persons, Indian and non-Indian alike. Additionally, our revised Constitution acknowledges that tribal officials violating these provisions and acting outside the scope of their authority are not protected by the Tribe's sovereign immunity.

One of the Tribe's most valued resource is its employees. The Tribe employs a total of over 800 individuals, many of them non-Indians who live off the reservation. We recognize that our unique sovereign status differentiates us from private employers and we are careful to explain these differences to our employees

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4/ Upon the adoption of our revised Constitution, these terms will be extended to ten years.

5/ 25 U.S.C. § 1302 et seq.

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in our employee handbook. We are also proud to explain the rights enjoyed by our employees, many of which far outweigh those provided by private employers.

The Tribe has also adopted an Employee Rights Ordinance which guarantees "every employee . . . the right to file a grievance and seek assistance" against the Tribe. The Ordinance also prohibits all employers, including the Tribe, from discriminating in employment on the basis of "age, sex, handicap, race, creed, religion, political affiliation, national origin, color, sexual orientation, marital status and ancestry." It also requires equal pay for men and women. Any employee filing a grievance has the right to present his or her case to an Employment Mediation Panel. If the employee is unhappy with the decision of the Mediation Panel, the employee may appeal the decision to the Tribal Court.

The Tribe maintains public liability insurance for personal injury and property damage resulting from occurrences at the Tribe's gaming facility. The Tribe's insurance policy includes a provision prohibiting the insurer from invoking tribal sovereign immunity. This is a limited waiver of the Tribe's sovereign immunity, similar to the Federal Tort Claims Act,6/ which, in a limited manner, waives the immunity of the United States for certain tort claims.

Mr. Chairman, on behalf of the Stockbridge-Munsee Tribe, I thank you for this opportunity to present our views on this important issue.

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6/ 28 U.S.C. §§ 2671-2680.

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VIEJAS INDIAN RESERVATION

ANTHONY R. PICO, CHAIRMAN
KIM M. BACTAD, VICE CHAIRMAN
PAULETTE A. LEWIS, SECRETARY
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THOMAS J. HYDE, COUNCILMAN
AUDREY R. WALLACE, COUNCILWOMAN
SANDRA A. BARRETT, COUNCILWOMAN

P.O. BOX 908
ALPINE, CA 91903
619-445-3810
619-445-5337, FAX

Written Testimony by Anthony Pico

Tribal Chairman, Viejas Band of Kumeyaay Indians

Submitted to the Senate Committee on Indian Affairs on

Tribal Sovereign Immunity

24 September 1996

Greetings to Chairman McCain, Vice-Chairman Inouye, and distinguished Members of the Committee. I am Anthony Pico, Tribal Chairman of the Viejas Band of Kumeyaay Indians. On behalf of the Viejas Band, and other California tribes, I appreciate the opportunity to present information concerning the mechanisms that the Viejas Band has established assuring both Indians and non-Indians the right to be heard in a Tribal forum.

The Viejas Band occupies a reservation located approximately thirty miles east of San Diego, California. The tribe numbers 281 enrolled members. The only non-Indians who reside on the reservation are the spouses of some tribal members. There are no non-Indians who own property within the boundaries of the reservation. Additionally, the tribe operates a gaming enterprise, which employs over 1600 people, the majority of whom are non-Indian.

I. Opposition to Congressional Efforts to Eliminate Tribal Sovereign Immunity

I commend the Senators who convinced Senator Gorton to strike objectional language from the 1997 Interior Appropriations bill. In my view, the language evinced a total disregard for the sovereignty of Indian nations, and demonstrated a level of disrespect for the efforts of my Indian ancestors who have fought, and struggled, and died, simply to preserve the right to be Indian, and to live as sovereign Indian tribes.

I view such efforts to limit, restrict or eliminate tribal sovereignty, as the products of misguided reasoning. In the FY1996 Interior Appropriations Bill, the Lummi Indian Nation was subjected to uncontionable actions by Members of the Congress who voted to pass the FY1996 Appropriations Bill. It is clear that the Indian tribe in question occupied the geographic location of this dispute long before the arrival of the non-Indian parties. It also appears that the non-Indian parties had notice of the existence of the tribe at the time they chose to move into the area.

In seeking to restrict the authority of the tribe, and to impair or eliminate the sovereignty of the tribe for the convenience of the late-comers, these types of legislative riders on appropriation bills ignore centuries of established legal precedents which question the merits of the claim when the plaintiff moves to the nuisance. The set of facts out of which such legislative languagegrew, is an inadequate basis for proposing additional legislation which would impair the sovereign rights of every tribe in this nation.

I view such legislative language as overreaching I am convinced that the great majority of American tribes exist in harmony with adjoining land owners, and I believe that when disputes do arise, the mechanisms already established by tribal governments are adequate to provide a fair resolution of the dispute. Similar legislative amendments proposed in the FY'97 Interior Appropriations Bill are an overbroad attempt to resolve a problem that is best addressed at the local level.

There has been some concern expressed about the right of non-Indians who reside or own property with the boundaries of reservations. Those concerns generally do not apply to the Viejas Band, since the only non-Indians residing on our reservation are the spouses of some tribal members. However, because I believe that the example of the Viejas Band's experience is typical of the experience of many tribes, I would like to elaborate on the status of those non-tribal members who own property adjoining or near the Viejas reservation.

Prior to the advent of gaming on the Viejas Reservation, there was little or no benefit to the surrounding community provided by the tribe. Since the tribe had no resources of its own, it was impossible to reach out to the neighboring community in a meaningful way. The tribe did draw on local law enforcement and fire protection resources, although not to any significant extent.

Since the establishment of a successful gaming enterprise, the relationship between the tribe and its neighbors has improved far beyond the expectations of event the most optimistic predictions. Property values in the locality of the casino have increased tremendously. New housing developments and other community improvements have multiplied. The amount of business traffic for area merchants has increased. The contributions made by the tribe to local charities and civic groups has gone from zero to thousands of dollars annually. Unemployment on the reservation has been eliminated, and the local community has also experienced a decrease in unemployment, and the local economy has been invigorated by the millions spent by the tribe each year whether in

casino payroll, or in payments made to local vendors for the food, equipment and supplies necessary to maintain the business. Having Viejas as a neighbor has been a tremendous "net win" for the local community.

For the benefit of the Committee, I would like to present in some detail the forums which are available for the resolution of disputes which occur on or involve the Viejas reservation. I believe these mechanisms are typical of those which exist to provide justice and fairness for members of Indian tribes and their non-tribal neighbors.

II. The Right of Indians to be Heard in a Tribal Forum

The Viejas Band is governed by a seven-member Tribal Council, which is the elected governing body of the tribe. The Tribal Council meets weekly, and the meetings take place at the Tribal Hall, located on the reservation. Tribal members who have proposals they wish the Tribal Council to consider are welcome to submit the proposals to staff members at the Tribal Hall for inclusion on the agenda of the next Tribal Council meeting. Tribal members who have disputes with the Tribal Council or with other tribal members are also free to bring these issues to the attention of the Tribal Council in the same manner.

The Tribal Council is responsive to the concerns of tribal members. All decisions affecting the distribution of income generated by tribal enterprises, or the use or allocation of reservation land and resources are decided by a vote of the General Council, which is comprised of every adult enrolled member of the tribe. Additionally, the election process act to ensure the accountability of Tribal Council members to their constituents. The tribe holds Tribal Council elections every two years, and tribal members do not hesitate to replace a Council member who has not been responsive or accessible. This form of representative democracy has served this tribe well for 6,000 years.

III. The Right of Non-Indians to be heard in a tribal forum

The gaming enterprise, in addition to being one of the largest sources of employment in the local area, is host to several thousand guests per week. The Viejas Tribe recognizes that guests who come into the gaming facility may not have a full understanding of tribal sovereignty, and that not all employees recognize how working in Indian country is different from working in the State of California. The employee hand book and orientation programs are designed to educate the employee about the differences, and to make employees aware of the importance to the tribe of maintaining tribal sovereignty.

The Viejas tribe also recognized that it has an obligation to conduct the gaming business in a manner consistent with the standards expected in the community. Just as we are conscious of the need to maintain good relations with our neighbors, so also we are not interested in abusing sovereignty by using it as an excuse to operate the business in an irresponsible manner.

Although not required, the Viejas Band maintains full premises liability on all its operations, to provide coverage for any accident sustained by any guest or employee. The tribe also has a full-time risk management department, and comprehensive workers compensation coverage. The tribe employs a third-party administrator to assess, investigate and provide recommendations on claims concerning property damage, liability and workers compensation. These protections, along with our commitment to rigorously observe all health, occupational, fire and building codes, make the gaming operation a safer place to visit or work than the local shopping mall.

Despite these measures, we occasionally have claims filed by guests or employees. The only requirement made by the tribe is that the claim must be submitted in writing for consideration by the appropriate department within the gaming operation. (Interestingly, we find that the requirement that a claim be made in writing has operated to resolve nearly 50% of the potential claims. Apparently, putting the claim in writing causes claimants to think more carefully about the situation.)

Each written claim is initially addressed by the appropriate department within the gaming operation. For example, claims concerning the integrity or outcome of gaming are addressed by the Gaming Commission. Claims concerning damage to property or injury to persons are handled by the in-house claims department, with the assistance of the third party claims administrator and the insurance carrier Claims by employees who feel they have been treated unfairly by a management are heard by the Grievance Committee, a panel consisting of three members of the casino management, two of whom are tribal members. Claims or disputes which do not involve the gaming operation are submitted directly to the Tribal Council, and become part of the agenda for the next meeting.

Because of our commitment to operating in manner consistent with local standards, 98% of the claims submitted are resolved by the appropriate casino department. We resolve claims promptly, and generally the claimant does not incur the expense or inconvenience of hiring an attorney to pursue the claim. If a claimant has exhausted his or her "administrative remedy" at the casino level and is not satisfied with the outcome, he or she is welcome to submit the matter, in writing, for the consideration of the Tribal Council.

In summary, I believe that the appropriate mechanism for dispute resolution by an Indian tribe is the mechanism established by the sovereign authority of the tribe. In the Viejas example, the tribe has established efficient and effective means of ensuring that claimants do receive a fair hearing, and that disputes are resolved in a fair manner. I do not believe that a broad attempt to eliminate tribal sovereignty is justified.

Senate Committee on Indian Affairs
Written Testimony on Sec. 329 of the Senate's Fiscal Year 1997
Interior Appropriations Bill: - A Proposal to Limit Tribal Sovereign Immunity

The proposals contained in Sec. 329 to abrogate tribal sovereign immunity in the context of tribal actions that impact "the ownership or use of private property" and to make the tribes in such situations amenable to suit in state or federal court are doctrinally flawed, unduly invasive of tribal self-government, and serve no meaningful public policy objectives. The proposal contained in Sec. 329 is within the scope of Congress' wide ranging plenary power, but it is nevertheless ill considered and conceptually problematic. The prevailing doctrine recognizes the ability of Congress to waive tribal sovereign immunity, but Congress has not done so for at least the past twenty-five years and there is good reason for this. Since the current federal policy period is properly recognized as that of meaningful self-determination, waiving tribal sovereign immunity and declaring tribes amenable to suit in federal and state courts would be a complete rejection of this important policy. As the Supreme Court recently noted:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes . . . Congress has consistently reiterated its approval of the immunity doctrine. *See e.g.* Indian Financing Act of 1974, 88 Stat. 77, 25 USC § 1451 et. seq. and the Indian Self-Determination and

> Education Assistance Act, 88 Stat. 2203, 25 USC § 450 et. seq. These acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." California v. Cabazon Band of Mission Indians, 480 U.S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long-established principle of sovereign immunity.[1]

The advances in the competence and sophistication of tribal governments and tribal courts during this period have been greatly enhanced by federal government support and endorsement. Why start reversing this most fruitful synergy of tribal government competence and maturation and supportive federal government efforts?

Despite this broad partnership for advance, one might ask - in a most particularistic say - what about the right of owners of private property within Indian country? Are they adequately protected? The answer is a definite yes and this is so because the existing federal/tribal statutory and practice context fully guarantees an adequate remedial scheme. The Indian Civil Rights act of 1968[2] fully guarantees all "persons" due process and equal protection rights against actions taken by a tribal government or any of its entities. The Supreme Court in Santa Clara Pueblo v. Martinez recognized the intent of Congress in the

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[1] Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 495 U.S. 505 (1991).

[2] 25 USC § 1301-1303 (1991).

Indian Civil Rights Act to provide only for limited federal redress in situations amenable to habeas relief, but otherwise to look to tribal courts as the appropriate forum.[3]

Specifically, the Court stated:

> Tribal forums are available to vindicate rights created by the ICRA, and § 1302 has the substantial and intended effect of changing the law which these forums are obligated to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.[4]

In the seventeen plus year aftermath of Santa Clara Pueblo, scholars and other investigators have consistently remarked on the strong performance of tribal courts in this area. For example, a leading Indian law practitioner has recently noted: "The decisions reported in the Indian Law Reporter show that tribal courts are committed to protecting individual rights and ensuring that individuals receive due process in their dealings with tribal government. These cases address claims across a broad spectrum that include threshold issues, such as the tribal court's power of judicial review and application of the doctrine of sovereign immunity, and the merits of a variety of individual rights claims."[5]

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[3] 436 U.S. 48 (1978).

[4] Id. at 65.

[5] Douglas B. L. Endreson, "The Challenge Facing Tribal Courts Today", 79 Judicature 142 (1995).

In addition and most significantly, a 1991 study of the U.S. Civil Rights Commission specifically rejected any proposed amendment of the Indian Civil Rights Act of 1968 to allow for increased review of tribal court decision making. The Commission specifically stated that such legislation would be "a further encroachment of tribal government sovereignty," which is "unwarranted and inappropriate at this time."[6] There appears to be little, if any, evidence that would support the necessity of the proposed changes enumerated in Sec. 329. Tribal courts are doing the job and this is not the time for Congress to precipitously act as if they were not.

The conceptual framework envisioned in Sec. 329 would stand Indian law on its head and grossly invade the right of tribal self-government. The Federal Government has never in its history stripped tribes of their sovereign immunity to expose them to litigation in state court by private individuals for causes of action arising on the reservation. State governments including state courts have never had authority or jurisdiction over Indian tribes involving matters arising on the reservation.

This basic precept of Indian law has its roots in the seminal opinions of Chief Justice Marshall in Cherokee Nation v. Georgia[7] and Worcester v. Georgia.[8] These cases hold that matters in Indian country that involve the tribe are strictly matters of federal and tribal

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[6] THE INDIAN CIVIL RIGHTS ACT: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS, ii-iii (June 1991).

[7] 30 U.S. (5 Pet.) 1 (1831).

[8] 31 U.S. (6 Pet.) 515 (1832).

concern. To depart from this basic teaching serves not only to reverse the current policy of meaningful self-determination, but to uproot one of the most basic tenets of Indian law that tribal sovereignty is not a matter to be challenged in state forums. To start down this road at this time is to upset the fragile balance of tribal-federal cooperation in the area of tribal self-government, to disturb a foundational principle of Indian law that has historically protected the tribal sovereign from an encroaching state sovereign, and to ignore a competent and responsive remedial scheme that already exists in tribal courts.

This proposal appears to be grounded - as other unfortunate Indian policies across American history have been - in the stereotypical vision that tribes are incapable of meaningful self-government. As other recent, positive actions of the federal government have indicated, the time for these common mistakes of the past has ended. The federal government must be careful not to repeat errors of the past and to steadfastly hew to its humane and thoughtful policy to support meaningful tribal self-government and self-determination.

Respectfully submitted,

Frank Pommersheim
Professor of Law

October 2, 1996

TESTIMONY OF DALE RISLING SR., CHAIRMAN
HOOPA VALLEY TRIBAL COUNCIL
HOOPA, CALIFORNIA

BEFORE THE
SENATE INDIAN AFFAIRS COMMITTEE
HEARING ON CIVIL JURISDICTION IN INDIAN COUNTRY
SEPTEMBER 24, 1996

My name is Dale Risling. I am Chairman of the Hoopa Valley Tribal Council, governing body of the Hoopa Valley Indian Tribe and Reservation in northwest California, the largest Indian reservation in California. Because of the complex affairs and the natural resources of the Hoopa Valley Reservation, our Tribe has had a lot of experience with the issue of sovereign immunity. I submit this testimony to urge the Committee against quick action that addresses sovereign immunity. At a minimum, the Senate should undertake extensive legal and factual research concerning the actual applications of the doctrine of sovereign immunity before crafting legislation of any kind.

A. Introduction.

Indian tribes are distinct, independent political communities that retain their original natural rights in matters of self government, as the U.S. Supreme Court has often made clear. *E.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978). Despite conquest by the American republic, tribes remain quasi-sovereign nations which by governmental structure, culture and source of sovereignty, are distinct from federal and state governments. Tribes have their own laws, their own courts. These institutions must be respected. Except where Congress or the federal courts have limited it, tribes may be immune from suit. However, there are many limitations on that sovereign immunity.

Indian tribal sovereign immunity is often blamed for the result of cases when the true fault lies with attorneys ignorant of the law or unwilling to pursue a proper legal claim. Sovereign immunity is not a barrier to most meritorious cases. It is essential that the Committee understand what is and is not encompassed within the doctrine of tribal sovereign immunity. In our view, tribal sovereign immunity is a limited legal protection which is not broken and should not be "fixed."

What is and what isn't sovereign immunity? To understand this, one must consider at least eight types of claims: (1) injunctions to stop action that violates federal law; (2) contract performance claims; (3) tort or personal injury claims; (4) suits by the federal government; (5) compliance with laws such as the Solid Waste Disposal Act; (6) claims that the federal government has hurt someone through exercise of its statutory responsibilities concerning Indian property; (7) habeas corpus actions; and finally, (8) suits to capture protected Indian tribal funds or property.

B. Types of Claims.

1. Injunctions. Sovereign immunity is not a shield behind which Indian tribes or tribal officials can violate their own laws or the supreme law of the land. Sovereign immunity simply does not apply to the acts of individuals who wish to violate federal or other applicable law. This is true for Indian tribal officials for the same reason it is true of state officials: the tribal and state sovereigns cannot clothe their officers with immunity that protects them from the supreme law of the land. *Ex Parte Young*, 209 U.S. 123 (1908). The rule allowing "officer's suits" was applied to Indian tribal officials in *Santa Clara Pueblo v. Martinez*, *supra*, and many other cases.

E.g., Rowland v. Hoopa Valley Tribal Council, Hoopa Valley Tribal Court No. C-92-016. Furthermore, the doors of federal courts are always open to claims that a tribe is exceeding its sovereign authority in doing something that aggrieves the plaintiff. Challenges to tribal jurisdiction raise federal questions that are within the jurisdiction of a district court under 28 U.S.C. § 1331. *E.g., National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). While a plaintiff who has remedies available in tribal court may be required to first seek relief there, federal jurisdiction to determine whether a tribe has exceeded its legal powers remains available if the plaintiff is dissatisfied by his tribal court remedies. *E.g., Yellowstone County v. Pease*, 9th Cir. No. 95-36026 (September 11, 1996).

2. **Contract enforcement.** In contracts, an express written partial waiver of a tribe's or tribal entity's sovereign immunity in contracting is nearly ubiquitous. Some tribes, like the United States, have expressly waived their sovereign immunity to suit in tribal court on written contracts. Any attorney representing a contractor doing business with a sovereign who does not determine that remedies for breach are available in tribal court, through an arbitration provision, or in some other form, is simply guilty of malpractice. *See generally Tamiami Partners, Ltd. v. Miccosukkee Tribe of Indians of Florida*, 63 F.3d 1030 (11th Cir. 1995) (waiver by arbitration clause). When Congress authorized incorporation of tribal entities in the Indian Reorganization Act of 1934, it authorized appropriate partial waivers of the immunity of the tribal corporations, as set forth in corporate charters. *See* 25 U.S.C. § 477 and caselaw construing that section.

3. **Torts.** Sovereign immunity does not generally prevent compensation for torts or personal injuries for two different reasons: insurance and the Federal Tort Claims Act. Our Tribe, like most others, purchases liability and casualty insurance. We pay premiums and injured

persons are compensated by our insurance carrier. The Indian Self-Determination Act forbids insurance carriers from invoking tribal sovereign immunity, at least to the coverage limits of the policy. *See* 25 U.S.C. § 450f(c)(3).

In addition, almost every tribe in the country has, to some extent, taken over services and functions that would otherwise be provided to tribes by the United States Departments of the Interior or Health and Human Services. These self-governance compacts and Self-Determination Act contracts carry with them the protection and procedures of the Federal Tort Claims Act. An authorized tribal employee acting under such an agreement with the United States is deemed to be part of a federal agency for Tort Claims Act purposes. 25 U.S.C. § 450f(d) and Note. So, for example, when a motorist collided with one of our forestry technicians recently, that person made a claim under the FTCA just as he would have if the collision had been with a U.S. Postal Service truck. In those situations, the sovereign immunity of the tribe is precisely the same as that of the United States. There are procedural requirements for FTCA claimants; for example, they must file an administrative claim, act within statutory time limits, and punitive damages are not permissible. But this is equally fair to persons injured by federal employees as it is to persons injured by authorized tribal employees.

4. **Suits by the Federal Government.** A tribe cannot assert its immunity against the United States. "It is an inherent implication of superior power exercised by the United States over Indian tribes that a tribe may not interpose its sovereign immunity against the United States." *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988).

5. **Compliance with the Solid Waste Disposal Act.** In environmental statutes, such as the Resource Conservation and Recovery Act of 1976, (part of the Solid Waste Disposal Act) 42 U.S.C. § 6901 *et seq.*, Congress has expressly waived tribal sovereign immunity. *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989), found a waiver of tribal sovereign immunity against civil actions because tribes are specifically included within the definition of municipalities. Other statutes protecting the environment may have similar provisions. In addition, an "officer's suit" is available to obtain compliance with all such statutes.

6. **Agency violations, such as "breach of trust."** The sixth type of case does not really involve tribal sovereign immunity. Many actions on Indian reservations, such as leasing tribal lands or timber or mineral extraction, require federal approval. Federal officials who ignore environmental laws or statutes directing the use of funds can be successfully sued and curbed by injunctions or by the damages remedies of the United States Court of Federal Claims. *E.g.*, *Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972); *Short v. United States*, 50 F.3d 994 (Fed. Cir. 1995).

7. **Habeas Corpus Actions.** As part of the Indian Civil Rights Act in 1968, Congress authorized jurisdiction in habeas corpus cases: "The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303. Strictly speaking, a habeas corpus action is not a suit against the sovereign because the restraint for which review is sought, if indeed illegal, would be outside the power of an official acting in the sovereign's name. In *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874 (2d Cir. 1996), the court ruled that the ICRA's habeas corpus provision is not limited to criminal proceedings and that banishment from tribal lands is among

the forms of detention over which the federal courts have jurisdiction.

8. Suits against tribal property. Do the many exceptions really mean that sovereign immunity is a myth? No indeed, instead sovereign immunity is a carefully circumscribed legal doctrine that protects Indian tribes (but not Indian individuals) in many of the same ways that the Eleventh Amendment protects States of the Union. *See Seminole Tribe of Florida v. Florida*, ___ U.S. ___ (1996).

If there is no statute or agreement authorizing a particular suit, one critical question to be answered in determining if sovereign immunity has come into play is to ask whether the suit is actually against "the sovereign". A suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain." *Land v. Dollar*, 330 U.S. 731, 738 (1947); *Shermoen v. United States*, 982 F.2d 1312, 1319-21 (9th Cir. 1992). Thus when an individual tries to capture monies and property held by an Indian tribe under a federal statute, sovereign immunity may protect the tribe unless there is an exception, such as those listed above. With respect to land or other real property, this principle is codified in part at 28 U.S.C. § 2409a(a). That section allows suits against the United States to adjudicate a disputed title to real property in which the United States claims an interest. However, the statute goes on to say that it "does not apply to trust or restricted Indian lands."

The scope of tribal sovereign immunity is very similar to that of the United States Government itself. Apart from the many exceptions provided in law, immunity still exists. Recognizing this principle, when Congress amended the Right of Review section of the Administrative Procedure Act in 1976 to permit the United States to be named as a defendant, it

also prohibited suits where another statute "grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702.

C. Conclusion.

I urge the Committee to study this matter very carefully and very thoroughly before taking any action whatever. Congress and the courts have addressed sovereign immunity in careful, intricate ways. A meat axe approach that curtails sovereign immunity is likely to produce consequences as devastating as the well-meaning General Allotment Act of 1887. Do not forget that the Act led to a loss of 90 million acres of Indian lands before allotment ceased in 1934. *F. Cohen, Handbook of Federal Indian Law* at 138 (R. Strickland ed. 1982). Who did it help? Thank you for your consideration.

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FORT PECK TRIBES
Assiniboine & Sioux

Testimony of Caleb Shields, Chairman
Fort Peck Tribal Executive Board
on Tribal Sovereign Immunity and H.R. 3662
before the
Senate Committee on Indian Affairs

Mr. Chairman and members of the Committee, my name is Caleb Shields and I am the Chairman of the Assiniboine and Sioux Tribes of the Fort Peck Reservation. The Fort Peck Tribes wish to express our opposition to any congressional action which unilaterally abrogates Tribes' sovereign immunity without tribal consent.

The Fort Peck Reservation is located in northeastern Montana. It is about 110 miles long (east to west) and 40 miles wide (north to south), containing slightly over two million acres. Over 5,600 tribal members live on the Reservation, as well as several hundred Indians belonging to other tribes. Reservation lands were allotted to tribal members beginning in 1908, and then opened to settlement by non-Indian homesteaders. Today, about half the lands on the Reservation are owned by non-Indians, and over 4,000 non-Indians also reside on the Reservation. About 550,000 acres on the Reservation are held in trust by the United States for Indian allottees, and another 400,000 are held in trust for the Tribes. Trust and fee lands are commonly interspersed in a "checkerboard" ownership pattern.

The Assiniboine and Sioux Tribes of the Fort Peck Reservation strongly oppose language providing for a waiver of tribal sovereign immunity contained in section 329 of H.R. 3662 and any comparable language in any Act of Congress. A mandatory waiver of tribal immunity is a serious

Poplar, Montana 59255 P.O. Box 1027 (406) 768-5155

encroachment on the sovereignty of our Tribes and that of other tribes. It is also entirely unnecessary. The Fort Peck Tribes, like a great many other tribes, have long enjoyed a history of cooperative relations with non-Indians living or doing business on the Reservation and with the State, including local and county governments. I describe this history and the functioning of our court system in detail below.

1. Fort Peck tribal judiciary

A. Structure

The Assiniboine and Sioux Tribal Code of Justice establishes a judicial system consisting of two levels, a trial court and a court of appeals. The Tribal Executive Board, our legislature, appoints the tribal court judges, who sit for a two year term, and justices of the Court of Appeals, who sit for a one year term. The Code of Justice provides that a judge or justice may be removed only upon written charges of specific misconduct by a member of the Tribal Executive Board. The Code further defines misconduct as 1) conviction of a felony or misdemeanor involving dishonesty or acts offensive to the morals of the community; 2) abusive or clearly incompetent performance of duties in the office; or 3) failure to perform the duties of office; 4) any other substantial violations of the Code of Ethics for judges and justices. The Tribal Executive Board must hold a hearing on the charges, and a judge or justice can only be removed by a two-thirds majority of the Tribal Executive Board. The Tribal Executive Board has not addressed any action for removal of a tribal judge or justice since the new Tribal Code of Justice was adopted over ten years ago.

Tribal court judges must successfully complete a judge's qualifying examination which is administered through the Tribal Executive Board. The Chief Justice for the Court of Appeals must have a degree in law from an accredited law school and be a member in good standing of the bar of a state or federal court, as well as a member in good standing of the Fort Peck Bar. In fact, all three justices of the current Fort Peck Court of Appeals are licensed attorneys and members in good standing of either the Montana or North Dakota bar.

The Court of Appeals hears appeals from the trial court, providing a second level of independent decision making. The Court of Appeals reviews all questions of law de novo, although the Code of Justice requires the reviewing court to give some deference to the factual determinations of the trial court. This requirement ensures that the litigants will be afforded two opportunities to present their legal arguments to a neutral arbiter.

B. Jurisdiction

The Fort Peck tribal courts regularly adjudicate civil cases involving non-Indian parties. The Code of Justice provides that the Fort Peck Courts "shall have jurisdiction over any action where one party to the action shall be an Indian [or Indian business] and where the cause of action arises under the Constitution or laws of the Tribes, or an Indian party to the action resides on the Fort Peck Reservation." With respect to persons outside the reservation, the Code provides that in cases where it otherwise has jurisdiction the Court will exercise personal jurisdiction if such person "transacts any business on the Reservation, or contracts or agrees anywhere to supply

goods or services to persons or corporations on the Reservation; or commits an act on the Reservation that causes injury."

Access to tribal courts by non-Indian parties is made easier by the fact that 26 non-Indian attorneys and six Indian attorneys are currently licensed to practice in the Fort Peck courts. The Tribes require attorneys licensed to appear before the Court to have a law degree from an accredited law school and pass the Fort Peck Bar Exam which is administered through the coordinated efforts of the University of Montana School of Law and the Tribes. This process not only ensures that non-Indian litigants have a choice of representation, but also that the attorney understands the procedural and substantive law that is used in the tribal courts.

In 1995, the Fort Peck Tribal Courts heard 84 cases in which the plaintiff was a non-Indian. In 58 of those cases, the Court issued judgment in favor of the non-Indian plaintiff. The Court also heard 16 cases in which the defendant was non-Indian and the Court dismissed the action or entered judgment in favor of the non-Indian in eight of those cases. (In some instances, of course, the case is dismissed for lack of jurisdiction, failure of the parties to appear or other procedural reasons.)

C. Availability of remedies against tribal officials

Consistent with established federal law, the Tribal Code of Justice provides that the Fort Peck Tribes shall be immune from suit. But the Code also provides that the Fort Peck Courts

"shall have jurisdiction over all suits in which Tribal officials or employees are defendants," except *habeas corpus* proceedings which are heard in federal court under the Indian Civil Rights Act. The Code provides absolute immunity from suit for elected officials or judges for actions "taken in the course of official duties . . ." or in the reasonable belief that the action was within the scope of his or her official duty. This is similar of course to the immunity of the President, Congress and federal judges. However, the tribal courts have jurisdiction over actions seeking declaratory and equitable relief against other tribal employees for actions the court determines unlawful, and can grant money damages for unlawful action clearly established to have been taken with malicious intent and in bad faith

2. Commercial agreements

The Fort Peck Assiniboine and Sioux Tribes often enter into agreements with non-Indian contractors or other off-reservation parties to do business on the Reservation. In order to encourage commerce on the Reservation, the Tribes have adopted the Uniform Commercial Code, with some very minor modifications. By adopting the U.C.C., the Tribes provide outside businesses with the assurance that commercial transactions will be treated by the tribal courts in the same general manner as business disputes elsewhere in the United States.

In addition, understanding the possibility of substantial breaches due to unforseen circumstances or other disputes arising from these agreements, the Tribes and non-Indian party most often agree on an administrative remedy such as binding arbitration to resolve the dispute.

The Tribes and non-Indian parties have successfully arbitrated one such dispute. A few years ago, the Tribes entered into a contract containing an arbitration clause with a construction company to do work on the Reservation. A dispute arose over the rental payments of equipment among other issues. The parties successfully arbitrated the resolution of those issues without legislative or judicial intervention. The arbitration ended in an award against the Tribes and the Tribes accordingly complied. Consequently, for non-Indians living or doing business on the Fort Peck reservation, it is unnecessary as well as demeaning for Congress simply to unilaterally waive the Tribes' immunity from suit.

3. Relations with non-Indian neighbors and State

The Tribes have always maintained avenues by which non-Indians can communicate and get redress for any disputes they may have with the tribal government. Meetings of the Fort Peck Executive Board are open to the public, and Indian and non-Indian individuals doing business with the Tribes often participate in the process to either voice their grievances with the Tribes or provide information to the Board. Minutes of the Tribal Board meetings are published in the local newspaper so the community is informed of current activities affecting the Tribes both on the Reservation and off.

The Tribes work closely with local governments and the State of Montana on issues of mutual concern to both Indian and non-Indians, on and off-Reservation. For instance, the Tribes and State of Montana recently entered into an agreement allowing Indian and non-Indian

proprietors to operate underground storage tanks on the Reservation provided they meet the stringent environmental standards set forth in the agreement. In order to do this, the Tribes, the State and operators of the underground storage tanks must work closely together in the administration of permits, installation, inspection, and removal of underground storage tanks.

In addition to the underground storage tank agreement, the Tribes and State have a number of tax-sharing agreements -- a tribal-state agreement to provide for the collection, use and distribution of gasoline taxes, and an agreement to provide for the sharing of taxes on beer, wine and liquor sales on the Reservation. Under these agreements, both the Tribes and State impose a single tax (equal to the State tax). The tax is collected by the State and shared between the State and tribal governments. The Tribes have also agreed with Montana that Indian smokeshops will not sell tax free cigarettes to non-Indians; an annual quota of tax free cigarettes is delivered for sales to Indians. Finally, the Tribes have also entered into an agreement with Montana concerning the operation and regulation of gaming activities on the Reservation. All of these agreements necessarily entail a large amount of cross-administration and regulation between the Tribes and State.

The Tribes and State executed the Fort Peck-Montana Water Compact in 1985. The Compact determined the reserved water rights of both the Tribes and State, and settled existing water rights cases involving the Tribes and State. The Compact establishes a joint State-Tribal Board to resolve any disputes between tribal and State water users. The Board has three

members -- one appointed by the State, one by the Tribes and one to be agreed upon by the other two members. In the eleven years it has operated, the Board has considered one dispute between an Indian and non-Indian concerning groundwater pumping. This dispute was resolved by agreement between the parties before a final Board decision.

4. Conclusion

The Assiniboine and Sioux Tribes of the Fort Peck Reservation have worked to build and maintain cooperative relations with our non-Indian neighbors on and off-reservation. These cooperative relations, like all business, political and social relations, invariably result in some disputes. The Fort Peck Tribes provide neutral forums, administrative remedies and public council meetings to make every effort to sustain these sometimes delicate relations. This sort of relationship needs to be developed over time by each tribe and each state and surrounding non-Indian community. There is no "one size fits all" relationship that fits every circumstance. Section 329 of H.R. 3662 would be a blunt instrument, disruptive of creative governmental processes on the tribal, state and local level. Most basically, it would be an unwarranted attack on each tribe's governmental authority to devise successful arrangements with each state and with neighboring non-Indians. No statute like this should ever be enacted by Congress.

The Tribes appreciate the opportunity to present this testimony.

The Chippewa Cree Tribe of the Rocky Boy's Reservation

Phone: (406) 395-4478 or 4210 - Finance Office
(406) 395-4282 or 4321 - Business Committee

RR1 # 544
Box Elder, MT 59521

September 19, 1996

The Honorable John McCain (R-AZ)
Chairman of the Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510
ATTN: Phil Baker-Shenk

Dear Senator McCain:

The Chippewa Cree Tribe of the Rocky Boy's Indian Reservation in Montana is honored to submit this testimony regarding civil jurisdiction in Indian Country. Specifically, we are addressing a fundamental component of our government-to-government relationship with the United States, that is sovereign immunity. The Chippewa Cree Tribe vigorously opposes any legislation which would subject tribal governmental decisions to the civil jurisdiction of State courts while unilaterally waiving our sovereign immunity. This would be an affront to tribal sovereignty and a violation of our government-to-government relationship. Not to mention the complete reversal of decades of Federal-Indian policy including Federal, State and tribal caselaw upholding tribal sovereign immunity. We suggest rather than attacking our civil jurisdiction and immunity to suit that Congress provide additional financial support for our tribal court systems to better handle increasing caseloads.

I understand that you and other key Senators were successful in striking the recent attempt by Senator Gorton to include an amendment waiving tribal sovereign immunity in the FY 1997 Interior Appropriations Bill. Indian Country applauds your continued support in protecting tribal sovereignty from any further erosion through legislative riders. As you know, sovereign immunity from suit is an inherent right of all governments, including tribal governments. Constitutional law requires state courts to honor federal sovereign immunity and the federal courts must honor the states' sovereign immunity. The justification for the doctrine is to protect the public fisc from treasury-draining lawsuits. This is of particularly importance to tribes given our limited revenue base as compared to states and the importance of building and maintaining tribal assets in order to provide for the economic security and protect our tribal autonomy. Senator Gorton's amendment for a blanket waiver of our immunity to suit would return us to the days when Indian lands were taken at will under the color of law and tribal self-government was ignored by the State and Federal governments.

A common argument by parties attempting to avoid tribal court jurisdiction is that tribal courts cannot be fair, and therefore should never be able to exercise jurisdiction over non-Indians, even those who enter voluntarily onto a reservation and cause damage there. The Supreme Court has rejected any such attack on tribal courts, *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18-19 (1987), and views them rather as important forums for the resolution of disputes arising within reservations. The civil subject matter jurisdiction of tribal courts is not determined by the race or political status of the parties and tribes generally retain civil jurisdiction over non-members' activities on Indian land unless that jurisdiction has been expressly divested by Congress. Our nation has long afforded Indian tribes freedom from state jurisdiction and control. *See Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."). The federal government has always assumed exclusive control over relations with tribes while protecting and upholding our sovereign right to self-government.

A long line of Supreme Court cases establish that the jurisdiction of Indian tribes, like that of any sovereign, has a significant territorial basis. In *Iowa Mutual*, the Supreme Court said, "We have repeatedly recognized the Federal Government's longstanding policy of encouraging tribal self-government. This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' to the extent that sovereignty has not been withdrawn by federal statute or treaty .... Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty." In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), the seminal case on tribal taxation powers, the Court concluded that, "the Tribe's authority to tax non-Indians who conduct business on the reservation does not simply derive from the Tribe's power to exclude such persons, but is an inherent power necessary to tribal self-government and territorial management." 455 U.S. at 141. Furthermore, in confirming tribal court jurisdiction over a reservation-based case between a tribal member and a non-Indian in *Williams v. Lee*, 358 U.S. 217 (1959), the Court noted that, "it is immaterial that respondent is not an Indian. He was on the reservation and the transaction ... took place there. The cases in this Court have consistently guarded the authority of Indian governments over their reservations." 358 U.S. at 223.

All of these cases, *Iowa Mutual*, *Merrion*, and *Williams v. Lee*, upheld tribal jurisdiction over the activities of non-members. In each case, the Court took pains to emphasize where the activity or transaction had occurred. Location and territory were the main factors upon which the Courts based its decisions. In addition, Congress consistently acts according to the basic principle that tribal subject matter jurisdiction is premised upon a geographic territory. Recent statutes such as the Indian Child Welfare Act of 1978, 25 U.S.C. 1903(10) and the Indian Gaming Regulatory Act of 1988, 25 U.S.C. 2703(4) (1988) specifically define Indian land for purposes of the activities they regulate. Similarly, Congress and Federal courts have recognized that tribal justice systems are the appropriate forum in which to adjudicate disputes affecting personal and property rights arising on the reservation. *See e.g.*, The Indian Tribal Justice Act of 1993, 25 U.S.C. 3601 *et seq.*. Therefore, any attempt to alter tribal civil jurisdiction by waiving tribal

immunity to suit and subjecting tribes to state court jurisdiction would seriously undermine tribal sovereignty while re-writing Federal-Indian policy and overturning Supreme Court precedent to satisfy those few individuals who feel they are not adequately served by our court systems.

The current jurisdictional scheme in Indian Country provides everyone an opportunity to address their concerns before either the federal, tribal or state court system. A waiver of sovereign immunity is unnecessary since it would violate the current jurisdictional scheme while intruding on the sovereign rights of Indian tribes. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (Tribal sovereign immunity is a bar to state or federal jurisdiction A tribe retains sovereign immunity unless it expressly waives it by affirmative action. Waiver cannot be implied.). The notion of waiving tribal sovereign immunity surfaced as an assault on tribal sovereignty and originated in retaliation to the Lummi Nation's efforts to exercise their inherent rights over their lands and people. Subjecting tribes to sanctions or penalties for exercising their inherent civil authority over our people and territory would seriously undermine the integrity of all governmental decisionmaking. Tribal governmental decisionmaking should not be singled out and subjected to review in State courts but instead should remain subject to tribal and Federal court jurisdiction. The Chippewa Cree Tribe opposes any changes or sanctions for exercising our inherent rights to civil jurisdiction in Indian Country, in particular waiving tribal sovereign immunity.

John R. Sunchild, Chairman
Chippewa Cree Tribe
R.R. 1 Box 544
Box Elder, Montana 59521
(406) 395-4478

cc: Honorable Senator McCain
Honorable Senator Murkowski
Honorable Senator Gorton
Honorable Senator Domenici
Honorable Senator Kassebaum
Honorable Senator Nickles
Honorable Senator Campbell
Honorable Senator Thomas
Honorable Senator Hatch
Honorable Senator Conrad
Honorable Senator Reid
Honorable Senator Simon
Honorable Senator Akaka
Honorable Senator Wellstone
Honorable Senator Dorgan

MENOMINEE INDIAN TRIBE OF WISCONSIN
P.O. Box 910
Keshena, WI 54135-0910

MENOMINEE INDIAN TRIBE OF WISCONSIN

JOHN TELLER
CHAIRMAN

TESTIMONY ON

TRIBAL SOVEREIGN IMMUNITY

for the

HEARING

before the

SENATE COMMITTEE ON INDIAN AFFAIRS

held on
September 24, 1996

submitted for the record on
October 8, 1996

The Menominee Indian Tribe of Wisconsin appreciates the opportunity to submit written testimony for the record of the hearing on this important issue.

The sovereign immunity that Indian tribes possess under federal law is essential to the ability of tribes to exercise their powers, and fulfill their responsibilities, as sovereign governments. On this basic point we want to express our general agreement with many of the witnesses who spoke at the hearing and who submitted written testimony -- a broad waiver of tribal sovereign immunity like that in the proposed section 329 of the Fiscal Year 1997 Interior Appropriations bill would strike a crippling blow to tribal governments all across the country.

The proposed section 329 was deleted from the Interior Appropriations bill and, since Congress has now adjourned, that language will not be attached to any other legislation by the 104th Congress. We expect that this issue will be raised again in the 105th Congress, however, and so we have focused on the language of section 329 in preparing this testimony. That language would have provided, in part:

> (a) In cases in which the actions or proposed actions of an Indian tribe impact, or threaten to impact, the ownership or use of the private property of another person or entity, including access to such property or the receipt of water, electricity or other utility to such property, the Indian tribe receiving funds under this Act or tribal officials of such tribe, acting in an official capacity, shall --
>
> (1) be subject to the jurisdiction, orders, and decrees of the appropriate state court or federal court of general jurisdiction for requests of injunctive relief, damages, or other appropriate remedies; and
>
> (2) shall be deemed to have waived any sovereign immunity as a defense to such court's jurisdiction.

Fundamental Change in the Law. It is important to emphasize that the language in section 329 would bring about a fundamental change in federal law and in the relationships among Indian tribes, the federal government and the states. Congress and the Supreme Court have recognized that tribal governments possess the governmental authority to regulate the use of private property within reservation boundaries. Much of the relevant law has been discussed in the testimony of other witnesses, including such matters as tribal authority to regulate the sale of liquor within reservation boundaries pursuant to a delegation of authority from Congress, *United States v. Mazurie*, 419 U.S. 544 (1975), and the "exceptions" to the rule announced in *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

In addition, a number of statutes enacted by Congress in recent years expressly or implicitly recognize tribal government authority over all persons and private lands within reservation boundaries. For example, several of the major federal environmental statutes include provisions authorizing the Environmental Protection Agency (EPA) to treat Indian tribes like states for certain purposes, including the Safe Drinking Water Act, 42 U.S.C. § 300j-11(a)(1), Clean Water Act, 33 U.S.C. § 1377, and Clean Air Act, 42 U.S.C. § 7601(d). These statutory provisions and EPA's implementing regulations are briefly discussed in "Testimony of Susan M. Williams," which was presented at the September 24 hearing. As implemented by EPA, tribes that choose to assume responsibilities like those of states will generally do so for all regulated persons and entities within reservation boundaries.

In addition to these statutes, Congress has expressly recognized tribal authority over privately lands within reservation boundaries in two other

statutes -- the Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001 - 3013, and the National Historic Preservation Act, 16 U.S.C. §§ 470 - 470w-6. Both of these statutes define the term "tribal lands" to include all lands within the exterior boundaries of any Indian reservation. 25 U.S.C. § 3001(15), 16 U.S.C. § 470w(14), respectively. Under NAGPRA, a tribe has the right to control the excavation and may have the right to control the disposition of Native American human remains, funerary objects, sacred objects and objects of cultural patrimony if such materials are imbedded in the ground within reservation boundaries. 25 U.S.C. § 3002(c). Under NHPA, a tribe may assume the functions that would otherwise be performed by the State Historic Preservation Officer (SHPO) for all "tribal lands," including all lands within reservation boundaries. 16 U.S.C. § 470a(d)(2). If a tribe assumes the role of the SHPO for purposes of consultation with federal agencies pursuant to section 106 of the NHPA, the statutory language provides that, with respect to private land within reservation boundaries, at the request of the landowner the SHPO may participate in section 106 consultation in addition to (and not in place of) the tribal preservation official. This language makes it absolutely clear that Congress intended for tribes to perform this regulatory function with respect to private lands within reservation boundaries.

If language such as that in section 329 were to be enacted, how could tribal governments afford to help carry out these federal laws? Any tribe attempting to exercise governmental authority affecting private property would face a constant threat of having to defend its proposed actions in court. And the litigation would not even be carried out in the tribe's own courts, but rather in the courts of other sovereigns, i.e., the states or the federal government. One likely result of the enactment of language such as that contained in section 329 would be that federal laws would simply go unenforced on private lands within reservation boundaries.

Many tribal governments have made great strides in assuming responsibilities in our federal system like those performed by the states pursuant to statutes such as those listed above. The notion of subjecting tribal regulatory actions to challenge in state courts is, quite simply, diametrically at odds with the intent of Congress expressed in the numerous legislative enactments that encourage tribal governments to assume regulatory functions to help carry out federal laws in partnership with federal agencies.

When Congress enacted the tribal amendments to the major federal environmental statutes, some issues regarding the scope and proper forums for judicial review may not have been considered. For example, in programs conducted by states pursuant to a delegation of authority from EPA, an administrative appeal to the EPA Environmental Appeals Board (EAB) is available and is a prerequisite to judicial review in federal court. 40 C.F.R. §§ 1.25(e), 124.19(f). *See generally* Nancy B. Firestone, *The Environmental*

Protection Agency's Environmental Appeals Board, 1 ENVT'L LAWYER 1 (1994). The EAB, however, does not have jurisdiction over permits issued by states under an EPA-*authorized* state program (as distinct from an EPA-*delegated* program). *In re Great Lakes Chemical Corp.*, RCRA Appeals Nos. 92-34, 36, 37, at 4 (EAB July 7, 1994). In such situations, judicial review is in state court rather than in federal court. In certain circumstances, the U.S. Supreme Court may review the decision of the highest court of a state involving a dispute arising under a state program carried out pursuant to a federal environmental statute, other than an EPA-*delegated* program. For example, in *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, ___ U.S. ___, 114 S.Ct. 1900 (1994), the Supreme Court decided a case involving certification by a state agency under section 401 of the Clean Water Act, 33 U.S.C. § 1341. This case came to the U.S. Supreme Court on petition for *certiorari*, which the Court granted in order to resolve a difference of opinion among the highest courts of several states.

Had such a case arisen in the context of section 401 certification by a tribe that had been determined by EPA to qualify for "treatment as a state," it is not clear whether there would have been federal court jurisdiction. This ambiguity could be clarified by amending the statute authorizing certiorari, 28 U.S.C. § 1257, so that it would include federal questions arising in decisions rendered by the highest courts of Indian tribal governments. *See* Robert N. Clinton, *Tribal Courts and the Federal Union*, 26 WILLAMETTE L. REV. 841, 893, n.126 (1990). The American legal tradition requires that the proper forum for federal court review of the decisions of the highest courts of the states be the U.S. Supreme Court. When tribal governments perform functions like those of the states in our federal system, the highest courts of the tribes should be treated with the same measure of respect.

Fundamental Change in the Trust Relationship. In addition to changing the statutory law, section 329 would bring about a fundamental change in the relations between the United States and the tribes, relations which contributed to the formation of this country and our federal system of government. A basic aspect of the federal-tribal relationship is that the federal government has long assumed the role of protecting the right of tribes to a measured separatism. The federal government has done this, in part, by defending the institutions of tribal government from intrusions by the institutions of state governments. This role is based in part on treaty obligations of the United States to protect Indian nations. E.g. Treaty with the Menominee, March 30, 1817, 7 Stat. 153, reprinted in II Kappler, INDIAN AFFAIRS: LAWS AND TREATIES 138 (Chiefs of the Menominee Tribe acknowledged themselves "to be under the protection of the United States, and of no other nation, power, or sovereign").

The federal government's role in protecting tribal governments from intrusions by state governments is part of the doctrine of the federal trust responsibility. In 1994 Congress expressly recognized that the trust

responsibility "includes the protection of the sovereignty of each tribal government." Indian Tribal Justice Act of 1994, Pub. L. No. 103-176, 25 U.S.C. § 3601. This statutes also expressly states that "tribal justice systems are an essential part of tribal government."

Language such as that in section 329 would be a wholesale abdication of the federal trust responsibility. The continuation of the long-standing special relationship that the United States has with Indian tribes requires that matters that are rightfully subject to adjudication in tribal forums not be given to the states over the objections of the tribes. Efforts to enact legislation such as section 329 strike at the heart of federal-tribal relations.

Fundamental Change in Policy. Legislation such as section 329 would be fundamentally inconsistent with the bi-partisan federal Indian policy of the last quarter century, the policy generally known as "Self-Determination." The policy of Self-Determination is codified in numerous statutes and has been embraced in policy statements issued by Presidents of both parties. Two of the most influential Presidential policy statements were those issued by President Nixon on July 8, 1970, and by President Reagan on January 24, 1983.

Throughout the Self-Determination era, the federal policy toward Indian tribes has emphasized strengthening the institutions of tribal governments. Section 329 would allow any person who objects to the exercise of tribal governmental authority to bypass tribal court and go directly to federal or state court. Such a federal law would strike a crippling blow to the efforts of tribal officials to build effective governmental institutions and would be a complete change of direction from recent federal legislation which supports the development of tribal courts, including the Indian Tribal Justice Act of 1994, in which Congress recognized that tribal justice systems are "the appropriate forums for the adjudication of disputes affecting personal and property rights." 25 U.S.C. § 3601(6).

As a matter of federal policy, disputes involving tribal governments should be heard first in tribal courts. Some of the witnesses at the September 24 hearing, including in particular Susan Williams and Douglas Endreson, discussed the issue of waivers of tribal sovereign immunity for actions in tribal courts. A growing number of tribes have waived sovereign immunity for lawsuits in tribal courts, and some tribal courts have rendered common law rulings finding waivers of tribal sovereign immunity for certain kinds of cases. Many of the witnesses that expressed opposition to statutory language like that in section 329 at the September 24 hearing expressed the view that, where such waivers of tribal sovereign immunity so permit, tribal forums are the proper forums for adjudicating disputes against tribes and tribal agencies and officials.

The experience of the Menominee Tribe, which included termination in 1961 and restoration to federally-recognized status in 1973, is unique among the tribes and should be noted by the Committee. Federal legislation which restored the Tribe to federally-recognized status included a requirement that a constitution be adopted by the Tribe and approved by the Secretary of the Interior. 25 U.S.C. § 903c. The Menominee Constitution and ByLaws (approved by the Secretary in 1979) includes a provision for the establishment of a tribal court as a co-equal branch of government. Powers of the tribal judiciary include the power to resolve disputes between and among persons arising under the Constitution and laws of the Tribe as well as those arising under the Constitution and laws of the United States. The Tribe's Constitution waives tribal sovereign immunity for actions in tribal court and requires persons seeking redress against the Tribe to exhaust all tribal remedies before seeking redress in federal court.

We urge the Committee to note that the solution of adjudicating disputes involving tribal agencies and officials has been part of Menominee tribal law for seventeen years. The current federal policy of supporting the development tribal courts as the appropriate forums for adjudication of disputes arising within reservations, including disputes against tribal agencies and officials, has been tested in the courts of the Menominee Tribe and has proven successful. In our experience, exhaustion of tribal court remedies places no inordinate hardships on potential litigants.

Indian Self-Determination as a Human Rights Issue. The federal commitment to Indian self-determination should be seen as a human rights issue. Indian tribes are significant participants in the worldwide struggle for the recognition of the human rights of indigenous peoples. The United Nations is currently considering the adoption of a Declaration on the Rights of Indigenous Peoples. A draft of this Declaration was approved by the Subcommission on Prevention of Discrimination and Protection of Minorities in 1994, resolution 1994/45, Aug. 26, 1994, and is currently under consideration in the Commission on Human Rights. *Reprinted in* S. James Anaya, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 207 (1996). Article 3 of the draft Declaration provides:

> "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

Many generations ago Indian tribes and federal government officials entered into treaties, and Congress enacted statutes, that recognized the rights of tribes to continue to continue to exist as distinct peoples, including exercising self-government within their recognized territories. When Indian tribes entered into treaties, they generally acknowledged the superior sovereignty of the United States, which agreed to protect the tribes in their

rights to continue to exist as a distinct self-governing communities. E.g., Treaty with the Menominee, 1817, cited earlier. Entering into such a treaty can be seen as an act of self-determination, since it is entering into a relationship with a more powerful sovereign.

The United States has since unilaterally changed the terms of this arrangement, during the "allotment" era of federal policy and again for many tribes, including the Menominee Tribe, during the "termination" era of federal policy.

But Indian tribes and nations still seek self-determination. Government is a social compact, and the government that the American people created has made commitments to preserve the right of Indian tribes to carry on as sovereign governments. When tribes exercise governmental authority, some people, tribal members and nonmembers alike, may be faced with certain restrictions on what they might otherwise like to do with their property. The rights and interests of individuals need to be respected, but it must be possible to accommodate such rights and interests while still honoring the national commitment to the right of Indian tribes to self-determination. Congressional support for the development of tribal judicial systems must be part of the answer to this challenge.

TESTIMONY BY BOBBY WHITEFEATHER
CHAIRMAN, RED LAKE BAND OF CHIPPEWA INDIANS

I want to thank Chairman McCain, Vice Chairman Inouye, and the Members of the Committee for this opportunity to provide written testimony on this subject which goes to the very heart of Indian existence, and especially the existence of the Red Lake Nation.

Because of our unchallenged, unique legal and historical status, it is important that the record reflect precisely and coherently the distinctive nature of our nation, the Red Lake Nation, and the unique hardships this callous thrust at sovereign immunity, if successful, would impose on the people of Red Lake.

First, let me begin by stating that the Red Lake Nation has a special stake in this debate. It is absolutely essential that this Committee and the Congress understand and appreciate the unique nature of the Red Lake Nation.

In *McClanahan v. Arizona State Tax Commission* (411 U.S. 164, 172 (1973)), the Supreme Court stated in regards to all Indian tribes, "their claim to sovereignty long predates that of our own Government."

This long history is for us, the Red Lake Nation, unbroken. The land of the Red Lake Nation has never been divided, diminished, disbursed, or Allotted. The inherent right of our self-government precedes the U.S. Constitution, and neither the Traditional Chiefs

nor the Tribal Council of the Red Lake Nation has ever relinquished any part of this sovereign right.

The Red Lake Band of Chippewa Indians live on our aboriginal homeland in northern Minnesota of 835,842 acres of land and water. Prior to the *Old Crossing Treaty of 1863,* the seven bands who comprise the Red Lake Chippewas owned and controlled more than 13 million acres of land in northwest Minnesota, extending into North Dakota to the west and Canada to the north.

All our land is and always has been held in common by all members of the Red Lake Nation. Sovereign authority is vested in us as a people -- and is exercised as a Tribal right, not an individual right.

There is further proof of the pristine and untarnished sovereign authority of the Red Lake Nation: we rejected the conditions of the Dawes Act of 1887, and we rejected state jurisdiction through P.L. 83-280, Civil and Criminal Jurisdiction on Reservations.

Thus, as the Red Lake Tribal Council exercises its power of self-government today, it does so by reason of our aboriginal Tribal sovereignty, not by the delegation of those powers from the federal government. Some tribes have not acted on this more basic principle of federal Indian law and have actively sought legislation that would further infringe on Tribal sovereignty, such as gaming legislation. We have rejected that

course.

Sovereignty for us is a very serious matter. It is more than the power to issue our own license plates, or build and maintain our roads and schools, or preserve and use our forests, or even maintain a constant vigil against potential threats coming from Washington, such as this. Sovereignty is at the essence of our tribe, our common existence, and our history with non-Indian governments. Forced restrictions on tribal sovereign immunity, or its complete elimination (as some of those who covet Indian land propose) would wreak incalculable damage on our unique tribal way of life and coexistence.

Second, we of Red Lake stand squarely with our brethren, the Flathead nation, the Lummis, Chickasaws, the Sioux, Navajo, Tulalip, and many other tribes represented at the September 24 hearing, in their strong and moving expressions for the legal, substantive, theoretical, and practical rationale for tribal sovereignty and its integral component, sovereign immunity.

I commend to the consideration of the Committee the concluding remarks of Mr. Herb Yazzie, Attorney General of the Navajo Nation. Although it is rarely mentioned now, Mr. Yazzie was right to point out that Indian peoples over 200 years ago taught the European immigrants to North America much about democracy. It is unfortunate that, in the Capitol of the U.S. government in Washington, D.C. today, we find tribes needing to

defend our long practice of justice and respect for individual rights and democracy. To suggest that Indian nations somehow provide less justice than do the states, I consider sad and offensive, and patently inaccurate.

And again, though it is mentioned in these modern times rarely or not at all, I commend to the consideration of every American, Native or otherwise, the early history of the Chickasaw Nation as a reliable ally of the besieged Continental Congress. Many do not know the story, as recounted by Chickasaw Governor Bill Anoatubby, that just fifty years later the ungrateful young American Republic demanded that the Chickasaw surrender their lands.

That story is important as background and historical context, against which sovereign immunity stands as one of our cornerstones of Indian independence and self-determination. For in the American system, laws and legal tools have not always served Indian peoples well, but sovereign immunity has consistently served as a pillar of our self-governance. After innumerable sworn promises and broken treaties, any discussion of a forcible waiver of sovereign immunity is a ghastly and solemn matter.

Third, much of the testimony of those who would seek to undermine sovereign immunity, Indian sovereignty, and Indian peoples generally, is based on misunderstanding, myths, and misrepresentation of the law or the facts cited. Some of what they state is simply offensive. Whether by effect or design, much of what they propose would serve only to

continue the steady erosion of Indian rights and lands that has occurred over the last four centuries. Although attacking sovereign immunity is a relatively new tactic, the ultimate goal remains the same: the misappropriation of Indian lands and the debasement of our property rights in order to favor non-Indian friends of some federal and state elected officials.

Mr. Darrel Smith of South Dakota, and a few other witnesses at the hearing on September 24, took much time describing stories of alleged injustices at the hands of tribes and tribal justice systems. Even were these stories to be proven true, they do not argue for the wholesale abolition of tribal justice and self-government any more than the stories of injustices wrought by state and federal courts which fill the newspapers and provide new material to TV drama after TV drama would cause the same to occur to those courts. If our opponents present as their most significant argument a loose collection of grievances and stories, a thrown-together potpourri of anecdotal evidence, then this misguided attempt to target sovereign immunity should go no further.

Mr. Smith told a story of several Indian youths committing vandalism on the Standing Rock Sioux Indian reservation. Jesse Taken Alive, Chairman of the Standing Rock Sioux tribe, stated that the situation is being dealt with. Yet, Mr. Smith stands in harsh judgment of the Sioux and their tribal courts. Should this Committee similarly criticize the entire American criminal justice system for one of the many well-publicized miscarriages of justice over the last several years that have occurred in the non-Indian

courts of South Dakota?

Just to the west of Mr. Smith's South Dakota, Chairwoman Swaney and the people of the Flathead Nation have undertaken a comprehensive tribal justice program, with the cooperation of Montana state and local governments, to reduce the number of crimes and incarcerated tribes people. The Flathead Nation's concerted, successful efforts to strengthen its justice system and address the resolution of disputes points out, once again, that Indian self-government, sovereignty, and sovereign immunity are working. They should not be "reformed" by those who stand to benefit.

Further, it should be noted that Mr. Smith of South Dakota cited the Dawes Act and the surplus land Acts as the origin of his and his family's residence on Sioux land. This is not unsoiled justification. The Dawes Act and the Allotment Era were instituted by the United States in a deliberate attempt to destroy traditional Indian governments and social institutions and to tear Indian people from their culture. It was forced assimilation into an anti-Indian America, which conveniently displaced Indian peoples from their land and caused the wholesale transfer of land and valuable property rights to non-Indians. Tribes in Minnesota and across America refused to accept the conditions of the Dawes Act of 1887, and today that Act stands as one of the most destructive pieces of federal legislation ever directed toward a class of people by the U.S. government. If this is legal justification, it is also bankrupt morality and no guide for this Committee in 1996 America.

Further, the Allotment Era is directly responsible for much of the conflict between Indian nations and non-Indian property owners, for it resulted in the checkerboard land ownership patterns which now exist within most Indian nations. The ugly after-effects of the misguided Allotment Era are directly responsible for this hearing today; and yet, some would compound the problem in order to solve it, by proposing even uglier legislation -- the forced debilitation of tribal sovereign immunity. And for seemingly the same purposes of the Allotment Act: dispossession of Indian lands and the destruction of Indian economic self-sufficiency.

Fourth, it is clear that Indian economic self-sufficiency and tribal economic development is truly at stake at this hearing, and under attack by those who are attacking tribal sovereign immunity. Sovereign immunity is one of the principal tools used by tribal governments in our economic dealings -- and whether to waive it or exercise it is a judgment tribes need to be able to make. Just as all governments contract, regulate, tax, license, and decide legal and economic relationships with those who deal within their jurisdiction and certainly those who deal directly with them as a government, so too do tribal governments.

The Washington state opponent of tribal sovereign immunity, Jim Johnson, cited Professor Joseph Kalt's statement at the recent hearing before this Committee regarding economic development on reservations:

> The central problem is to create an environment in which investors --

> whether tribal members or outsiders -- feel secure and therefore are willing to put energy, time, and capital into the tribal economy.

Mr. Johnson apparently believes, although he offers no proof, that there is uncertainty and intolerance for risk on the part of non-Indian investors; and that it is caused by tribal sovereign immunity; and that this condition will be cured by a "one size fits all" federally mandated forcible waiver of tribal sovereign immunity. Yet Professor Kalt's actual testimony was quite firm in support of sovereignty, and he issued a very different prescription:

> We cannot find a single case of sustained economic development where the tribe is not in the driver's seat.

Besides anecdotal evidence, and a suggestive and unsupported reference to alleged investor uncertainty, our opponents did offer varied legal arguments. Mr. Long, Chief Deputy Attorney General of the State of South Dakota, offered a brief arguing that 1) tribal sovereign immunity is relatively undiminished in its potency after 200 years; 2) the sovereign immunity of U.S. states, the U.S. federal government, local governments and municipalities has been critically curtailed; and 3) the commercial activities of foreign nations under U.S. courts differ markedly from the status of Indian tribes.

While many legal scholars will argue with Mr. Long, especially on points 1) and 2), tribal sovereign immunity is not comparable to that of U.S. states or local governments. As Indian and non-Indian leaders have stated, and restated, again and again at hearings

before this and other bodies, the United States is in a government-to-government relationship with tribes. It is, in fact, unconstitutional for a state to superimpose another legal relationship upon a tribe, or, for that matter, the federal government to back away from its own Constitution, legal precedents, treaties, and history.

While the U.S. government has abrogated a portion of its sovereign immunity, primarily in the areas of torts and contracts, this is an instance of Congress re-defining the boundaries of its own federal immunity, often in concert with the establishment of some additional resolution mechanism such as the Federal Tort Claims Act. Both Executive statement and Congressional legislation on the issue of Indian governance have been entirely clear, in the past and most recently. They have not wavered from strong tribal governance, economic development and self-sufficiency. For this reason, a forced restriction or elimination by Congress of tribal sovereign immunity would not only be a death blow to tribal governance but wholly incompatible with on-going federal policies to encourage tribal sovereignty and economic development. An assault on tribal sovereign immunity would of necessity be a cheap legislative whittling-away of our rights, rather than a truly integral and relevant component in the evolving, strengthening relationship between tribes and the U.S. government.

Fifth, it is important to note the position of the U.S. government, as stated by Associate Solicitor Anderson, on "the integral function which sovereign immunity serves" in Indian self-government and self-determination.

Solicitor Anderson pointed out that as recently as 1994 the Congress affirmed that "the United States... recognizes the sovereignty of those tribes" (Federally Recognized Indian Tribe List Act). The office of the Secretary of Interior indicated that tribes possess immunities deriving from their government-to-government relationship with the United States.

This vital government-to-government relationship follows from an older, somewhat paternalistic attitude that saw tribes as "domestic, dependent nations" (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831)). Solicitor Anderson affirmed that "the genesis of the government-to-government relationship between Indian tribes and the United States is the Constitution."

Moving closer to the topic of the Committee's consideration, Solicitor Anderson stated:

> [T]ribes... possess all powers of government, except those which have been expressly extinguished by Congress or which the Supreme Court has ruled are inconsistent with overriding national interests.

I consider this to be a very important statement. If the Supreme Court has only forcibly restricted tribal sovereign immunity under conditions of "overriding national interests," that poses the looming question to this Congress of why it should now depart from such an elegant standard.

Solicitor Anderson did address civil jurisdiction, the source of the complaints of many of

this hearing's non-Indian witnesses. He stated that:

> Since tribal civil jurisdiction concerns those matters which are linked most intimately with tribal identity, the exercise of broad tribal civil jurisdiction is essential to the maintenance of a vigorous tribal government.

Civil jurisdiction is vital to sovereignty. It is an issue of respect for our institutions and respect for our government-to-government relationship with the United States. At a more concrete level, in 1992 the Congress recognized the importance of tribal courts by passing the Indian Tribal Justice Support Act. Tribal justice and civil jurisdiction is thus a growing, strengthening institution.

Solicitor Anderson referenced the specific issue of waiver of sovereign immunity for both tribes and the U.S. federal government. It is significant that Congress did waive the federal government's own sovereign immunity under the Federal Tort Claims Act system -- where even Indian tribes, acting as contractors for federal functions, can be petitioned for grievances -- yet even then, this system was specifically established without affecting tribal sovereign immunity.

There are very concrete dangers, to tribes and to the core concept of justice, inherent in forced restriction of tribal sovereign immunity. A blanket forcible waiver would allow anyone to pick and choose between justice systems, "court shopping" for the favored verdict. A snarl of inconsistent decisions would be just one of the many unpleasant outcomes. Lost resources spent in frivolous, hostile litigation in courts historically

antagonistic to Indians, is another.

Finally, Solicitor Anderson confronted the naked thuggery of the recent behind-the-scenes battles over appropriations to tribes, where receipt of federal funds by tribes was to be linked to an automatic elimination of tribal sovereign immunity:

> Judgment funds are the tribes' money. When the United States pays what it owes a tribe for a wrong committed against the tribe, it should not attach burdensome and sovereignty-impairing conditions to the payment of what is rightfully the tribe's money, free and clear.
>
> ...Any erosion of tribal sovereign immunity would undermine one of the most fundamental principles of government.

I would add that any Congressional erosion of tribal sovereign immunity, would undermine one of the most fundamental principles of government under the U.S. Constitution. Any Congressional action to eliminate or forcibly restrict tribal sovereign immunity would be not untrammeled, but highly circumscribed by the responsibility to tribes established by legal precedent and by stated Congressional Act and intent. Looking at the larger picture, the overall strengthening course of tribal relations with the U.S. and tribal economic development would demand that the federal government let stand, unabridged and uninjured, the vital legal foundation that is tribal sovereign immunity, upon which rests so much of the elements and the very soul of our self-government.

The very fact of the growing strength of tribal self-government and economic development, at Red Lake and across America, argues strongly against any debasement

by the Congress of our sovereignty or sovereign immunity. The Red Lake Nation's solid, centuries-old link to the land is an even stronger argument. Our special achievement, of retaining true independence and the land in the face of so many challenges, must not be compromised by this intemperate assault on sovereign immunity.

The Red Lake land base is aboriginal, unallotted land, and our inherent right of self-government predates the U.S. Constitution. As one of just two "closed reservations" in the United States, our unique status and history must be specifically and particularly taken into account in any discussion of tribal sovereign immunity.

Mr. Chairman, I thank you and the Members of the Committee for your earnest consideration of my statement. As we work together to put behind us this callous threat, I look forward to again working with you towards building a more healthy relationship between our peoples.

Sac and Fox Nation

Route 2, Box 246 Stroud, OK 74079

Principal Chief DORA S. YOUNG
Second Chief MERLE BOYD
Secretary MARY F. McCORMICK
Treasurer CANDACE HOWARD
Committee Member EDWARD CHARLES SPOON

Testimony of Dora S. Young,

Principal Chief

of the Sac and Fox Nation

for the

Senate Committee on Indian Affairs

Hearing on

Civil Jurisdiction in Indian Country

September 24, 1996

Mr. Chairman, Vice-Chairman and Honorable Committee Members, on behalf of the Sac and Fox Nation, I thank you for the opportunity to submit our written comments for this very important hearing regarding civil jurisdiction in Indian Country. My esteemed colleagues in Indian Country have provided oral and written testimony to the Committee and the Sac and Fox Nation supports their efforts. I wish to present several key issues specific to the Sac and Fox Nation.

With the signing of the first treaties, the Sac and Fox Nation agreed to work, government to government, with the Federal government of the United States and "no other power". When we entered into relations with the United States, we did not forfeit our sovereignty. The movement in Congress to circumvent the Federal government trust obligations is in direct opposition to the government to government relationship between our government and yours. The Sac and Fox Nation has signed numerous treaties with the U.S. Government, beginning in 1804. As you are fully aware, treaty making authority was abolished in 1871 due to humanitarian attacks upon the treaty system and objections from the U.S. House of Representatives to the concentration of authority for dealing with the Indians in the hands of the Senate through its treaty-making power. Here we are again today, in the year nine thousand nine hundred and ninety six, over 120 years later, and we are still facing the same attacks on our sovereignty by Members of the Senate as well as Members of the House of Representatives. When will the powerful U.S. Government, respected throughout the world, uphold its promises to our people? I have cited excerpts from some of the numerous treaties of the Sac and Fox Nation as an example of what has been promised to us, but has not been upheld by the United States of America.

TREATY WITH THE SAUK AND FOXES, 1804

ARTICLE 1. "The United States receive the united Sac and Fox tribes into their friendship and protection, and the said tribes agree to consider themselves under the protection of the United States, and of no other power whatsoever".

ARTICLE 4. "The United States will never interrupt the said tribes in the possession of the lands which they rightfully claim, but will on the contrary protect them in the quiet enjoyment of the same against their own citizens and against all other white persons who may intrude upon them. And the said tribes do hereby engage that they will never sell their lands or any part thereof to any sovereign power, but the United States, nor to the citizens or subject of any other sovereign power, nor to the citizens of the United States."

ARTICLE 6. "If any citizen of the United States or other white person should form a settlement upon lands which are the property of the Sac and Fox tribes, upon complaint being made thereof to the superintendent or other person having charge of the affairs of Indians, such intruder shall forthwith be removed."

TREATY WITH THE SAUK, 1815.

ARTICLE 1. The undersigned chiefs and warriors, for themselves and that portion of the Sacs which they represent, do hereby assent to the treaty between the United States of America and the united tribes of Sacs and Foxes, which was concluded at St. Louis, on the third day of November, one thousand eight hundred and four: and they more-over promise to do all in their power to re-establish and enforce the same."

ARTICLE 3. "The United States, on their part, promise to allow the said Sacs of the Missouri river all the rights and privileges secured to them by the treaty of St. Louis beforementioned, and also, as soon as practicable, to furnish them with a just proportion of the annuities stipulated to paid by that treaty; provided they shall continue to comply with this and their former treaty."

TREATY WITH THE SAUK, 1816.

ARTICLE 1. "The Sacs of Rock river, and the adjacent country do hereby unconditionally assent to recognize, re-establish, and confirm the treaty between the United States of America and the United tribes of Sacs and Foxes, which was concluded at St. Louis, on the third day of November, one thousand eight hundred and four; as well as all other contracts and agreements, heretofore made between the Sac tribe or nation, and the United States".

TREATY WITH THE SAUK AND FOXES, 1822.

"WHEREAS, by the ninth articles of the Treaty made and entered into between the United States and the Sac and Fox Tribes of Indians, concluded and signed at Saint Louis, in the District of Louisiana, on the third day of November, one thousand eight hundred and four, it is stipulated, in order to put a stop to the abuses and impositions which are practiced upon the said Tribes by private traders"

TREATY WITH THE SAUK AND FOXES, 1824.

"To perpetuate peace and friendship between the United States and the Sock and Fox tribes or nations of Indians, and to remove all future cause of dissensions which may arise from undefined territorial boundaries, the President of the United States of America, by William Clark, Superintendent of Indian Affairs, and sole Commissioner specially appointed for that purpose, of the one part"

TREATY WITH THE SAUK AND FOXES, ETC., 1830.

ARTICLE XII. "It is agreed that nothing contained in the foregoing Articles shall be so construed as to affect any claim, or right in common, which has heretofore been held by any Tribes, parties to this Treaty, to any lands embraced in the cession herein made; but that the same shall be occupied and held by them as heretofore."

TREATY WITH THE SAUK AND FOXES, 1832.

ARTICLE IX. "In consideration of the premises, peace and friendship are declared, and shall be perpetually maintained between the United States and the whole confederated Sac and Fox nation, excepting from the latter the hostages before mentioned."

TREATY WITH THE SAUK AND FOX TRIBE, 1842.

ARTICLE X. "Provided always, That should the Senate disagree to and reject, alter or amend any portion or stipulation thereof, the same must be again submitted to the Sacs and Foxes, and assented to by them, before it shall be considered valid and obligatory upon them, and if they disagree to such alteration or amendment, the treaty shall be returned to the Senate for ratification or rejection, in the form in which it was signed."

As evidenced from the above treaties language, the Sac and Fox Nation has historically committed its people to a government to government relationship with the United States. Others may ask why our people entered into so many treaties. It is because what was agreed upon in each of the respective treaties was not upheld; therefore, more treaties were entered into in an

effort to rectify broken promises. We are prime examples of the abuses of power by the Federal government, and we became victims of unscrupulous actions on the part of Federal representatives of the United States time and time again.

Today, we see evidence of humanitarian attacks against Indian people occurring once again. Members of this Congress seek to limit our sovereign immunity, and our inherent power to govern our lands and ourselves. Congress no longer has the power to enter into treaties with Indian tribes; however, that has not prevented Members of Congress from asserting their Congressional authority to thwart the progress which has been made by Tribes within the last few decades. We see the tragedies of the past resurging in a renewed effort to annihilate Indian tribes and to steal away our place in this country as a government among the governments which make up this great nation. Nowhere in our treaty language did we assent to this type of treatment. If Congress is indeed attempting to rewrite Indian law, then Congress does so without the permission or participation of the Sac and Fox Nation and against all treaties and laws which have governed our Nation since we first entered into relations with the United States of America in 1804. When Congress is prepared to allow Tribal governments to dictate to state, federal and foreign governments and their citizens, then we will begin to consider ourselves on a level playing field.

Tribal Governments have operated as third world countries far too long; and now, in this era of Self-Governance and strengthened Self-Determination laws, when the Tribes finally have an opportunity to exercise their sovereignty, certain Members of Congress would seek to eliminate tribal sovereignty by mandating a formula for negotiation of appropriations without consultation, undermine Tribal jurisdiction authorities by granting powers to outside governments in civil matters, and by completely rewriting Federal-Indian law for the convienence of non-Indian insurgence into Indian country. Will the leaders of the U.S. Government ever become people of their word and honor their commitments to our Tribal governments?

In conclusion, I encourage this Committee to continue your efforts to protect the sovereign rights of Indian people and to ensure that Tribes are provided an opportunity to exercise their governmental rights. I appreciate the time your Committee has devoted to our people in advancing the Federal/Tribal relationship.

Thank you.

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Senate Committee
on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510-6450

Dear Sirs,

Throughout my 70+ years, I have always believed that a written and signed contract, by two parties, is binding.

My wife and I, as residents of Shelter Bay, have found that this may not be true. After retirement in 1988, we moved to this community, building our home on Tribal Lease land, but that was OK, because Shelter Bay Company had a Master Lease, with firm, up front, agreed upon escalations. Therefore as such lessees, we felt safe that we had planned well for our retirement.

If the Swinomish Tribe, through the advise of B.I.A. Portland, is allowed to disregard the Master Lease, we as sub lessees, would be unable to meet the added fees. Home sales in Shelter Bay are basically at a stand still due to the uncertainty of these proposed, unfair, escalations.

We are asking that you review the original Swinomish Tribal (B.I.A.) - Shelter Bay Company Lease, and conclude that the rules of a contract, cannot be changed midstream.

Sincerely,

Robert Boyle
Jessie Boyle

Robert and Jessie Boyle
911 Bannock Pl.
LaConner, WA 98257

Senate Committee on Indian Affairs
838 Hart Senate Office Building,
Washington, D. C. 20510-6450

September 20, 1996

Ladies and Gentlemen,

If it pleases the Committee, the following statement is submitted with respect to significant irregularities and conflict of interest in the management of land leases on Indian Reservations by the Bureau of Indian Affairs. The instances to be noted are with respect to the lease of lots and tracts of land for long term occupancy of home owners (Indian and non-Indian) on Tulalip and Swinomish Indian Reservations. The writer of this statement, John S. Perrin, Lt Col, USMC Rtd is drawing on over 20 years of experience with the lease of land through the BIA.

As the holder of a lease on a lot on Hermosa Point, Tulalip Reservation in the mid 70s (inherited from my Father, Ray S Perrin, Capt. USArmy Rtd), I discovered that in dealing with the BIA directly in contesting unfair, unjustified accelerated lease rates, the BIA dismissed such complaints out of hand with no explanation. This inspite of the fact the complaints were supported by data from qualified Appraisers and the lease itself called for an appeal process to resolve any impasse through arbitration. In the years since I accepted the loss and dropped the lease as unreasonable under BIA management, lease rates on Hermosa Point have continued to rise arbitrarily, inconsistent with surrounding comparables for raw land. In effect, this practice by the BIA facilitates a"taking" of the value of improvements made by lease holders to a point where home has no asset value left. Many of the older, retired, long term lease holders are being left in desperate straits, unable to sell their retirement home or pay the lease.

In a newer development of lease lots for homes on the Swinhomish Reservtion, the acceleration of lease rates has been even more flagrant in a shorter period of time. Here the homeowners have banded together in in an effort to fight off what is an unconscionable taking of the value of their personal property (houses & land improvements) in the West Shore Tenants Assn. This effort to date has cost upwards of $200,000 in legal fees, with the alternative of having to lose everything and walk away. One of the long standing practices of the BIA to implement this "taking" is to use their own appraisal standards for evaluating raw land. On being challenged, their answer is there are no satisfactory comparables so they fabricate their own which are then used to contradict qualified appraisers. In sum, going through arbitration with the BIA over a conflict in rates rarely leads to a reasonable resolution for the home owner. The following is a case in point.

The Shelter Bay Community on the Swinhomish Reservation is the latest target of the BIA for the "taking" of personal property. In this case the BIA has become so embolden with their success in undermining the viability of leasing land, that they have now taken on the Developer of Shelter Bay tract with over 800 lots. Unlike the foregoing projects where leases are made directly with lot lessees, here the Developer, Osberg (Shelter Bay Company) negotiated a Master Lease sanctioned by both the Department of Interior and the BIA to develop an idealized, planned community in an area dominated by a large acreage of tide flats. A costly undertaking with a long term struggle to sublet sufficient lots to make the project break-even as an investment.

Now that Shelter Bay Community is a thriving community making a significant economic impact on the nearby City of La Conner and Skagit County, the BIA has already taken action to break the Master lease with demands for rate increases that Osberg can't meet. This was done with the BIA's proven tactic of setting their own criteria for appraisal inconsistent with the basis for increases in the Master Lease. In arbitration, the findings as agreed to by Osberg would have allowed a significant increase beyond that provided for in the Master Lease which he could live with. However, as this did not satisfy the BIA's objective to break the Master lease to get at the subleases individually, the findings were summarily turned down. Osberg has appealed this action months ago. In the mean time, the uncertainty now existing beclouds title to property, depreciates values, and discourages sales.

A fair and equitable lease has value in the market place as long it is priced competitively with other approaches to securing adequate housing. In the West Shore area cited above, over half the lots for lease have never been occupied and those that are were developed before the acceleration of lease rates began. As with all problem areas cited, the least critical observation one could make at this point is that the BIA is guilty of gross mismanagement and is long overdue for being held accountable for its actions.

Respectfully submitted,

John S Perrin

PS In all my years in the Marines and in multiple careers since 1943, I have yet to encounter an organization as counter productive in the exercise of its power as the BIA. Its demise would be a blessing to all Americans.

Bob Manzke
-Exec. Secretary-Treasurer

PARR-
Dedicated to the goal of preserving our natural resources, protecting rights of all Americans equally.

P.O. Box 27098
Milwaukee, WI 53227-0098
Phone or Fax (414)-543-4181

September 13, 1996

Senate Committee on Indian Affairs
838 Hart Senate Office Bldg.
Washington D.C. 20510-6450

Ladies & Gentlemen:

Protect American's Rights & Resources (PARR) strongly urges you to factor the rights of non-Indians into the equation during the committe's upcoming hearings on Indian affairs. Since the early 1980's the rights of non-Indians has become non-existent when it interferes with tribal agenda. In Wisconsin the non-Indian has become a second class citizen. Through litigation one tribe (the Chippewa) has gained control of the fish and game in the northern one-third of the state. The Indians take what they want and the non-Indian gets what's left, if anything. The reduced bag limits for non-Indian anglers has generated tremendous havoc with the portion of Wisconsin's tourist industry that depends on the fisheries. Another tribe, the Menominee has litigation pending in federal court which will give them similar control of another one-third of the state.

Wisconsin and Minnesota along with many other states are burdened with increasing litigation regarding management of the resources and property rights. The myth of Indian sovereignty is a powerful tool being used in an attempt to install costly regulations of air and water, threatening communities and industries.

The concept of sovereign immunity places American Indians apart from the rest of society. It puts limitations on the freedoms of other citizens; raises the prospect of further confrontations regarding interpretation of past treaties; finally, it creates a climate of antagonism toward Indians, isolating them even further. Many of the treaties of the 1800s contained the phrase, "they are to be integrated into the mainstream of society as soon as possible."

Finally on the myth of tribal sovereignty:

1...The U.S. Constitution recognizes only the federal and state governments as sovereign entities.
2...That the U.S. Supreme Court (Marshall, Duro, Oliphant) reaffirm the Constitution on this matter.
3...That your own act of Congress (1871 Appropriations Act) refutes tribal sovereignty.
4...That your own act of Congress (Indian Claims Commission Act) specifically stated that Indian tribes could no longer lay claim to the natural resources of this country, i.e. treaty rights lawsuits against states.
5...That your own act of Congress (The 1934 Indian Reorganization Act) defined Indian tribal governments as nothing more than business corporations. Can bring one to only one conclusion, tribal sovereignty is nothing more than a myth.

Yours Truly,
Bob Manzke
Bob Manzke Exec Secretary.

Citizens for Responsible Zoning and Landowner Rights, Inc.
CRZLR, Inc.
P.O. Box 16 Maiden Rock WI 54750 Tel/FAX 715-448-3213

September 7, 1996

Senate Committee on Indian Affairs
838 Hart Senate Office Bldg.
Washington D.C. 20510-6450

Ladies and Gentlemen:

Americans pledge we are, "...one nation under God, indivisible, with liberty and justice for all."

The concept of 'sovereign immunity' denies this ideal and should be eliminated. It gives members of the American Indian community a special status not provided for any other ethnic group

Non-Indians involved in Indian-related disputes should have access to state or federal courts. The authority of Indian-controlled courts over non-Indians has resulted in a loss of freedom and due process for these people.

Polish, Chinese, Italian, Jewish, Mexican and other groups are also proud of their native cultures; they may even choose to live together in communities or enclaves, yet they do not have, nor do they expect 'sovereign immunity,' nor do they administer their own justice systems.

The States of Wisconsin and Minnesota, along with others, are facing increasing litigation regarding resource management and property rights. Communities and industries are threatened with costly regulations of air and water prompted by Indian claims of sovereignty.

The country has embraced a policy of integration which should include Indians. Laws have been written to insure people of different races, or even those with physical or mental limitations, are to be given equal treatment.

The concept of sovereign immunity places American Indians apart from the rest of society; it restricts their integration; puts limitations on the freedoms of other citizens; raises the prospect of further confrontations regarding interpretation of past treaties; finally, it creates a climate of antagonism toward Indians, isolating them even further.

Very truly

Marilyn F. Hayman, President

Board of Directors: Jack E. Brown, Vernon Martin, William Holst III, Francis H. Ogden, Joe Wieser, Dr. Ernest Larson, Frederick Richter

Jim Hamilton
HC 59 Box 13
Decker, MT 59025

Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510-8450

Dear Committee Members:

I hope that what I write here may be presented at the congressional hearing September 24, 1996. Watty Taylor and I have written to members of the Committee in the past regarding the Crow Boundary Settlement Act of 1994. Under this act (Public Law 103-444) the privately owned ranch lands of nine Non-Indians were placed within the boundaries of the Crow Reservation. This was accomplished by moving the 104 year old eastern boundary of the Crow Reservation. This totally unnecessary boundary move constituted a serious breach of property rights. For two years now, we have attempted to inform members of Congress and this Committee of the seriousness of this boundary move and why we object to being placed within the boundaries of the Crow Reservation. At the present time we are seeing the very things we have feared actually happening.

The Crow Indians, under the guise of Tribal Sovereignty are attempting to impose taxes on Non-Indian landowners and businessmen on the Reservation. At least three lawsuits are presently under way regarding this. The Crows have actually filed tax liens against businesses, thereby clouding land titles and interfering with peoples credit and borrowing ability. Non-Indians have no representation in the Crow Government or standing in their so-called court system. Does this not make taxation without representation and did the United States not fight a war with England over this very issue? How can there possibly be a "Sovereign nation" within the boundaries of these United States? Montana taxpayers and United States Citizens are being forced to defend themselves at considerable expense, in these Tribal Courts. This is absolutely totally 100% wrong. What has happened to the rights of the Non-Indian citizen?

Law enforcement on the Crow Reservation is practically non-existent. Our county sheriffs' department has no authority over an Indian on the reservation and will not come on the reservation to investigate a crime. We find it difficult to get the Tribal Police to pursue investigations or to prosecute an Indian committing a crime against a Non-Indian on the Reservation. The result is a total lack of law enforcement which results in arguments and frustration and will ultimately result in violence and bloodshed.

The Crow Reservation is approximately 50% owned by non-Indians. These lands were

obtained legally thru private or BIA sponsored sales. No covenants or restrictions exist to grant the Crows jurisdiction on these lands. In our particular case, we suddenly, by passage of the Crow Boundary Act of 1994 found our lands and our rights then placed within the supposed jurisdiction of the Crow Tribe.

There is no need for situations such as this to exist in the United States of America. All the races in this country must co-exist peacefully, but they can not while things like this are allowed to continue. These and similar problems are occurring on all the Indian Reservations where Non-Indians own land or businesses.

Thank you,

Jim Hamilton

Jim Hamilton

11 W. Aloha Apt. 302
Seattle WA 98119
September 1, 1996

Senate Committee on Indian Affairs
SH 838 HSOB
Washington, D.C. 20510-6450

1996 SEP -9 AM 12:25

Subj: Hearing on Sovereign Immunity of Swinomish Tribe, Sept. 24, 1996

Dear Sirs:

We respectfully request your waiving the right of sovereign immunity to the Swinomish Tribe regarding the subject matter.

We have leased lot 26 of Br. Jack Waterfront Tracts on the Swinomish reservation since 1960. We have experienced the increase of lease rates for our fifty foot lot beyond what the market will support, the value of the house is literally "given" to the tribal landowners. The house is worth ZERO and cannot be used to borrow against or even given away.

The recent sale of four houses ranged from $2000-$6000 with sellers taking a loss of $15,000 to $50,000.

The rate of assessment for the utilities has yet to be cleared by the Tribal Court which further exacerbates the chance of selling the improvement.

We, together with other lessees, have diligently tried to reach an amicable solution to this dilemma. We are proceeding through legal means to meet this goal. In the absence of

the federal government's waiving the Tribe's "sovereign immunity" we fear that a just solution to our problem cannot be reached.

Sincerely yours,
William B. Gillespie
Eileen Gillespie
Thomasina Clarke

c.c. Senator Slade Gorton

PO Box 1343
LaConner, WA 98257
August 27, 1996

Senate Committe On Indian Afairs
SH-838 HSOB
Washington, DC 20510-6450

Dear Senator:

Never have I read in any history book that rights and protections given to a US citizens in my county (Skagit) are not available to non-tribal Indians on a reservation. Never have I been told that protections given to US citizens in my state (Washington) are not available to non-tribal Indians on a reservation. No one told me that on an Indian reservation the only Federal protection a non-tribal US citizen could access is the Federal court system and then only if they had enough money to get through the Tribal court system.

The Congress of the United States has allowed Indian Tribes to basically declare themselves sovereign nations WITHIN THE BOUNDARIES OF THE UNITED STATES. If the Congress is going to continue to allow this, then I demand that citizens be **warned** that they are entering a section of land that has different rules, different rights, and different protections for US citizens entering its borders.

When driving over the border to Canada or Mexico, the border patrol signifies to a citizen that they are leaving the protection of the laws of the United States. I want signs on roads leading into reservations notifying people that they no longer carry with them the protections of the county government, the state government, and seldom the Federal government. The United States government insists that warning signs be placed on cigarettes, beer,and medications to protect its citizens. Surely, the basic fundamental rights of its citizens are just as important?

The early colonists hated and rebelled against "Taxation without Representation" and yet Tribal governments are allowed to pass legislation that affect non-tribal members WITHOUT REPRESENTATION!!!!! The Courts have allowed Tribes to declare they have **sovereign immunity.** The Tribes now have the potential to have governments similar to those our forefathers fought **against.**

If Tribes are to be sovereign and have sovereign immunity, then it is time the Tribes stand in line with Mexico, Bosnia, and Haiti for foreign aid funds. It is time to quit paying "quilt" money to the tribes. It is time to oversite the Federal money that is given.

I know that almost every governmental agency I have contacted is "scared to death" to get involved in protecting a non-tribal citizen who lives on a reservation because of the **"sovereignty"** issue. It is this fear that gives the Tribal governments their unbridled power. It is the lack of oversite of Federal dollars that gives the Tribes their arrogance about spending the money any

way they want. It is this arrogance that causes them to spend Federal dollars in a discriminating manner based on race. The Swinomish Tribe has just charged non-tribal members for a sewer and water system that benefits Tribal landowners. No Tribal landowners have been billed. I have no vote or representative on the Tribal Senate who passed the discriminating ordinance. I have no legal standing.

The BIA increased the rents on leased Trust land by 400-500%. The market could not sustain the new rents. The value of my home along with 100 other homes has been "taken" from me. An attempted to solve this unfair action by accessing the administrative appeals process of the BIA has been ongoing for four years! I have written you before. NOTHING HAS CHANGED. People from agencies in Washington DC come to see and hear about the problem. They then disappear back into the "black hole" somewhere in Washington D.C. Why is everyone so afraid of the Tribes?

I HAVE ONLY YOU, THE CONGRESS, TO PROTECT ME. Please do something. We should have one nation with one set of laws. Stop the "quilt trip" and embrace the "fairness" issue.

Why would Congress allow the Tribes to have sovereign immunity and deny it to other governmental agencies? It makes no sense! I thought I lived in the **United** States of America where ALL people (tribal and non-tribal) were treated with equality and justice for all.

Yes, I can walk away from many, many years of mortgage payments and investment and be thankful I don't live in Bosnia where my **life as well as my home** would be at risk. But I live in America. I do NOT expect my government to abandon me because I am a non-tribal member living on a reservation. We are a diverse family in the United States and everyone is valued and that **includes me**.

Sincerely,

Kathleen Whalley

Box 363
Hardin, MT 59034

September 19, 1996

Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, DC 20510

We live on a ranch which is located in Southeastern Montana on the Crow Indian Reservation. I am writing this letter because of my heartfelt concern regarding the future of our lives and our livelihood.

As non-indians who own land purchased years ago from indians who wanted to sell the land, we seem to have lost our constitutional rights. We are in danger of being taxed by the Crow tribe. We have NO representation in their "sovereign" government. We are United States citizens who abide by the laws of our country and the state of Montana. The Crow tribe makes up its own laws and has its own court system where we are unable to vote, unable to be jurors, unable to seek appeal, unable to take part in any way.

In our current situation, if we exercise our right to free speech and speak out against anything the tribe is doing, we run the risk of retribution. We lease some land from the tribe and if we say or do something that they disagree with or don't like, they seem to have the authority to say, "Your leases are cancelled." End of discussion. We have NO way of protecting ourselves against this retaliation, other than remaining silent and living in oppression, which isn't right.

We have no law-enforcement as non-indians on the reservation. The Sheriff's department

doesn't want to deal with us because we are on the reservation.....the Crow police don't want to deal with us because we are non-indian. What are we supposed to do, besides try to protect ourselves?

Private property rights enter into this also. We own property on the reservation but the indians are allowed to hunt and travel year around on OUR land because it's located on the reservation. We've had numerous cattle shot for sport, fences cut, and trash and litter left all over our place. It's just incredible to me how tribal members seem to be exempt from all the rules and laws that we abide by as United States citizens.

With our children (a 7 year old and twins 4 years old), we represent the 4th and 5th generations on this ranch. We are DEEPLY concerned about our future and our children's future on this ranch if things are allowed to continue as they are. We are not asking for preferential treatment, we just want FAIR treatment, as guaranteed us by our constitution.

I hope you will be able to address these issues and if not resolve them, determine a way to gradually phase out the Reservations. Thank you for your consideration and taking time to read this letter.

Sincerely,

George J. Hammond, Jr. and Delora Hammond and

Children

To Senate Committee on Indian Affairs;

I am writing in regard to your hearings September 24th. I am a descendant of the Crow Indian Tribe. I am writing to express my concerns over law and order on the Indian Reservations. We currently have none. We recently had several vehicles stolen from our ranch. The local Sheriff and B.I.A. policeman came to investigate. Three suspects were caught red-handed in the stolen vehicles. The B.I.A. officer said he would take them to tribal police headquarters, but it probably wouldn't do any good. I asked why not and he replied that the tribal judge would probably turn them loose. That is exactly what happened.

How can this happen, you ask? One reason is that the tribal judges have no law backgrounds, and are appointed to their offices because they agreed with the current administrations policies.

I strongly believe that we are all citizens of the United States of America and should be under the same jurisdiction. There is no such thing as a sovereign nation within a nation. We need to have one law and order system that is recognized and upheld by the Constitution of the United states of America.

Sincerely,

John Ala Stevens (?)

Sept - 12 - 1996

Senate Committee on Indian Affairs
838 Hart senate Office Building
Washington DC. 20510-8450

Dear members of the Senate Committee

This letter is in response to the matter of sovereign immunity for Indian Reservations. My family has had a spot on the west bank of the Colorado River Indian Tribes near Blythe Ca. for around seven years. In that time the yearly lease has more the tripled and we have no recouse. We are systematically being evicted through fee increases. We cannot appeal to the courts because of the sovereign immunity issue.

The C.R.I.T. land is now under ownership dispute in the Supreme Court, and the Special Master has clearly ruled that the land on which we reside is not Indian Reservation. Despite the ruling C.R.I.T. continues →

to send us eviction notices, and further refuses to budge on issues of long term leases and standard permit increases.

The sovereign immunity has bound our hands in that we can not access the local, State and Federal courts as private citizens. It is as if we reside in a foreign country on U.S. soil.

Please abolish the sovereign immunity for Indian reservations.

Respectfully submitted;

John Winterstellar

SEP-20-'96 FRI 09:19 ID:WHATCOM CO B&C TEL NO: (206)738-2525 #698 P01

Post-it® Fax Note 7672 | No. of Pages 1 | Today's Date 9/20 | Time 9:11 am

To NINA | From MICHAEL KNAPP, DIRECTOR

Company DIRECTOR SENATE COMMITTEE INDIAN AFFAIRS | Company WHATCOM COUNTY - PLN & DEV SVCS

Location 838 HART OFFICE BLD WASHINGTON DC | Location | Dept. Charge

Fax # 202-224-9393 | Telephone # | Fax # 360-738-2525 | Telephone # 360-676-6907

Comments | Original Disposition: ☐ Destroy ☐ Return ☐ Call for pickup

WHATCOM COUNTY
PLANNING AND
DEVELOPMENT SERVICES
5280 Northwest Drive
Bellingham, WA 98226

MICHAEL T. KNAPP, A.I.C.P.
Director

Director Senate Committee on Indian Affairs
838 Hart Office Building
Washington, D.C. 20510-6424
Attention: Nina

Subject: Congressional Hearing/Senate Committee on Indian Affairs

Dear Committee Members:

In so far as Whatcom County issues building permits on fee lands owned by Lummi Indians inside the boundaries of the Lummi Indian Nation and the Tribe does not recognize Whatcom County jurisdiction regarding County Zoning and enforcement of County Codes, management of Indian owned fee lands in contrast to Trust Lands is difficult if not impossible. By failing to recognize our jurisdiction, the situation creates potential liability for Whatcom County in that we may be left to correct health and safety problems on properties received by tribal or non-tribal members through tax foreclosures and/or later sales to non-Indians.

The Lummi Reservation is an open reservation. The roads and easements are maintained by Whatcom County. In so far as the tribe manages the reservation sewer system, they must provide sewer availability slips before construction. During this process, the Tribe redirects fee land owners to their own tribal planning department for site and planning approval. This situation creates confusion and often a burden on our tax assessor who uses Whatcom County Planning approvals to notify all landowners of their new tax assessments.

While the solution to these issues is not easily resolved, it is important to consider methods and solutions that will enable Indian Nations and Counties to jointly agree on ways to insure life-safety compliance.

Sincerely,

Michael Knapp

Michael Knapp, Director

September 7, 1996
4098 Sucia Drive
Ferndale, Wa.
98248
(360) 384-3289

To the Members of the Senate Committee on Indian Affairs.
838 Hart Senate Office Building, Washington, D.C. 20510-6450

1996 SEP 12 Aug 34

NQN/S.1.

Dear Senators:

1. Sovereign Immunity should be removed from Indian Tribes.
   A. No one else has it.
   B. Used as "legal Blackmail" to get what they want.
   C. This is not sovereign power, Indians have:
      1. The right to completely control their people.
      2. U.S. Government is still the superior Sovereign power.
   D. Sovereign Immunity, Blacks Law Dictionary:
      1. "a judicial doctrine which precludes bringing suit against the government without it's consent.
      2. Founded on ancient principle "the King can do no wrong".

2. Constitution - war for Independence fought to insure rights:
   A. Redress of grievances - or harm done.
   B. Citizens or government that do illegal things can be sued.
   C. No Citizen is more superior to another.

3. Tribal governments need to held responsible for their actions:
   A. Drilled illegal well within 100' from our community well, which put the health and safety of over 550 homes in jeopardy with only 7 days water left.
   B. With such aggressive pumping may have damaged the aquifer.
   C. Threaten to close county roads to our homes, on T.V. and in paper.
   D. Threaten to sue if we get water brought in.
   E. Federal Court Consent Decree prohibits discrimination by race, yet non-Indians have been denied water provided to the Lummi Public Utility District by the City of Bellingham, some even unable to hook up to sewer.
   F. Utility tax on essential services, without being consensual.

I have brought to your attention some of the ways that sovereign immunity has affected me. The special rights and privileges afforded one race and not all citizens can not be allowed to continue, nor is it necessary to continue for the tribes in order to maintain self-government over their own tribal members through the election process. They also have voting rights for all County, State, and Federal government offices that I have.

Sincerely yours,

Wesley Bergman

Wesley V Bergman

Shirley Bergman

Shirley Bergman

September 11, 1996

1996 SEP 16 AM 10:02

Senate Committee on Indian Affairs,
838 Hart Senate Office Bldg.,
Washington, D.C. 20510-6450

NQN/Sov. Immun

Dear Senators:

It is my understanding that there is to be a hearing beore your committee on September 24th regarding Indian Tribal Sovereignty.

I am a Fee simple land owner living on the Lummi Indian Reservation, Whatcom County Washington. In the past year my rights have been violated by the Lummi Indians with a serious threat of taking our water supply (by drilling an illegal well without permit near ours and then overpumping) and then threatening to block county roads to cut-off the accessibility to my property.

I think this sovereignty should end for the following reasons:

1. Accountibility for all individuals for their actions through the legal process.

2. Eliminate discrimination - one nation one equal citizenship for all.

3. End the contempt for our laws and Judges rulings.

4. Stopping illegal acts - then hiding behind this sovereignty.

I urge you to vote to end this sovereignty - enough is enough.

Very truly yours,

Richard W. Fisher,
4079 Salt Spring Dr.,
Ferndale, Washington 98248

4445 Hannaby Way
Ferndale, WA 98248
(360) 354-5801

NON|SI

August 11, 1996

To: Members of the Senate Indian Affairs Committee

I have written many times regarding the unfair treatment of those of us who live on fee land within the boundaries of the Lummi Indian Reservation. I again ask you to consider the "sovereign immunity" status of the tribe.

They do what they please, mostly illegal acts,--sue us at a drop of the hat and we have no recourse to make them obey the law.

We purchased our land and made our homes here, now they have illegally drilled into our well stealing our water, taxing us for utilities with no authority., refuse to let us bring water from elsewhere by threatening to sue, and continually harassing the non-Indian residents of Sandy Point.

They were ordered by the County Sheriff department to cease drilling when they started to dig the well on land that no longer belongs to the tribe. No permit was gotten from the County, and no regulation was followed. They purchased the lot in Sandy Point specifically to drill into our well. The County can't do a thing about it even when they break the rules.

They have threatened to close our roads, and as they told us at a meeting, want to take back their land because it was a mistake to have sold it in the first place, they said. You need to know that the Lummi tribe now consists of mostly Indians who have come from Canada and joined the tribe. I have been told that there probably is only a handful of original Lummi's, who really are very nice people, and who are no doubt ashamed of what their leaders are doing to the community.

Our golf course is badly in need of water, and the greens are being kept alive solely by the graciousness of a member who gets water outside the reservation and puts a little on each day during the hot weather. These greens are very costly to replace and the Lummi's know that their destructive actions are hurting us.

I am enclosing copies of letters I got from Senator Patty Murray in response to ones I had written to her. As you can see I got a big zero there.

I ask that you take all this into consideration as you vote. We desperately need help.

Sincerely M Herman

NAIGIS1

August 18, 1996

To Members of the Senate Indian Affairs Committee:

The Indians tribes are free from any form of accountability for their actions and are immune from lawsuits or legal redress of grievances or harm by the "right of Sovereign immunity". A right no one else has, not even the Federal government or the President. So no matter what they do or say, fail to do when promising or contracting with the County and non-Indian citizens, no one can legally take action.

The "right" needs to be removed and let all citizens and governments be equal under the law. Not one "race" with power to hold themselves exempt from being accountable for what they do, but must be subject to all laws the same as every other citizen and the rest of our State and Local Governments are.

One "super race" of people enjoys all the power and freedom from being held accountable for anything they do or say. With this "power" they hold local, county and state governments at bay to do their bidding with the continued threat of "if you don't, we will sue". This has caused these governmental bodies from enforcing laws and regulations that all other citizens must obey and comply with, because there is no budget that can handle the great cost of fighting a lawsuit. So this "super race" continues to call the shots and demand more and more rights, at the expense of other citizens. This is strictly prohibited by any other race.

When our Country was founded, it resulted in given us our Constitution and Bill of Rights, the ability and rights to have a redress of grievances or when harm is done. Where we have both State Courts and Federal Courts to address these issues, to insure the right and privilege of "all" it's citizens, this is true due process. Sovereign Immunity has nothing to do with interfering with Tribe's self-government, it only makes the Tribe's and their tribal-members responsible for their actions against non-Indians citizens and holds them to the same standards as the rest of the citizens and governments of our "one Nation".

Tribal governments need to be held responsible for their actions:

A. Drilled illegal well within 100' from our well, which put the health and safety of over 550 homes in jeopardy with only 7 days water left.
B. With such aggressive pumping may have damaged the aquifer.
C. Threaten to close county roads to our homes, on T.V. and in paper.
D. Threaten to sue if we get water brought in.
E. Federal Court Consent Decree prohibits discrimination by race, yet non-Indians have been denied water provided to the Lummi Public Utility District by the City of Bellingham.
F. Utility tax on essential services, without being consentual.

In closing it is Congress's responsibility to protect equally the rights and due process of all it's Citizens.

Sincerely yours,

Lyle Smith
Shirley Smith

Note: We are property owners within the exterior boundaries of the Lummi Reservation.

Lyle and Shirley Smith
4265 Salt Spring, Ferndale Wa. 98248

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD. • BELLINGHAM, WASHINGTON 98226-9298 • (206) 734-8180
DEPARTMENT 1990 EXT. ____
Rabs, Johnsen, Garrett & Stuen

RESOLUTION NO. 90-89 OF THE LUMMI INDIAN BUSINESS COUNCIL

WHEREAS, the Lummi Indian Business Council is the duly constituted governing body of the Lummi Indian Reservation by the authority of the Constitution and By-Laws of the Lummi Tribe of the Lummi Reservation, Washington, as approved on April 10, 1970, by the Assistant Commissioner of Indian Affairs, and,

WHEREAS, the Lummi Indian Business Council is responsible for maintaining a strong and stable government for the purposes of protecting and enhancing the general well-being of Lummi tribal members as well as other Reservation residents, businesses, workers, and visitors; and,

WHEREAS, the Lummi Indian Business Council finds that it has insufficient funds to furnish the needed and desired services to the Lummi tribal members and the Reservation community, in areas including, but not limited to youth, elders, cemetery, recreation and social services, repair and maintenance of tribal facilities and equipment, jurisdictional disputes, law and order, community economic development, and many other areas; and,

WHEREAS, the Lummi Indian Business Council has previously proposed a tax on the business of providing utility services within the Reservation and has held public hearings on this issue, and, after fully and freely discussing the issue, has found that the tax revenues are necessary to maintain a strong tribal government, and has also found that the benefits to the Reservation community from these tax revenues are greater than the burdens imposed on the individuals required to pay this tax.

NOW THEREFORE BE IT RESOLVED, that the following Utility Business Activity Tax Ordinance is adopted by the Lummi Indian Business Council and shall be implemented as quickly and fairly as possible:

"UTILITY BUSINESS ACTIVITY TAX ORDINANCE

"010 Legislative Intent and Findings

"This ordinance is enacted pursuant to the inherent sovereign powers of the Lummi Indian Tribe and such other powers as

SAMUEL M. CAGEY Chairman
WILLIAM E. JONES Vice Chairman | VIRGIL L. WILLIAMS Secretary | RICHARD P. JEFFERSON Treasurer | HENRY M. CAGEY Councilman | JAMES R. HILLAIRE Councilman
GERALD I. JAMES Councilman | ERNEST J. JEFFERSON Councilman | MERLE B. JEFFERSON Councilman | VERN JOHNSON Jr. Councilman | LARRY G. KINLEY Councilman

have been delegated to, vested in or confirmed in the Tribe through the actions of the federal government. Among other sources, it is based upon the federal policy of self-determination for Indian tribes and the government-to-government relationship between the tribes and the federal government.

"The Lummi Indian Business Council finds that it is necessary to raise revenues for the provision of essential governmental services in order to fulfill its obligations to the people of the Lummi Tribe and the Lummi Reservation. Those obligations and services include, but are not limited to the provision, in whole or in part, of public health and safety services such as police, fisheries enforcement, fire protection, environmental health concerns, sewage collection, treatment and disposal, provision of safe drinking water, litter and garbage control and disposal, environmental protection, maintenance of a court system for the resolution of civil disputes and criminal actions, and traffic safety and road improvement and maintenance services.

"In addition, the Tribe provides social welfare services such as child welfare services, a broad range of educational programs from pre-school through college level, economic aid to the impoverished or disadvantaged, mental health and emotional counseling, employment training and job placement services, housing programs, cemetery benefits and other social services. The Tribe also provides recreational amenities and facilities such as athletic fields, a gymnasium, meeting rooms, and parks as well as supporting cultural and religious events and activities.

have been delegated to, vested in or confirmed in the Tribe through the actions of the federal government. Among other sources, it is based upon the federal policy of self-determination for Indian tribes and the government-to-government relationship between the tribes and the federal government.

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bear a substantial portion of the costs of tribal government, given the economic benefits of the treaty fishery, but also desires to distribute the tax burden more equitably among those benefiting. The Lummi Indian Business Council therefore enacts the following tax on the business activity of utility providers.

"020 Definitions

"Wherever in this ordinance, unless a different meaning is clearly intended by the context:

A. "Buyer" means, without limiting the scope hereof, every person who receives goods or services from a seller in exchange for a promise to deliver to the seller, or for the actual delivery to the seller, of money or other goods or services of value to the seller;

B. "Cash Discount" means a deduction from the invoice price of goods or charge for services which is allowed if the bill is paid on or before a specified date;

C. "Gross Receipts" means the full amount billed by a utility for the retail sale of goods or services.

D. "Person" means any individual, receiver, assignee, Trustee in bankruptcy, trust, estate, firm, co-partnership, joint venture, club company, joint stock company, business trust, tribal, state, or other local government or any agency thereof, private or municipal corporation, association, society or any group of individuals acting as a unit, whether mutual, cooperative, fraternal, non-profit or otherwise;

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E. "Retail Sale" means every sale of services or tangible personal property to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof:

(1) the provision of telephone, telegraph, or other communication services;

(2) the provision of electricity, natural gas, or other energy sources;

(3) the provision of water or water distribution or sewer collection and/or disposal services;

(4) the provision of refuse collection and/or disposal services;

(5) the provision of cable or community antennae television signal distribution services;

(6) the provision of transportation services;

(7) the sale, lease, or rental of any personal property by a utility to a buyer;

F. "Sale" means any provision of services or the transfer of ownership of, title to, or possession of property for a valuable consideration and includes any activity classified as a "retail sale". It includes renting or leasing, conditional sales contracts, leases with option to purchase, and any contract under which possession of the property is given to the purchaser but title is retained by the vendor as security for the payment of the purchase price;

G. "Seller" means every person making retail sales to a

cles or boats;

(7) the conveyance of persons or property on a regularly scheduled basis; including those transportation systems operating primarily outside the Reservation but regularly loading or unloading passengers or cargo at a fixed terminal or station within or appurtenant to the Reservation; but excluding regular mail or parcel delivery services.

J. "Waste" means garbage, trash, rubbish, or other material discarded as worthless or not economically viable for further use. The term does not include material collected primarily for recycling or salvage.

"030 Imposition of Gross Receipts Tax

A. There is imposed on and there shall be collected from each utility doing business within the Lummi Reservation a business privilege tax equal to 5% (five per cent) of the utility's gross receipts generated from retail sales within the reservation.

B. The tax imposed under this ordinance shall apply to successive retail sales of the same property or services.

"040 Timing of Sales

"For the purposes of this ordinance, a sale is deemed to have occurred at the time buyers are billed for the seller's actual or promised delivery of goods or services to the buyer.

"050 Payment of Taxes and Reporting

"All persons required to pay the tax imposed herein shall file within thirty days following the end of each calendar quarter a statement of that person's retail sales made within the Reservation during that quarter. Such forms shall be filed following the end of each calendar quarter even if no taxes imposed under this ordinance are due. This statement shall be made on the proper form as made available by the tribe and signed by the person responsible to conduct the utility's official business attesting to the accuracy of the statement. Full payment of any taxes due under this ordinance must accompany the statement and be received by the close of business of the last working day of the month following the end of the quarter for which the taxes were imposed.

"060 Cost of Collection Actions

"In any action brought to enforce the provisions of this ordinance or to collect any sums due, the tribe shall be entitled to its actual costs and reasonable attorney fees incurred in bringing the action. Any judgment entered shall bear interest at the rate of 12% (twelve per cent) per year until paid.

"070 Interest on Late Payments

"If any sum payable under this ordinance is not paid to the tribe by the date specified, there shall be added to the unpaid sum interest at the rate of 12% (twelve per cent) per year.

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"070 Interest on Late Payments

"If any sum payable under this ordinance is not paid to the tribe by the date specified, there shall be added to the unpaid sum interest at the rate of 12% (twelve per cent) per year.

"080 Effective Dates

"This ordinance shall become effective on August 1, 1990, and shall expire at midnight July 31, 1991, unless, after review by the council prior to that date, the ordinance is extended for a period to be specified by subsequent action of the council.

"090 Severability

"If any paragraph, section, or provision of this ordinance shall be declared invalid for any reason, that paragraph, section, or provision shall be severed from the remainder of this ordinance and the validity of the remainder of this ordinance shall not be affected by such decision.

"100 Codification

"The provisions of this ordinance are deemed to be a part of the Tribal Revenue Code and shall be renumbered so as to be consistent with that Code.", and;

BE IT FURTHER RESOLVED, that the need to continue this tax shall be reviewed again before July 31, 1991, at which time it shall expire if not re-affirmed by the Council; and,

BE IT FURTHER RESOLVED, that this ordinance shall be immediately submitted to the Bureau of Indian Affairs for approval as required by the tribal constitution, but that the ordinance shall take effect and be enforceable by the tribe on the effective date specified herein regardless of the actual date of federal approval of the ordinance; and

BE IT FURTHER RESOLVED, that the Chairman (or Vice-Chairman in his absence) is hereby authorized and directed to execute this resolution and any documents connected herewith, and the Secretary (or recording secretary in his absence) is authorized and directed to sign the following certification.

LUMMI INDIAN NATION

Samuel M. Cagey, Chairman
Lummi Indian Business Council

C E R T I F I C A T I O N

As Secretary of the Lummi Indian Business Council, I hereby certify that the above resolution no. 90-89 was adopted at a Regular meeting of the Council held on the 6th day of July, 1990, at which time a quorum of 6 was present, and was adopted by a vote of 5 FOR, 0 AGAINST, and 0 ABSTENTION(S).

Virgil L. Williams, Secretary
Lummi Indian Business Council

NQN/51

Members of the Senate Indian Affairs Committee Aug. 12, 1996

Dear Senator's: Re. Sovereign Immunity

As long as the prerequisite of race or national heritage is allowed to have special rights and privileges you will create dissension among all citizens, who have a right to equal justice and due process for all.

I am writing you today because we are unable to be at the hearings regarding the effects that the so called sovereign immunity self-government has had on our life's as a non-tribal members who for the last five years have lived on land we purchased within the exterior boundaries of the Lummi Reservation.

1. A 5% utility tax on telephone, power and sewer bills that the utility Co's. passed on because they did not want to try to take the tribe to court due to the cost of possible litigation.

2. Threats of closing our County roads, because they did not want non-Indians here except to gamble.

3. Drilling a well on a residential lot within 100' and 40' deeper than our water association well, ignoring a county stop work order, thereby depleting our water in an effort to stop non-Indian development on plotted parcels by draining our well.

4. The Tribe's threats and actions that have caused devaluation of property values, which the county now has to pass these taxes on to other residents, which tribal trust land is exempt. Which is against the law.

5. The threats of litigation to P.U.D, if we attempt to bring in water, over county easements.

6. The currant cost paid by our self's and other non-Indian property owners for the cost of the current water negotiations that was requested by the Tribe. Federal funds are paying for their legal cost.

7. Legal fees are given to the tribe for litigation, these are taxpayer funds, yet we have been turned down when we have requested funds to stop their illegal actions and defend our rights. This is not a level playing field, or equal Justice for all citizens.

8. Actions taken by the BIA which approved taxing on non-Indian utilities even though current U. S. Supreme Court cases Montana and Brendale have ruled taxing of non-Indians must be consentual. Also a violation of the Constitution and Bill of Rights.

9. The tribes are exempt from the Freedom of Information act, no government body unless if affects the security of our nation should have this privilege when taxpayers fund their government and services. It should be public record how much their tribal leaders are paid. The tribes must be accountable for all funds received from our tax dollars.

I am also of Native American heritage [approximately 20% Cherokee Indian] as many Americans are. As an American citizen I do not expect

any special rights but must be protected from any special rights that are or could be afforded to any other citizen or ethnic group. To qualify for these special rights on this Reservation you only have to be 25% Lummi or equivalent, Native American. The tribes self-government over and above the State and Federal government that is already in place must only apply to Tribal members and non-Indian citizens who consent to civil jurisdiction. [noted in the Supreme Court cases. Montana and Brendale] It is imperative that our constitutional and civil rights be protected. My due process must not be set aside to benefit another citizen, due to race or national heritage. We are one Nation not many, as the tribes would have us believe.

If tribal members wish to use the tribal court system where all parties are tribal-members is one issue, non-Indians must not be subjected to a court where there is no separation of powers where Judges are appointed by the Tribal Council and must reflect their view's or be replaced. Where there is not the same resolve that we could find in the state or federal court systems is a violation of our constitutional rights and due process. We must be able to use our State and Federal Court systems where all our rights are protected, Indian and Non-Indian alike. Otherwise it is a violation of our constitutional rights, that all citizens are entitled to equal justice under the state and federal laws of our land, as noted on the Supreme Court Building of The United States. THIS SCALE MUST NOT BE TIPPED FOR ONE RACE, BUT EQUAL JUSTICE AND DUE PROCESS FOR ALL. THE TRIBES MUST BE ACCOUNTABLE FOR THEIR ACTIONS AS ARE THE REST OF THE CITIZENS, STATES, LOCAL AND FEDERAL GOVERNMENTS OF THIS "ONE NATION".

Their is no accountability for their actions if allowed sovereign immunity, and why should they not be accountable for their actions at the cost of our rights. Native Americans are citizens, as such they are already covered by the laws of this land, by allowing sovereign immunity you are taken the civil rights away from non-Indians and Indians who are not Tribal members.

In closing self-government is explanatory, if tribal members who choose to be governed by Tribal Government is one thing, to expect non-Indians to be governed or taxed by a government they can not access is another and a violation of our constitutional rights. It is Congress's responsibility to protect equally the rights of all it's citizens, regardless of race or national heritage. Again, as long as the prerequisite of race or national heritage is allowed to have special rights and privileges you will create dissension among all citizens, who have a right to equal justice and due process for all.

I am attaching a copy of the definition of Sovereign Immunity as defined by Black's Law Dictionary. Note: the Lummi Reservation [an open Reservation] has only about 50% still in trust for individual tribal members and less than 10% held in trust for the tribe.

Sincerely yours,

Richard D. Brannan Dennis Brannan

Mr.& Ms. Richard D. Brannan
4097 Puffin Rd.
Ferndale, Wa. 98248

4209 Salt Spring Drive
Ferndale, WA 98248
August 20, 1996

Members of Senate Indian Affairs Committee

NQN/S1

Dear Senator:

Sovereign immunity should be taken from native American tribes! No one else, no other citizen, is free to threaten, harass, discriminate or harm another person knowing he is immune from being taken to a state court to face a judge. Yet this is a way of life here. This reservation is run by the Lummi Indian Business Council. Members of this Council have led an active campaign against the non-Indian residents on the reservation in the newspapers, on television and on the reservation itself.

One instance of all this, a well was illegally drilled only 100' from our well, even after the county issued a stop work order, and the state failed to enforce permits that are required before anyone can put in a new well. This well was on fee-simple land which is under County zoning laws. The pumps ran so intensely that our water was down to a seven day supply, putting health and safety at risk for over 550 homes. When we wanted to bring water in from off the reservation, this tribal council said "NO!" When the threat was made to sue us if we tried, even the Public Utility District refused to consider helping us. No one has the money to fight an Indian lawsuit, especially since our tax money helps the tribes to fight us. When we live under a Constitution and Bill of Rights which provides for equal protection under the law, and with the awareness today that racial discrimination is not to be tolerated, where is our ability to find redress for such actions by an Indian tribe against non-Indians, strictly on racial grounds and a desire for power? We are going into another century, and this rewrite of history must be stopped.

Waiving the right of sovereign immunity has no impact on tribal self government. The Lummi Business Council has the power to govern its members in any way they choose, but this does not include the right to harass, intimidate, threaten and scheme to get new powers to govern the non-Indians. Their tribal sovereignty is not at issue. But, the tribe, or its individual members, should be held accountable equally with every other citizen for what they say, or actions taken when dealing with non-Indians. There is no place where laws of this country are written with built-in exemptions for one race only.

Please, please, waive sovereign immunity!

Sincerely,
Dwight Allison

4206 Salt Spring Drive

Ferndale, WA 98248

August 12, 1996

NQN/51

Members of the Senate Indian Affairs Committee

Dear Senators:

We live in 1996, almost a new century at a time of great awareness of individual rights under the law as given in our Constitution and freedom from any form of harassment or discrimination by reason of race religion or color. We cannot continue to rewrite history.

Yet, one " race" the Indians tribes are free from any form of accountability for their actions and are immune from lawsuits or legal redress of grievances or harm by the "right of Sovereign immunity". A right no none else has, not even the Federal government or the President. So no matter what they do or say or fail to do when promising or contracting with the County and non-Indian citizens, no one can legally take any action to right a bad situation.

Every effort local and state governments hear when trying to work with the tribe is if you don't do as we want, "we'll sue" and there is no budget with money to spend on lawsuits, so this form of "legal" blackmail continues and other citizens are held hostage to the Indian tribes.

The "right" needs to be removed and let <u>all</u> citizens be equal under the law. Not one "race" with power to hold themselves exempt from being accountable for what they do, but must be subject to all laws the same as every other citizen.

The tribes sovereign status to govern their own people is not touched, but remains intact. Sovereign immunity need to be waived and equal access to the laws regardless of race.

Sincerely yours.

Kenneth Caughlee

August 11, 1996 NON/51

To: Members of the Senate Indian Affairs Committee

Indian tribes clearly have a special class of citizenship because of Sovereign Immunity, wherein tribes cannot be sued without their permission. As citizens of "One Nation under God, with Liberty and Justice for All", ALL citizens should be subject to the same laws to assure our freedoms and access to a just legal system to protect our rights under the Constitution and the Bill of Rights. Yet the Indian tribes are allowed Sovereign Immunity, while city, county, state and federal governments have waived their Sovereign Immunity. Even the IRS and the President of the United States of American can be sued, so why should a special class of citizenship be allowed in our country? It should not.

"Tribal Sovereignty" as "Independent Nations", is sovereignty intended to set the laws to govern and control their own people and the tribe's own future, however some tribes are also trying to control non-tribal members living within the geographical boundaries of their Reservations. By Treaty the tribes are dependent upon the Federal Government of the United States of American. At best the tribes are "Dependent Sovereign Nations" able to rule their own tribal members, but they have no authority to govern the lives of non-tribal members even if they live within the geographic boundaries of a reservation. Yet, the constant threat of litigation by the Lummi leadership still persists and non-tribal members have no recourse, other than a seriously flawed tribal controlled tribal court system, because of Sovereign Immunity.

It is a paradox that these "Tribal Nations" insist on Nation-to-Nation and Government-to-Government status when in negotiation for issues of importance to all citizens, such as gambling. However, Washington State Indian Tribes, through State compacts on gambling, are required to go before the States' voters for approval or denial of the levels of gambling allowed on their Reservations. An unusual sort of "Independent Sovereign Nation", to say the least. Dependency on the approval of the majority of all voters within the state does not give an impression of pure Sovereignty. While at the same time the Lummi tribe is trying to control the lives of non-Indian residents living within the geographic boundaries of reservation through long standing strategies to control our utilities...water, sewer, etc. Yet non-tribal members have no say or vote in tribal government which is contrary to our federal constitution. We cannot protect our inalienable rights because of tribal Sovereign Immunity.

It is clearly time for the removal of Sovereign Immunity by Indian tribes so all citizens have equal protection within our otherwise fair judicial system.

Sincerely, Edward J Wyngaert
Fransena M. Wyngaert
4157 Saltspring Dr.
Ferndale WA 98248

SELDEN S. FRISBEE
ATTORNEY AT LAW
P.O. BOX 1998, 13 E. MAIN STREET
CUT BANK, MONTANA 59427-1998

Telecopier (Fax)No.(406)873-4342

OFFICE(406)873-2263
RES.(406)873-4374

September 17, 1996

Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510-6450

Gentlemen:

I, and numerous other Montana residents, can see no justification for the existence of seven Indian sovereign nations inside the boundaries of the State of Montana (the seven Indian tribes).

The late Russell E. Smith, U.S. District Court Judge in several of his decisions stated that the Indian tribes are sovereign nations only so long as, and to the extent that, the U.S. Congress allows them to be.

When a tribe is entitled to discriminate against non-Indians based on race; when a tribe believes it is entitled to stop State highway road construction and repairs unless and until members of the tribe are employed replacing regular State employees; when a tribe can obtain a judgment in Tribal Court against a non-Indian for millions of dollars without any lawful basis for that judgment; and when a tribe can sue in State Court but be immune from a counter-suit in that same action, it is time for congress to put an end to this travesty.

The individual Indian is entitled to the same rights and privileges as any non-Indian, and the Congress should guarantee the rights awarded the individual Indian under the various treaties. But, the so called Tribal Government rights created by the Wheeler-Howard Act and other Federal legislation must be terminated because of their abuse by the Tribes.

Sincerely yours,

SELDEN S. FRISBEE

BY: Selden S. Frisbee

SSF/dak

WESTERN FARM BUREAU IN ID:505-525-0858 JUL 16'96 16:11 No.022 P.01

NEW MEXICO FARM AND LIVESTOCK BUREAU
421 North Water Street • Las Cruces, New Mexico 88001 • (505) 526-5521 • FAX (505) 525-0858

Senator Pete Domenici
Fax ASAP
Washington D.C.

Dear Senator Domenici,

On behalf of the 14,000 members of the N.M. Farm and Livestock Bureau, and at the request of the leadership of the Sandoval County Farm Bureau, we respectfully ask for your support of the language in the Dept.of Interior Appropriations Act in section 329 regarding private property rights.

This language provides relief for private property owners within the boundaries of Indian reservations who at times have to seek legal action to protect their property. In many of these cases the tribes will invoke questionable immunity to such actions leaving the property owners (families) with no recourse.

Senator, this is not only a vital private property rights issue, it is a matter of fairness and a chance to do the right thing for families who are finding their very existence threatened by lack of judicial relief in these cases.

Thank you for your consideration, Senator.

Warm Regards,

Erik L. Ness
Assistant Administrator

399 Washington Street
Salamanca, NY 14779
Sept. 24, 1996

Honorable Slade Gorton
730 Hart Building
Washington DC 20510

Dear Senator Gorton:

I purchased my home about 20 years ago in the City of Salamanca, County of Cattaraugus, State of New York.

The banks and the attorneys led me to believe that I had about 16 years on the old 99 year lease, and then it would roll over into a master lease in 1991 with slightly higher Indian lease payments. But the terms of the lease would remain about the same.

I knew there were negotiation meetings for a new lease; but no one (not even the press) was allowed any information.

When the time came the lease (not fully completed) was unveiled and passed by our city council with over 200 citizens locked outside of our city hall, screaming--STOP! The city accepted it, without authority to do so, and I believe it was never scrutinized by any federal authorities. So we are left with a lease that is illegal, immoral and unconstitutional.

When I first viewed the new lease, it was nothing like the old lease. Then I was informed that there was an agreement that was an integral part of the lease. These two documents make up an unacceptable package, as there are too many gray areas, such as the Seneca Nation claiming ownership of our homes. Seneca Nation then President, Calvin John made the statement to the press that "unequivocally we own the homes."

By signing this lease all my rights would be gone. I am appalled by the letter I received dated Sept. 1, 1994 from the U. S. Dept. of the Interior, signed by Michael J. Anderson.

It said and I quote

> "This is notice that you must take appropriate measures to either enter into a new lease with the Seneca Nation of Indians or vacate the premises and deliver possession to the Nation on or before Sept. 16, 1994. If you fail to execute a new lease or deliver possession of the premises on or before Sept. 16, 1994, we will request that the United States Dept. of Justice file suit against you in Federal

District Court for ejection from the Seneca Nation of Indians lands you now hold and for trespass damages based on fair rental value of the subject land. We may also seek punitive damages for willful and malicious refusal to deliver possession."

It is hard for me to believe that I am malicious when my only requests are for my Constitutional rights. I had many friends and relatives killed in action, fighting for the same rights that are being taken away from me.

I feel the only fair solution for anyone not willing to be intimidated and give up their high moral values by signing this lease, is for the government to authorize compensation for our homes and businesses.

My wife and I would like to move off of sovereign Seneca Nation lands and back to the United States where our Constitutional rights would be honored.

We anxiously await your reply.

Sincerely,

Ronald and Marjorie Schubert

HONORABLE
ALFONSE D'AMATO

Marjorie Y Schubert

HONORABLE
DANIEL MOYNIHAN

Ronald K. Schubert

26 Swan St.
Salamanca, NY 14779
September 14, 1996

Senator Slade Gorton
Rm 730, Senate Hart Bldg.
Washington, DC 20510

Dear Senator Gorton:

It is very difficult to express in a few words how Native American sovereignty and immunity affect us and our community.

In 1990 a new 40-40 lease between the Seneca Nation of Indians and individual leaseholders in Salamanca was forced upon us as a "take it or leave it" lease. After much stress and with threat of losing our home, we signed the lease, under duress, at the third opportunity, as did most other leaseholders. We are still very concerned about many of the lease terms, in particular, the Nation claims ownership of all improvements on reservation lands. We fear that at any time the Nation can claim our home and we have no recourse through the courts due to their sovereignty. We bought our home in 1957, have greatly improved it and paid taxes on it. Due to Native American sovereignty, the Federal Government, our Congressional Representatives and the courts have not listened to our requests to be heard. Our constitutional rights, for which I fought in World War II, are being violated. So far, we have found no place to be heard and no one to listen.

More and more property within our city is being purchased by Native Americans thereby removing it from the taxrolls and other property owners must make up the tax deficit. Their exemption from property and sales taxes, as well as state income taxes on reservation income, puts additional burden on others. Many businesses are owned and operated by Native Americans which, because of their tax immunity and exemptions from some laws and regulations, has created unfair competition for other businesses.

Our beautiful little city has steadily gone downhill because of our unique situation and the apathy created by it. Several incidents of threats and violence have already occurred in our community and state.

We urge Congress to immediately study all aspects of sovereignty and immunity as it affects other citizens of the United States and right the wrongs.

Sincerely,

Willard H. Opferbeck
Willard H. Opferbeck

Doris A. Opferbeck
Doris A. Opferbeck

cc: Senator Alfonse D'Amato
Senator Daniel P. Moynihan

51 Henry Street
Salamanca, NY 14779
Sept. 24, 1996

Honorable Slade Gorton
730 Hart Building
Washington DC 20510

Dear Senator Gorton:

My husband and I are one couple of many who at retirement age are being forced to leave our home. We are being threatened with eviction by our own government.

We live in Salamanca, New York, a small city situated on the Seneca Nation of Indians' reservation.

At every turn our rights as American citizens are being denied us. It is beyond comprehension that our government could, or would, evict us from a home that we have worked hard for all of our lives.

There is no way in this world that either of us will sign away our right to due process or the right to own our own home by signing the lease offered us now.

I submit to you, it is your duty as an elected government official to protect us in this situation.

Sincerely,

Alice M. Fluent

September 14, 1996

Senator Slade Gorton
Attn: Nina
730 Hart Senate Office Building
Washington, D.C. 20510-4701

Dear Senator Gorton:

I write, urging Congress to eliminate Indian Tribe Sovereignty Immunity. I especially urge facing up to the question of Indian Land Claims as a NATIONAL problem. Until a majority of the Members of the Senate and House understand the frustration and sense of injustice felt by tax-paying property owners as the result of Indians coming to the public trough with law suits, while enjoying special exemptions and all the benefits of American life without assuming commensurate responsibilities, the current gross injustice will persist. As each case is adjudicated individually, in a piecemeal fashion, each succeeding law suit becomes more difficult to resolve with justice to all.

Here in Seneca County, 400 Cayuga Indians have for more than 15 years been holding hostage 10,000 - 12,000 property owners who hold legal titles to their properties. The Cayuga suit of 1980 for $350 million (nearly #3/4 million/Indian) plus land, is based on a technicality in a 1795 Treaty which was settled at the time, in good faith. The Cayugas were paid for 64,000 acres of land over some of which, they had roamed, slashing and burning when land became fallow, never having title to land as we know it, until the agreement reached in the bargaining. All thru the years, from 1795 until 1931, the Cayugas were paid an annual stipend and in 1931 a lump sum of $247,000. During this same period they enjoyed many emoluments not available to American citizens.

Because the Indians were here before us, the conscience of the American people has been aroused by those who would exploit them, and the public has become convinced that they should have all these special privileges Still they come back for more, and will continue to do so, if this piecemeal process of settlement is not squarely faced by Congress !

By and large the Indians are fine people, but in recent years have become pawns in the hands of modern-day exploiters. This is to urge Congress to bring the Indians into first-class citizenship, end Indian Sovereignty Immunity, and once and for all, call a halt to these unjust, piecemeal handouts.

Sincerely yours,

Donald S. Allen

2976 Rte 89
Seneca Falls, N.Y. 13148
CC: Senator Alphonse M. D'Amato; Senator Daniel P.Moynihan; Congressman Bill Paxon; Governor George Pataki.

99 Merden Street
Salamanca, NY 14779
August 26, 1996

U. S. Senator Slade Gorton
Room 730, Hart Building
Washington, D. C. 20510

ATTN: Nina Nugent

Dear Senator Gorton:

Enclosed please find a copy of a letter sent to all congressmen and women in 1994. Since that time our situation has continued to deteriorate. At the present time, only 16 families have continued to refuse to sign the lease and are being threatened with immediate eviction by the Justice Department.

The Seneca Nation Settlement Act of 1990 specifically stated that its constitutionality could be challenged but when we attempted to do so, the courts ruled that we could not. Surely an Act of Congress which cannot be challenged must be unconstitutional.

Please support the Istook amendment and hopefully similar problems to ours will not recur.

Sincerely,

Virginia Banner

Virginia Banner

Encl.

SALAMANCA COALITION OF UNITED TAXPAYERS
BOX 552
SALAMANCA, NEW YORK 14779
POPULATION--6500 AMERICAN CITIZENS
Phone-716-945-4553 FAX-716-945-6044
May 10, 1994

Senator Ernest F Hollings
125 Russell Building
Washington, DC 20510

Dear Senator Hollings:

RIGHTS PROTECTION

We have been writing to the members of Congress for the past four years with absolutely no response to the very serious issue of **rights protection** on the Seneca Nation of Indian land on which we reside.

On August 8, 1992 our City officials met with Senator Daniel K. Inouye and our Congressman Amory Houghton who promised that they would immediately seek dialogue with the Nation over the involved issues, which we as an organization had raised. Since that date the City has received no correspondence whatsoever from those individuals. Unless you, **the Congress,** take some immediate action, this City will no longer exist. The courts of this land have told us that the only body that has jurisdiction over our claims is the Congress. What do we have to do to get a response from you?

The most pressing issues involve the tax erosion of the city's tax base. Every time a Seneca purchases a home or business in the city, it is removed from the tax rolls, yet the city is obligated to provide essential city services. Over $3,672,910 dollars of city property is immune from taxation leaving the city taxpayers an additional burden of $169,504.80 to be paid by the remaining taxpayers. This dollar amount changes weekly! Imagine what Congress has done to our property value; or more importantly our rights as Americans. This additional increase has already placed a tax increase of 17% for 94-95.

The Nation has claimed ownership of our homes and businesses and we are unable to pursue this issue in Federal court because of the sovereign immunity of the Nation; and therefore the lease, that you approved via the Act of 1990, is not enforceable by the ones most affected (the lessees.) There are over 200 lessees who have refused to sign this lease on the fact and principle that it is **unconstitutional** and therefore have become squatters on the land, with the constant threat of being evicted from the homes and businesses that they most surely own!

We are pleading with you to offer your assistance by arranging a . **Congressional hearing** on these most pressing facts. Our only pediatrician left town two years ago stating that he was moving back to the United States of America. We are sitting here without the protection of the Constitution and you, our Congressmen, have done nothing to help. **Wasn't President Clinton elected because he was the "domestic issue President"?** As of today our only department store has left town, to be followed this week by a National Pizza business, and the National Fuel Gas offices. Three churches have closed their doors and every day there is a new threat that other businesses will follow their lead. Unless the Congress amends the Act of 1990, **to assure us of the ownership of our homes and the Constitutional Right of due process,** and also finds a way to help us with tax erosion, an American city will be dissolved.

We await your response and hope you will give careful consideration to these most urgent issues! Please forward this letter, with your comments, to Congressman Houghton. It is time for him to decide whether he wants to be part of the solution or continue to be part of the problem.. We are depending on each of you.

Respectfully.

Carol Kelley

Salamanca Coalition of United Taxpayers
Carol Kelley, President

cc/Honorable Amory Houghton

September 10, 1996
Committee of Indian Affairs
838 Hart Office Building
Washington, D.C. 20510-6450

Dear Senators:

We live in 1996, almost a new century at a time of great awareness of individual rights under the law as given in our Constitution and freedom from any form of harassment or discrimination by reason of race religion or color. Tribal members have the right to vote and run for any office in our state, they are state residents. They are not a Nation.

I am a property owner within the exterior boundaries of Lummi Reservation, I have had my lot since 1962. The Lummi's have threaten to close our county roads, have done everything to devaluate my property, I have been waiting five years of to build, because they say they it is their water, and have even threaten to be sued if we bring off reservation water because they say that is there also. There is no water shortage here, the Tribe is using utilities to stop building and to gain control of "my property". This would be against the law anywhere else, is this the intent of sovereign immunity? Which allows the tribes not to be responsible for their actions as the rest of us are including County, City, State and Federal governments are. I am also paying the illegal utility taxes on the standby fees for water and sewer. There is nothing in the treaty that gives them this right.

It is imperative that our constitutional and civil rights be protected. Our due process must not be set aside to benefit another citizen or "self-government" due to race or national heritage. We are <u>one Nation</u> not many, as the tribes would have us believe.

Removing Sovereign Immunity will be a step forward in treating all citizens the same and making the tribes responsible as the rest of local and State and Federal governments of this <u>"ONE NATION"</u> are, equal under the law. One has to be reminded that the tribes "as citizens" of the States and of this Nation, have been afforded special rights and privileges over and above my rights as a citizen. (Some could be as little as 10% Indian.) <u>It is the rights, privileges and due process of non-Indian or non-Tribal members that are being denied.</u>

Sincerely yours,

Robert Blowers

Mr. Robert Blowers
766 VanDyk Rd.
Lynden, Wa. 98264

Col. C. D. Clarenbach ret. USA
4199 Sucia Drive
Ferndale, WA 98248

Senator Slade Gorton
730 Hart
Washington D.C. 20510
SUBJECT : Sovereign Immunity For The American Indians

Dear Senator;

Indian tribes clearly have a special class of citizenship because of Sovereign Immunity. This gives them power and privileges normal citizens do not have. They do not recognize county or state laws and do not abide by the same regulations as the rest of us. They drill wells where they want without regards to existing permit process. They ignore county cease and desist orders. They build casinos, smoke shops and liquor stores on federal land without accountability. Because of Sovereign Immunity they have no accountability to the communities that surround the reservation. Because of sovereignly we cannot sue them without permission and if there is any litigation they get federal money to fight in court. Its like suing myself.

I am a retired veteran on a 100% service connected disability. I have given my all for this country and for what it stands for. I always thought that one of the fundamental principles of our nation was equality for all. Now I am finding that we have a privileged class that is above many of the laws and regulations that the rest of us have to live with. This is not what America stands for. I urge you to eliminate sovereign immunity.

Thank you,

Carl D. Clarenbach

September 16, 1996

Committee of Indian Affairs
838 Senate Hart Office Building
Washington, D.C.20510

Dear Chairman and Committee Members:

I am writing today asking for your help and support in the problems that are caused by the special rights and privileges afforded the Indian tribe's, based on their race and national heritage. One only has to be part Indian to be afforded these rights and privileges at the cost of other property owners and residents.

Lack of water is not the problem on the Lummi reservation, the Lummi tribe's goal it to stop non-Indian development on lands they have sold, by controlling basic utility services, water and sewer, this is about land and control by any means and get us off our property.

1. The Lummi tribe is deliberately interfering with our water well. When a tribe can come onto our residential development, erect a huge storage tank next to a residence, precede to drill a well 100 feet away and 40 feet below the our association's well, which serves over 600 homes all without required permits, and ignored a county stop order, then something is wrong. The Lummi tribe had available a road access several lots away to a huge tract of trust land where they could have erected their well 1,000 feet away and avoided interference. But interference, so as to prevent further non-Indian development was their goal. Our associations water well was nearly depleted in the summer of 1995. Senator Slade Gorton and Congressman Jack Metcalf, interceded on our behalf. Now we need a permanent solution, as we know this harassment is not going to stop if sovereign immunity is allowed to continue. The tribes must be held accountable for their actions.

We have been told if we attempt to bring in off-reservation water, we will be sued by the tribe. This is about control of our land, we are a small community who doesn't have the resources for legal fees, as the tribes have. We plead with you to do something to protect us from acts such as these or it will continue. Quoted from the Lummi Indian Resolution #90-108 "NOW THEREFORE BE IT RESOLVED, that the Lummi Indian Reservation has no surplus water present for additional non-Indian development and water present on the Lummi Indian Reservation is subject to the sole regulatory authority of the Lummi Indian Nation."

2. It is the threat of litigation that has caused some of the utility companies and businesses to be used as a collection agent for this tribe. Even though utility company lines cross county roads and on county easements, which are outside tribal regulatory jurisdiction. The utility companies managed to roll the taxes to the reservation ratepayers and thereby avoid the tribe's threat of taking the companies to the Supreme Court for non-payment. The Utility and Transportation Commission approved the roll over because they felt the costs of potential litigation initiated by the tribe, outweighed the personal rights of the ratepayers. There are some utility companies who refused to pay the utility tax to the tribe, the tribe has not taken them to court, it is the threat of litigation that has caused the other

utility companies to enforce and collect the Lummi Utility Tax ordinance.

Unfortunately litigation is now required to reverse the action of the U.T.C. at a very " high cost" which now must be born by the non-Indian ratepayers. Where do we get the funds? Who do we sue? the utility companies? the U.T.C.? How do you think we would do in tribal court were there is no separation of powers? This is what we are up against;

1. The same tribal attorney Mr. Johnsen, who most likely developed and wrote the utility tax ordinance, it went back to his office after it was signed by the tribal council.
2. He still represents Lummi Indian Business Council.
3. He also represents the Lummi Indian managed, Lummi Sewer District which collects the tax and made the decision not to challenge if the utility tax was legal.
4. He also served as hearing examiner at the sewer board tax hearing, prior to tribal court.
5. He also wrote the argument on behalf of the sewer board and the L.I.B.C. at the tribal court hearing, even though another tribal attorney represented the tribe at the sewer board hearing.

It this a problem you would like to face? Come walk in our shoes.

The Native Americans are citizens of the county's and states where they reside, they are entitled to all state and county benefits, can vote for state and county candidates the same as I, run for any office, they already have these same rights as I do, it is the non-Indian or non-tribal member who's rights and due process is being denied. You have on this reservation, residents that live next door, that because of their "race", is afforded special rights and privileges and denies me my constitutional rights and due process. This is not a matter of being "Political Correct", this is significantly too important, is about doing the right thing for all citizens regardless of race or culture.

Sincerely yours,

Mr + Mrs Joe Anstette

Mr. and Mrs. Joe Anstette
4145 Patces
Ferndale, Wa. 98248

SEPTEMBER 20, 1996

THE HONORABLE SLADE GORTON
U.S. SENATE
WASHINGTON, DC 20510

DEAR SENATOR GORTON:

UPOW HAS INFORMED ME THAT YOU WILL APPEAR NEXT TUESDAY, 9/24/96, BEFORE THE SENATE'S SELECT COMMITTEE ON INDIAN AFFAIRS WHEN IT WILL CONDUCT A HEARING ON THE QUESTION OF TRIBAL SOVEREIGN IMMUNITY.

IN THE SPRING OF 1962 I COMPLETED CONSTRUCTION OF A PERMANENT RESIDENCE IN KITSAP COUNTY, WASHINGTON IN WHICH I STILL RESIDE. THE AGENT WHO SOLD ME THE PROPERTY DID NOT SEE FIT TO TELL ME THE LAND WAS LOCATED ON THE PORT MADISON INDIAN RESERVATION. NO MAPS MADE AVAILABLE TO ME SHOWED THE RESERVATION. THE FEW INDIANS STILL LIVING IN THE GENERAL AREA HAD NO VISIBLE PRESENCE.

SINCE DECEMBER 30. 1982 MY WIFE AND I HAVE BEEN DEFENDANTS IN INDIAN LAWSUITS, FIRST BY A QUIET TITLE SUIT BROUGHT BY THE SUQUAMISH TRIBE AND CURRENTLY BY ALL THE PUGET SOUND TRIBES IN AN EXTENSION OF THE BOLDT CASE.

WE CAN NO LONGER TOLERATE THIS CONTINUAL HARASSMENT BY THE TRIBES AIDED AND ABETTED BY OUR OWN GOVERNMENT AND FUNDED WITH TAX DOLLARS FROM OUR OWN POCKETS. WE ASK ONLY FOR A 'LEVEL PLAYING FIELD" CREATED BY THE ELIMINATION BY CONGRESS OF THE SO CALLED "TRIBAL SOVEREIGN IMMUNITY", A MYTH CREATED BY THE FEDERAL JUDICIARY.

I HOPE YOU AND THE COMMITTEE CAN GIVE THIS SITUATION THE QUICK AND DECISIVE ACTION IT SO COMPELLINGLY DEMANDS.

Pierce W. Davis

PIERCE W. DAVIS
17128 S. ANGELINE AVE., NE
SUQUAMISH, WA 98392
TEL 360-598-1996

WENDY S. PEARSON
KATHRYN I. EIMS
22416 80th Ave. West
Edmonds, WA 98026

September 12, 1996

Sen. Slade Gorton
10900 NE Fourth St.
Ste. #2110
Bellevue, WA 98004

RE: Swinomish Tribe; Stewart & Sharon Wright; West Shore Tenants Association

Dear Senator Gorton:

We are writing you on behalf of Sharon and Stewart Wright, and the West Shore Tenants Association. As you are no doubt aware, the Wrights and their associates have been attempting to negotiate equitable and just purchases of their home sites from members of the Swinomish tribe in northwest Washington. These are homesites on which these people have built their lives, and on which they intended to live for the remainder of their lives.

The only legal and procedural means by which they can fairly attempt to keep their own homes has been thwarted by the U.S. government's Native American ombudsman, the Bureau of Indian Affairs (BIA). The homeowners and the Native American landowners have been individually willing to negotiate terms which would allow the West Shore Tenants to keep their homes and buy the lots on which they sit, but the BIA has undermined their efforts to do so. For years, "necessary" red tape has hindered good faith efforts of the Swinomish tribe beneficiaries (owners of the land in trust) to obtain fee title or otherwise secure a means for selling their land to the tenants association. It is ironic given the Republican hue and cry for "less government" that a government agency is wasting time and effort to work against the will of its clients and the taxpayers upon which it relies for financial support.

The checks and balances of a democratic and due process are wholly unavailable to both willing buyer and willing

seller in this matter. The tenants association has been given little or no standing to protect their financial and inalienable interests in property. The voices of individual tribal members who have sought to sell their land have been unheeded by the Swinomish tribal association. And sadly, a U.S. bureaucracy has fostered the seeming unfettered ability of a Native American tribal association to deafen the voices of its members and to prevent U.S. citizens from defending themselves against actions which threaten their security, their homes, and their lives. We find it an utter outrage.

PLEASE help the Wrights and the West Shore Tenants Association secure due process of law to protect their rights and interests. Please also seriously consider the necessity of maintaining the BIA, an agency which has apparently outlived its intended purpose.

Sincerely,

Wendy S. Pearson

Kathryn I. Eims

cc: West Shore Tenants Assn.

1996 SEP 12 AM 9:41

3608 Lovejoy Ct NE
Olympia, WA 98506-9619
Sept. 8, 1996

Senator Slade Gorton,
730 Hart Senate Office Bldg.
Washington, D.C. 20510-4701
ATTN: NINA

Dear Slade,

I understand that the September 24th meeting of the Senate Committee on Indian Affairs will consider the rest of us Non-Indians as part of the United States. For those of us who have been battling the invasion of private tidelands for the past several years this is a welcome and hopeful approach. I feel strongly as do my neighbors living on the salt water that the time is here for some positive action in Washington, D.C.

As a native born American citizens we should have the same constitutional rights as the so called "Sovereign Nation persons living among us. I know that treaties were made by our forefathers and by many folks since then but there comes a time when these should be reviewed and revised as appropriate for the good of all citizens. The Indian tribes have proven that without integration into the American Community that survival is difficult. As Sovereign people with much outside and usually mercenary help they have instituted gambling, sales of non-taxed liquor and cigarettes, and have received disproportionate share of fish and shellfish from our waters as well as receiving millions of dollars in goods, services and cash from the government. All of the forementioned activities not available to other citizens.

It is time these tribes join the United States and live under the same laws and rights as all other citizens.

Sincerely,

Ray Dinsmore

PS:Keep up the good work for us in washington.

Chris & Barbara Lindsley
736 Tillamuk Drive
LaConner, Wa 98257

September 12, 1996

Senator Slade Gorton
Attn: Nina
730 Hart Senate Office Building
Washington, D.C. 20510-4701

Dear Senator:

Please eliminate tribal sovereign immunity. I have no quarrel with their right to govern their own people but we are living on an Indian reservation as citizens of the U.S. and are constantly being threatened by the tribe refusing to honor our laws that the rest of us have to support and obey. The Indians are dependent upon the Federal Government but they should not be able to govern the lives of non-tribal members. There have to be laws in common for all. The tribes must be responsible for their actions and not be able to hide behind their immunity.

We have invested hundreds of thousands of dollars in improving our leased land only to discover now that the tribes are not accountable in our courts and are attempting to change the meaning and terms of our leases.

If you waive tribal sovereign immunity, we would be able to seek recourse for any injustices and make them accountable under the same laws as all U.S. citizens.

Very Truly Yours,

September 8, 1996

Senator Slade Gorton
109 NE Fourth St. #2110
Bellevue, Wa 98004

Senator Daniel Inouye
Senate Committee on Indian Affairs
SH-838 HSOB
Wash., DC 20510-6450

Dear Senators Gordon and Inouye,

Your file contains numerous letters regarding the Morris Dan Tract with respect to the tenants and their attempt to purchase the land on which they reside from the Indian land owners. Although 11 of the 14 land owners have agreed to our offer, the BIA and the Tribe have coerced and convinced the 3 remaining not to sell. They have undergone this type of harassment since they initiated the offer to buy in June of 1995.

The other on-going struggle as you are also aware is with the BIA and the tribe over the horrendous increase in lease rents that have been imposed on all the Tenants in this area This prompted the formation of the West Shore Tenants Association (WSTA). As the sale is currently being blocked by the BIA and the Tribe they have broadened their energies to force the issue on the rent factor and other associated wrong doings such as the imposition of a Sewer System charge which in its self is fraudulent. Here in lies the problem. **The Tenants are not allowed a voice or representation on any of the decisions the Tribe and BIA have made to impose these charges. It is akin to taxation without representation! What makes matters worse in the Tribe considers itself a Sovereign Nation and accordingly claim Sovereign Immunity, blocking any avenue the Tenants have to assert legal action.**

Every day all of us see projects going on- on the Reservation paid for by our tax dollars that seem in some ways a waste of these tax dollars. **If the Tribe declares itself a Sovereign Nation, then let them stand alone and cut or hold of funding until they act responsibly.**

The Tenants need your help Senator Gorton and Senator Inouye and they need you to inform your colleagues of the injustices they are experiencing. The Tribe and BIA opened the Reservation to Tenants at reasonable rent rates. **Now they are trapped by lease increases over 500%. They have lost their equity, they have no representation and they apparently have no legal resourse. They are in a Foreign Country funded by the Tenants themselves.**

Sincerely,

Patricia E. Lawler
15108 NE 68th Street
Redmond, WA 98052

September 9, 1996

Honorable Senator Slade Gorton
c/o Kay Gabriel, Deputy District Director
10900 N. E. 4th St., Suite 2110
Bellevue, WA 98004

RE: Private Property Rights

Dear Senator Gorton,

We have been very concerned about our private property rights on a forty-three acre parcel of land we own within the boundaries of the Quinault Indian Reservation. This is fee simple land that has been in our family for ten years. We have paid property taxes on this land to Jefferson County all that time. The Quinault Indian Tribe has declared their right to zone and control the permitting systems on our land. We have looked to the County Commissioners in Jefferson County to protect our right to build or develop our property. After years of pleading our case to the three Commissioners who should have intervened for us since they have collected taxes from us on this property, Jefferson County signed a "memorandum of understanding" with the Quinault Tribe that basically gave the Quinaults rule over us with regard to our land. Now we have no idea just what we have paid taxes for on this property. We thought we would have all the private property rights afforded to all other property owners in that county. We do not have "due process" with the Quinault Tribal government and the county government has abandoned us.

We respectfully request your support for legislation to protect our Constitutional property rights for our land on the reservation. Several Supreme Court decisions have been in our favor with regard to other similar circumstances on other reservations. Hundreds of other land owners are in this same dilemma. Please help us defend our property rights with legislation that will settle this matter once and for all.

Gratefully,

Laura and Ken Walton

3148 Marvin Rd. S. E.
Olympia, WA 98503

September 6,1996

The Honorable Slade Gorton
United States Senate
Washington D.C.

Dear Senator Gorton,

I am a high school civics teacher involved in a real life example of the Federal System. Over the last two summers I have been searching for an affordable piece of recreational property for my family. Recently, I found a twenty acre piece of property on Lake Roosevelt, on the Coleville Indian Reservation side of the lake. This property is not, and never has been, part of the Coleville Indian Reservation. The property is fee land and not subject to special zoning restrictions by the Coleville Indian Tribe. However, the tribal zoning office has informed me that I would never be able build on the property as they consider the land as part of their Tribal Game Reserve. Ferry County considers the property very buildable but the threat of Tribal litigation makes it impossible for me to purchase the property.

It has been brought to my attention that you are preparing to hold Senate Hearings concerning Indian Tribal Zoning. I would very much like to attend those hearings to provide input, but unfortunatly employment commitments make it impossible for me to attend. I hope this correspondence will help provide some imput at your hearnings.

After having read the United States Supreme Court decision Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation , it is obvious that the Coleville Tribal zoning office is in complete violation of a Supreme Court decision and thus The Law Of The Land. To try and circumvent that decision with an Inter-Govermental agreement with Ferry County is in violation of the 14 Th Amendment, Section 1, which forbids a state or local government to discriminate against, or draw unreasonable distinctions between, persons.

The land in question is fee land, private property and not part of the Coleville Indian Reservation, much less part of their Game Reserve. I

would hope that your Senate Hearings would help clear up these zoning threats by the Coleville Tribe and thus push for Congressional legislation that would preserve the rights of property owners and to eliminate useless and time consuming litigation concerning zoning issues that are already The Law Of The Land.

Sincerely,

Steven O. Banks

Steven O. Banks

8807 169 Th St. Ct. E
Puyallup, Wa. 98373

(206) 845-9409

1828 O Brien Road.
Port Angeles Wa 98362
August 28, 1996

Honorable Senator Slade Gorton
% Kay Gabriel Deputy Dist. Director
10900 NE 4th Street Suite 2110
Bellevue, Wa. 98004

Subject: Property Rights

Honorable Senator Slade Gorton:

I am one of over 800 private property owners on fee patent land in the Quinault Indian Reservation. I have owned this property for over 30 years

Tribal Zoning for ocean view and beach property is "Wilderness". Their regulations on these areas is very restrictive.

I recently attempted to subdivide my 20 acres of ocean beach property. Because I pay taxes to Jefferson County, I made my request to them. After spending over $30,000.00 they have come up with requests for $150,000.00 in studies (Environmental, clams, fish, archeological) and when this is completed they will turn the information over to the Quinault Indian Reservation for their approval or rejection. So far they have rejected all requests for development from other land owners, so I am expecting the same indian rejection

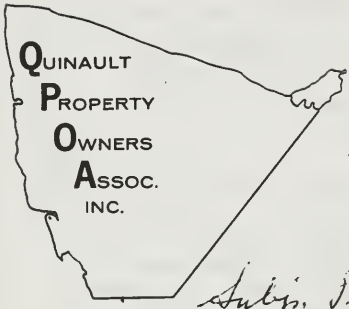
As land owners within the Quinault Indian Reservation we desperately need your help.

Sincerely yours,

Floyd L. Dickinson

8-10-96

QUINAULT
PROPERTY
OWNERS
ASSOC.
INC.



Honorable Senator Slade Gorton
% Kay Gabriel, Deputy Dist. Director
10900 N. E. 4th St., Suite 2110
Bellevue, WA 98004

Subj. Private Property Rights

Honorable Senator Slade Gorton:

The Private Property Owners, approx 800, Fee land owners on the Quinault Indian Reservation have been denied the development & use of their private property since 1973. The Quinault Indian Nation declared tribal sovereignty with the right to Zone & Control the permit system of all Fee land on the reservation. Gray Harbor County Commissioners, Montesino, WA. agreed to the Quinault Indian Nation Declaration. However the Gray Harbor County, to this day, continues to assess & collect our "Taxes." The County will issue a building permit, which has no value, because they advise all applicants to request a permit from the Quinault Indian Nation. Tribal Zoning such as "wilderness" along the Coastal Ocean, area & 20 acres in the timber area & other

P.O. Box 887
ABERDEEN, WASHINGTON 98550

QUINAULT
PROPERTY
OWNERS
ASSOC.
INC.

restrictions prevent fee land owners, including tribal member fee land owners, from developing their property.

I personally went to the tribal planning dept. & requested an application to build on my ocean front lot in Pt. Grenville Estates & was refused due to the tribal zoning of "wilderness" for all ocean front property. My application to the County was in compliance with County Zoning & Permit system.

Fee land owners do not have "Due Process" in Tribal Government. The County is helpless & the state of Wa. as well as the US Justice Dept. will not defend our Private Property Rights. Our last & only ray of hope is that you our Honorable Senator will provide legislation that will permit & <u>protect</u> our <u>Private Property Rights</u>.

On behalf of the Fee Landowners, approx 800, in the Quinault Indian Reservation, the Board of Directors of the Quinault Property Owners Assoc, Inc., request your support of legislation to protect our Constitutional Private Property Rights!

Sincerely,

George W. Garland, Pres.
8904 W Arrow Dr. N.W.
Gig Harbor, Wa 98335
206-265-2534 692

C.C.: All Board members.

P.O. Box 887
ABERDEEN, WASHINGTON 98550

Sen. Slade Gorton
730 Hsob
Washington, D.C., U.S.A.
20510

1996 SEP 12 1:14

NQN/Swinomish

Aug. 24, 1996

Dear Senator Gorton

Hello! & first of all thank you for taking the time to read my letter... I know you are very busy... & a few years ago you reminded me that I do caught... & I feel very privileged that I can ask you for help in this matter.

I have been leasing one lot on the reservation & I own my cabin... this has been going on since 1981 (lease # 8101... Swinomish Indian Land... Jack Cabahug tract... in La Conner, Wa.)

After reserveying for the improvements that they wanted to put in they found 1½ on two lots... with the lot line running down my front door. I wrote them a note that stated I'd been paying for 1 lot for 15 yrs. & that is what the house surveyed at the beginning... one lot. Their response to me was I could either pay the lease on the two lots, or remove my cabin from their land & have my lease cancelled.

On the assessment for the water & sewer... again being on two lots... it was a whopping amount. This has been reduced... through letters & meeting with my county Commissioner (who I have the utmost respect for.)

pg. 2

One year they were going to give me a small reduction in my lease because of taking & using part of my land for their road improvements & they told me not to pay until they figured out how much my lease was... because I wanted like I was told... they charged me 18% interest... + my lease... I paid this because I was scared... of losing my home & I have nothing else I have poured all of my earnings into this cabin... hoping I would be able to stay here in my older years. Everyone in my family is gone from Cancer & my husband drowned 6 yrs. ago... So its not possible I go live with a relative. This is my life!! Why can't I claim sovereign immunity? I just want to live!

I'm sure the government will figure out something that is fair & equitable to both sides... but this has been going on for a long time now... if only we could all sit down & talk... about "where the rubber meets the road on the reservation"... not about big bucks & ego trips etc we're all bigger than that! & this doesn't solve anything

Thank you again for your time & patience in this matter Sen Cantwell I will be praying for you in your busy travels in September & throughout the year, (I know how physically & emotionally demanding it can be) (I have been a volunteer nurse in a hospital ships in 3rd world countries)

Very Sincerely & with warm regards

Charlotte Thurlkill
P.O. 549 - La Conner Wa. 98257

P.S. Formerly... Mrs. Larry Harris (684)
It was $625 yr. — lease # 7699 - beginning 7-01-82 Expires-6-30-2007

WASHINGTON FEDERAL SAVINGS AND LOAN ASSOCIATION OF SEATTLE
SEATTLE, WASHINGTON

1. ACCOUNT SUMMARY SECTION
ACCOUNTHOLDER(S): CHARLOTTE HARRIS ~~AND~~ OR c.s. DOUGLIS HARRIS
Account No. 12-401070-8
Date of Issuance [illegible]
No Additions Permitted

			RENEWAL TERM — SEE SECTION 4		
OPENING BALANCE	MINIMUM BALANCE REQUIREMENT	INITIAL MATURITY DATE	RENEWAL TERM	RATE OF EARNINGS PER ANNUM	FREQUENCY OF COMPOUNDING
$625.00	$500.00	11-13-84	18 month	9.250	daily

Earnings Distribution Dates beginning June 30, 1983 and quarterly thereafter, with the last distribution on the final Maturity Date.

2. **GENERAL SECTION** This certifies that the Accountholder holds a savings account with the Opening Balance and for the Initial Term expiring on the Initial Maturity Date shown hereon in the above named savings institution.

3. **EARNINGS SECTION** This account shall receive earnings at the rate and with the Frequency of Compounding as above set forth. Such earnings shall be payable on the Earnings Distribution Dates above set forth, provided the balance in the account is not reduced below the Minimum Balance Requirement. If such balance is reduced below the Minimum Balance Requirement, the Rate of Earnings on the remaining balance shall thereafter be reduced to the rate then paid on regular savings accounts (see also Section 5).

4. **RENEWAL SECTION** This account shall be automatically renewed at the close of business on the Initial Maturity Date or the maturity date of any Renewal Term unless (1) withdrawn within the 7-day period referred to in Section 5 hereof or (2) at least 15 days prior to any maturity date, the association gives written notice to the Accountholder that this account will not be renewed. In such latter event, upon maturity the account will be converted to a regular savings account and receive earnings at the rate then paid on regular savings accounts.

The rate of earnings for any Renewal Term shall be at the rate being offered for this term certificate by the Association on the renewal date.

5. **PENALTY CLAUSE SECTION** Except as otherwise provided herein, in the event of any withdrawal of principal from this account prior to the initial or renewal period maturity date, the Accountholder shall forfeit an amount equal to six months earnings, whether earned or not, on the amount withdrawn at the nominal (simple interest) rate being paid on the account, regardless of the length of the time the funds withdrawn have remained in the account.

The penalty prescribed herein will not be imposed for withdrawal of principal following the death or adjudication of incompetence of any Accountholder.

Any withdrawal which reduces the account balance below the Minimum Balance Requirement, or any change in the term or Rate of Earnings, shall be considered as a withdrawal of the entire account balance and shall be subject to the penalty prescribed herein.

Earnings credited to the account during any term may be withdrawn at any time during such term without penalty. If the account is renewed at the same earnings rate, earnings during the preceding term as well as the current term may be withdrawn at any time without penalty during the Renewal Term. If the Renewal Term rate is different, earnings in the account at the commencement of the Renewal Term shall be deemed merged with the principal and only earnings for the Renewal Term may be withdrawn at any time without penalty during such term.

If the account or any portion thereof is withdrawn not more than 7 days after a maturity date, earnings shall be paid thereon at the Rate of Earnings above set forth to the date of withdrawal without penalty.

To the extent necessary to comply with these requirements, deductions shall be made from the amount withdrawn or the remaining account balance.

This account will be administered in accordance with the rules established by the Board of Directors for this account classification.

Not transferable except on the books of the depository institution.

FSLIC

Washington Federal Savings and Loan Association of Seattle

By Joan Raffel
AUTHORIZED SIGNATURE

FCD 6-82

Lease 7697

ASSIGNMENT OF SAVINGS ACCOUNT

FOR THE VALUE RECEIVED, we hereby assign and transfer to the United States Department of Interior, Bureau of Indian Affairs, funds on deposit in our Savings Account # 19-401070-8 deposited with the bank of Washington Federal S & L address: P.O. Box J La Conner, Washington 98257 Phone: 466-3129 standing in the name of Douglas and Charlotte Harris Gen. Del. LaConner WA 98257 with full power and authority to demand, collect, and receive said deposit, and to give receipt and acquittance therefore, with the above-mentioned bank to hold the passbook covering said account in its possession, agreeing to hold the sum of $ 625.00, until a release of this assignment from the Bureau of Indian Affairs, is received; this amount to be held as collateral security for any and all indebtedness and obligations of either or both the undersigned to the said U.S. Dept. of Interior, Bureau of Indian Affairs, which may exist by reason of Lease #7697 beginning on 7/01/82 for a term of 25 years, and expiring on 6/30/2007, covering Lot 24 Cobahud Waterfront Tracts

Upon default in the payment of any sum owing under said lease, or upon any default in the performance of the terms and conditions of said lease, the said bank of Washington Federal Savings & Loan is hereby authorized to apply the funds represented by said savings account to the payment of said indebtedness and to withdraw funds for such purpose at such times and in such amount as shall be demanded by said Assignee. This Assignment shall terminate when the Bureau of Indian Affairs releases it.

Dated this 5-13 day of May 19 83

Charlotte Harris / Thiringer
Lessee Charlotte Harris
General Delivery
Address LaConner, Wa.

x Douglas Harris
Lessee Douglas Harris
Gen. Del. LaConner, WA 9825
Address

The bank of Washington Federal Savings & Loan hereby acknowledges receipt of notice of the above Assignment of Savings Account No. 19-401070-8 to the United States Department of Interior, Bureau of Indian Affairs.
Dated this 13th day of May 19 83.

By: Joan Kaffel Title: Manager

Steven Peck
P.O. Box 1132
Shelton, Wash. 98584

Nina

1996 SEP -5 AM 1:14

August 30, 1996

United States Senate
Office of Senator Slade Gorton,
Washington, D.C., via Bellevue, Washington State Office

ATTN: SENATOR SLADE GORTON, HONORABLE CHAIR OF THE UNITED STATES SENATE INDIAN AFFAIRS COMMITTEE, COMMITTEE MEMBERS. Please consider the following as my testimony for inclusion in the official record on the matter before the committee regarding tribal sovereign immunity.

Dear Senator Gorton;

Please feel free to have this testimony read into the record. I would be willing to come to Washington, D.C. to testify if you feel it would be effective or necessary.

I have been involved in law enforcement in one form or another for a number of years. Several of these years I served as a police officer for indian tribes. I have a two year degree in Criminal Justice, have attended and graduated from two law enforcement training academies sponsored by the State of Washington, and attended other law enforcement seminars and training. I have been witness to many illegal acts committed by tribal personnel. These acts have gone unpunished, unprosecuted, and, in some cases, uninvestigated, because of sovereign immunity claims by the tribes.

Most recently, on August 16, 1996, while driving an automobile in a safe and legal manner on a roadway controlled and maintained by Mason County Government , and an Interstate Highway maintained by the State of Washington, I had my civil rights violated by a local indian police force when they initiated a contact. I was illegally stopped, detained, and assaulted by alleged tribal police officers that were operating outside their jurisdiction and without lawful authority. These persons were operating vehicles without external emergency blue lights, without police uniforms, and without authorization from the State of Washington. These persons were not lawfully commissioned to enforce Federal, State or County law. When I was stopped by these unmarked, non-uniformed persons I was never presented a reason for the contact or shown any form of identification, badge, picture identification card, or commission card. Even when I asked to see identification, I was shown none. I have contacted and complained to my state senator, state representative, the Bureau of Indian Affairs, (BIA), the FBI, the Washington State Attorney General, the Mason County Sheriff and prosecutor regarding these crimes. My State Senator advised that since the violations involves an indian tribe that there, "is nothing we can do." My state representative agrees with me that what happened is unlawful, improper, and outrageous, but can do nothing more that make inquiries. The BIA and FBI have shown absolutely no concern

that civil rights are being violated and have declined to investigate. The end result in this case is that there is apparently no one, no government agency, no court of competent jurisdiction, no local, Federal, or State law enforcement agency, or any other governmental entities that are willing to pursue these illegal, unconstitutional acts, or to investigate the many civil rights violations committed against myself and other citizens. The indian police in this case, and in many indian police agencies across the United States, commit civil rights violations and other illegal acts without fear of punishment, accountability, responsibility, nor are they held to any legal or ethical standard, or are they answerable to a United States court of law. Several times I was ordered, by tribal police supervisors, to violate the civil rights of citizens of the State of Washington and the United States. I informed them that I had no jurisdiction or lawful authority to act as ordered, and that I was morally and ethically bound to enforce the law in a legal manner. I also told them that I had concerns that if I were to act as ordered I would be subjecting myself to prosecution for civil rights violations or be civilly sued for exceeding my lawful authority. I was told, "Don't worry. If anything happens, the tribe will cover you with it's sovereign immunity. No one can legally touch you."

While on patrol, I was requested by a tribal police officer to meet him at a location outside our jurisdiction. This area was several miles away from the reservation. Upon my arrival the officer told me that he had entered onto about six private properties, conducted searches of those properties, and concluded that these properties contained material that he was intending to seize. He did not show me a legally obtained search warrant, he enumerated no probable cause, nor did we have jurisdiction to lawfully take any action. He requested my assistance in searching a particular house and property and assist him in seizing some material from this property. In the absence of a legally obtained verbal or written consent to search the property by the property owner, or without a legally obtained search warrant, without probable cause to search, and having no legal jurisdiction to conduct a search, or any other lawful reason, I had to refuse to participate in the apparent illegal search he was conducting. I observed this officer enter the private property, conduct his illegal search, seize material from the property, place the seized property into his patrol vehicle and into a civilian truck owned by a tribal members husband. This officer took some of the seized material to his residence and the civilian minor took some of the seized material to his parents residence. There is no indication that this officer properly disposed of the seized material by placing it into the police evidence / property room for safekeeping nor was it returned to it's proper owner. I filed a detailed report with my supervisors, with the BIA, and any other agency that I felt had any remote jurisdiction. No charges were ever filed against this officer for his illegal acts nor, to my knowledge, were the acts ever officially investigated. Although the tribal officials knew of these illegal actions, no action was taken. The tribe has no fear of ever being held accountable in a United States court of law because they claim sovereign immunity. The landowner in this case was unable to recover any damages.

At one indian police agency I witnessed officers burning seized Indian fishing nets within 20 yards of a river used for spawning by large salmon runs of multiple species.

These nets are made with synthetic materials such as nylon, plastic, lead, and Styrofoam. All of these materials are toxic when burning and the burned residue is toxic to the environment. The lead and other toxic residue was released into the air and the river where the salmon make their home. I reported this illegal burn to the local Pollution Control Authority and they indicated that they was nothing they could do. I also witnessed numerous civil rights violations and other illegal acts committed by officers with this department and no action was ever taken against them. Lack of action was due, for the most part, to the tribe having sovereign immunity. I was ordered by a superior to falsify Federal documents that were used to calculate the amount of money that the tribe was given for law enforcement activities. The falsifications related to artificially inflating the numbers used to gather statistical information by the BIA regarding police activities. I reported this to the BIA.

I notified my superior that several tribal members were illegally selling salmon that were supposed to be counted as treaty share for the purposes of complying with Federal law regarding treaty allocation of salmon. I was told to ignore this illegal activity.

I personally observed two tribal members digging shellfish in an area known to be polluted with human fecal chloroform bacteria, commonly known as E-Coli. I approached these persons, told them the area was polluted and that they should stop digging. I was later contacted by my superior and advised to not tell these persons, or other individuals, that they could not dig clams from this beach. When I informed him that this beach was polluted I was told, "They can dig for subsistence shellfish on any public beach they want to." I advised, that due to past experience with these persons, I believed they would sell the unclean shellfish. This particular tribe was allowed a subsistence amount of 50 pounds of shellfish, (clams), per person per day. It is illegal under tribal law to sell clams dug for subsistence. These two persons had about 200 pounds of polluted clams in their possession when I departed the area. I drove about 10 miles north of this location, spent a short time there checking for violations, and returned to the area where I had first contacted the clam diggers. The diggers had left. About five miles south of the polluted beach was an indian business, (known as a "fish buyer"), that purchased shellfish from clam diggers and in turn sold them to wholesalers that sold them to stores that sold them to the public. I observed the two persons I had contacted earlier digging clams at the polluted beach at the indian fish buyer selling the polluted clams. Their car was distinctive, I knew the individuals by name and on sight, and the five gallon plastic buckets that held the polluted clams were distinctive as well. They had no time, due to tidal conditions and time constraints to dig any other clams, nor did they, when I asked, have clams that belonged to other individuals. I advised my superior what I observed and was told, "You can't prove it, just forget it." I checked the documents each fish buyer is required complete after each purchase from a digger. The document contains information as to the date the clams were dug, the location of the dig, weight of clams, diggers name, etc. The documents regarding the polluted clams that were purchased from these two persons had been falsified as to the location the clams were dug. The document listed the location the clams were dug as four miles south of the actual digging site. These polluted clams were sold to an unsuspecting public whose health was highly endangered. The persons that were made sick or damaged by these polluted clams have no legal

recourse for damages caused by this reckless act of knowingly selling polluted shellfish for public consumption. Any persons damaged by the polluted shellfish cannot bring any legal action against the indian diggers, the indian fish buyer, or the tribal officials that permitted the sale because of the tribe and it's members enjoying sovereign immunity.
I witnessed a tribal gillnet fisher violating no less than three of the tribe's laws and regulations regarding the manner, mode and place they were allowed to fish. I warned this person twice that he was fishing in an illegal manner and subsequently issued a citation for the violations. Later, I was advised by my superior that he was changing the regulation so that the fisher was no longer in violation and voided the citations I had issued. The non-indian fishers that were damaged by these acts have no legal recourse to regain the lost fish they were legally allowed to catch.

This last incident I will relate depicts, is a clear and cogent manner, the necessity for removal of the tribal sovereign immunity law.
While an employee of a Federal Government Contractor, an indian tribe, I was the only minority police officer. From the first day of my employment I was the target of racial harassment, racial slurs, and discrimination by tribal officers on a daily basis. I witnessed officers, on a daily, routine basis, harass and intimidate citizens based solely on race or national origin. The victims of these abuses have no legal means to stop the abuse or to bring it to light via the courts. I observed officers conduct illegal searches, convert seized property to personal use, make illegal arrests, illegally serve arrest warrants, and otherwise act immorally, unethically, and outside the law. I witnessed tribal officers verbally intimidate, demean, and demoralize an indian woman, who is mentally retarded, until she was in tears. I daily documented these illegal or improper acts and when I reported these activities I was ignored. I was finally ordered by the sergeant to stop documenting the racist, illegal, and improper activities I witnessed. I was also ordered, once again, to falsify Federal documents for the monetary gain of the tribe. I was ordered to rewrite an accurate, factual, truthful, police report and insert false information into the report that covered up misconduct that I witnessed and attempted to report.
I confronted my harassers during the second week of employment and told them that their harassment, racial slurs, and other misconduct was not wanted or appreciated and I requested that they stop. After being ignored, I complained to the sergeant regarding the racial harassment I was being subjected to. When the sergeant continually ignored my complaints, I went to the Chief of Police. When the Chief of Police failed to stop the racial harassment, slurs and discrimination, I went to the tribal personnel manager. After I filed my formal written complaint with her and after she gathered information from me regarding specifics of the incidents, she informed me I was being terminated. When I asked the reason for the termination I was told, "It's because you filed this complaint and because you are not working out." I inquired of the personnel manager as to how long she would take to process my complaint. She indicated that I should give her about a week. If a week went by and I did not hear from her I was told to file a complaint with the Washington State Equal Opportunity Commission, (EOC). After ten days I received no response from the tribal personnel manager. Despite repeated requests for action, the tribe took no action and has done

nothing to this day.
Prior to applying for this job, I noticed the tribes advertisement in the local newspaper for employment with the tribe. I noticed that within the advertisement was the phrase, "An equal opportunity employer". I also saw, posted in the workplace, posters issued by the EEOC, indicating that racial, sexual, or other forms of harassments or discrimination were not allowed and a contact person, the tribal personnel manager, was to whom any violations were to be reported.

Considering that I was employed by "an equal opportunity employer", and feeling that I had been, illegally treated, violated, and degraded by the acts of racial harassment, discrimination, and other illegal acts I experienced, and receiving no response from the tribe, I began a nightmare that continues to this day trying to obtain a little justice.
I first filed my complaint with the state EOC, who, at the same time filed with the EEOC. I subsequently received letters from both the State and Federal EEOC offices that they had no jurisdiction. I was told that the indian tribes are exempted from Title VII of the Civil Rights Act and are not required to adhere to anti-discrimination laws. I complained to the U.S. Office of Civil Rights and was told that they had no jurisdiction. I filed a lawsuit in Federal District Court only to have the tribe's attorney claim that the court lacked jurisdiction and the tribe had sovereign immunity. I complained to the FBI and they have done nothing. I complained to the BIA Area Offices in Everett, Washington and Hoquiam, Washington, and both failed to do anything. In August or September of 1991, I complained to the BIA Regional Office in Portland, Oregon. They maintained, for about a year and one half, that they had no control over the tribes and could do nothing. When I later confronted the BIA with irrefutable facts, they indicated they had some responsibility and would take action. It took until August of 1995, about four years after my initial complaint, for them to conclude that I was subjected to racial harassment and discrimination in the workplace. As of the date of this letter the BIA has taken no action of any kind against the tribe that allowed and tolerated racial harassment by it's employees, and in the words of a BIA official, "the tribe knew they, (the persons who harassed me), were racists when they hired them."
It took the BIA in excess of two years to issue a "Report of Finding of Fact and Determination" that is and remains unsigned by the BIA official that issued it.
I notified the BIA Inspector General, (BIA / IG) of numerous examples when the BIA failed to adhere to the law or it's own regulations, knowingly receiving falsified documents, failing to investigate these falsifications, and failing to maintain control over it's contract with this indian tribe, and other problems. Also, that they have failed to conduct an impartial, fair, complete investigation. I was informed by the BIA / IG that I had a right to appeal the lack of action of the BIA to the Area Director of the Portland, Oregon Area Office of the BIA. I am expected to appeal to the area director that is responsible for doing nothing about this problem. I have been attempting to get a response from the Area Director regarding my appeal to the Area Contracting Officers Report for just over one year and to this date have received no appropriate response.

I grew up in and around an indian reservation at Marysville, Washington. I have spent several years serving the indian community. Given all my experience with the indian tribes, all the knowledge I have gained in life and in dealing with indian tribes, and all

the training in law enforcement I have obtained tell me that to allow a group of persons to act with impunity, without regard for lawful behavior, without accountability to any United States Court, by not allowing compensation for damages suffered from the protected group via the legal system, is quite simply, inviting the type of abuses I have related and to allow and condone the abuses to go on. To continue the special right of sovereign immunity is just plain WRONG. The tribes are allowed to file suits against me but the reverse is not the case. How can this be and why is it allowed to continue? It is my hope that you will very seriously consider my valid concerns. I feel that my experience and what I witnessed cannot be ignored, overlooked, or considered lightly. Given the proliferation of indian gambling casinos in this country it is now, more than ever, imperative that you take action and rescind the tribes sovereign immunity. For the most part, the indian casinos are designed to attract non-indians. People enter these casinos believing they have their civil rights intact, this is not an accurate belief. The tribes currently operate these casinos without adequate supervision. This lack of supervision will, in all probability, allow organized crime to easily enter and flourish.

The tribes are not legally liable for any damages caused by their employees. Tribal police know they are free to, and likely will, conduct illegal searches, make illegal traffic stops, illegal seizures of property or persons, violate the civil rights of Citizens of the United States, commit other illegal, improper, or other negligent acts at these casinos and they know they are not legally accountable. The citizens against whom these illegal acts are perpetrated have no access to a competent court of jurisdiction for a redress of their grievances. In the State of Washington, as in other states, if a person is over served alcoholic beverages by a barkeeper, and then that over served person exits the cocktail lounge, drives an automobile and causes property damage or personal injury to another, then the person damaged is allowed to recover damages from the person responsible for the over service of the alcoholic beverages. When a person enters into an indian casino cocktail lounge, and is over served, drives an automobile and causes damage or personal injury, the person damaged cannot recover damages from the tribal barkeeper or the tribe as can be done under state law.

Without your action to rescind sovereign immunity, indian officials can and will continue to act without accountability, without responsibility, and without regard to the law. Civil rights have been, and will continue to be violated without action from you that would change the status quo. Reasonable and legitimate damages for negligent or illegal acts committed by indian tribes must be allowed. Whenever one group is allowed special rights that no other single person or other group enjoys, it is not only unfair, but reprehensible and corrective action is long overdue.

I realize that I am only an individual citizen, and that in the big picture I am insignificant, but, on this matter I urgently, strongly, implore you to rescind the tribes sovereign immunity protection and place them under the same laws that apply to all of us. The time is long past for this immunity to be rescinded because the reason a

sovereign immunity exemption was granted is no longer a factor. There is more than enough legal avenues and support available to the tribe to use against the non-indian, but no such legal avenues exist for the non-indian against the tribes for their unlawful, intrusive, improper, damaging acts.
This single fact alone makes rescinding sovereign immunity a requirement to obtain equality, and fairness.

I gratefully thank the entire committee your time, your due consideration of my information and experiences, your patience, and your support of all Americans by acting to do the right thing and rescind sovereign immunity so the tribes can be truly self-sufficient and ALL Americans can truly be equal.

Respectfully submitted for the record;
Steven Peck

September 10, 1996

NQN/Sov. Immunity 1996 SEP 13 AM 12:36

Dear Senator Gordon:

I am writing this to you in regards to the issue of Tribal Sovereign Immunity. I am an American Citizen, Taxpayer, Business Owner and a person who is becoming disenchanted with the words "One Nation, under God, with Liberty and Justice for All".

A single group of individuals should not be given special rights and privileges no matter what race, according to our Bill of Rights and Constitution. If an Indian Tribe has chosen to become its own nation then so be it. The protective blanket of funds and benefits allotted to that Indian Nation should cease and they should become responsible for all harmful actions such as discrimination , harassment and financial wrong doing. I feel that this shield of Sovereign Immunity is giving these Indian Tribes a license to stomp over and abuse the very people who have been footing the bill for far too long. They want independence, but only if they are allowed to stay in the money flow. THIS MUST STOP! Only then will they become independent and responsible for their own actions.

The poverty on the reservations is blamed on the White Man. This is not true. In fact if the Tribes had to be accountable, we would see who is getting the money and where it is being spent. This is not to say that there aren't some tribes that do very well handling their affairs. As in the White population, there are some that manage very well and others who need help. We have created laws to help people handle their monies and property, so why don't we do the same for the Indians on the reservations. Look around you, do you have more respect for the ones you see trying to get on with their life, and contributing.... or the ones that are always after money form you?

I hope you will all take a good hard look at the monster that has been created and vote to remove Tribal Sovereign Immunity.

Sincerely,

Linda Barnes

Linda Barnes
P.O. Box 101
La Conner, Washington 98257

David M. Montague
775 Dan Street
LA Conner, Wa.
98257

1996 SEP 13 AM 12:45

Senator Slade Gorton
730 Hart Office Building
Washington, DC
20510

Dear Senator Gorton,

I am writng this letter to encourage you and other members of the U.S. Senate Indian Affairs Committee to consider waiving Tribal Sovereign Immunity.

I, along with my family, currently reside within the geographical boundaries of the Swinomish Tribe, Skagit County, Washington, and have for the last thirteen years. I selected this site to build my house for many reasons but also had never had any particular negative associations with the Tribe and had essentially "grown-up" with many members and subseqently have always felt comfortable here. Property was purchased as "Fee Simple", listed as part of Skagit County and always considered to be part of the County with its commensurate tax responsibilities.

What is not comfortable is to become aware that this link to the County is tenuous, with local and state government officials being reluctant to represent property owners and that there is a political/legal/cultural group (Tribe) which has access and power within U.S. system and which may also act unilaterally, as a Sovereign Nation, which has direct impact on non-tribal persons and issues about which they have no control or even effective input. Essentially, the tribes may participate in both systems but it is impossible for a non-tribal person to participate and be fairly represented by a group asserting total control. It feels very much like being a "non-citizen" within one's own country.

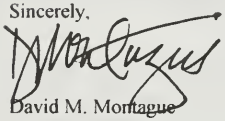
The re-birth of Indian culture and the economic advances of many tribes is truly heartening. Locally I see many indications that folks are more hopeful and are starting to actually see a good future for themselves and their children. Particularly through the proliferation of casinos the local tribes have realized a way to economic prosperity, though I fear they may over do it and I can't help feeling my own personal cultural apprehensions about the grown of gambling.

I just would like to see the political/legal playing field leveled somewhat and I feel that waiving Tribal Sovereign Immunity is the place to start. I don't believe that this would negatively impact the Tribes but would actually improve their "equity" by establishing accountability which is a cornerstone in the financial world we live in and begin to make us all truly equal in the eyes of the

eyes of the County, State and Federal Government.

Thank you for your time and consideration. I know this is a very difficult issue and I appreciate your dedication to government service and your willingness to take on problems and to speak out when its necessary.

Sincerely,



David M. Montague

September 12, 1996
861 Kalispell Drive
LaConner, WA. 98257

Senator Slade Gorton
730 Hart Senate Office Building
Washington, D.C. 20510-4701

1996 SEP 16 PM 12:58

NOV/Indians

Dear Senator,

Enclosed, please find a copy of our letter to the Senate Committee on Indian Affairs.

We need all the help that we can receive to eliminate tribal sovereign immunity.

Thank you,

Robert L/Mary C Bibeau

Robert L./Mary C. Bibeau

P.S.:
I agree that the native american has been short changed in the past.However, we feel that the government and the courts have gone overboard on the greater than equal rights for tribes. They are immune to our court systems except when they benefit from it, such as the Judge Boldt decision.

September 12, 1996
861 Kalispell Drive
LaConner, WA. 98257

Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510-6450

Dear Senators,

We purchased a sub-lease here in Shelter Bay on the Swinomish Indian Reservation through the Shelter Bay Company in 1989. That same year, we had a home built on the lot and retired in 1990. The land use agreement fee to 1992 was $360/yr. Per the master lease agreement, the land was re-evaluated in 1993 and the new land lease agreement provided for a lease fee of $675/yr to the year 2003.

The Swinomish tribe is now disputing the renogiated lease agreement relative to the land value. In that the tribes are exempt from court action and are subject to BIA interpretations, I fear that our lease fee could triple from that of the current agreement.

If this marsh had not been developed by the Shelter Bay Company, this community would be non-existent and the land for all practical purposes would be essentially worthless. It surely would not have been developed by the tribe.

In our retirement years, this will become a significant burden. In that we do not own the land, there is no way that we can potentially recover these monies through the sale of our property.

In all fairness, we feel that our native americans should be subject to the same laws as any other non-native american.

The tribes should be required:

1) to pay taxes, be it local, state or federal on income, (ie;land leases, businesses and gambling casinos),

2) to abide by legal contractual agreements/obligations,and

3) to be subject to prosecution and subsequently penalized just as the general public is liable.

We heartily support your hearings leading to the elimination of tribal sovereign immunity.

Yours Sincerely,

Robert L/ Mary C Bibeau

Robert L./Mary C. Bibeau

1996 SEP 12 ~.. 1: 15

Jack & Betty Wockner
8919 160th St.
Snohomish, Wa. 98290

August 31, 1996

Senator Slade Gorton
730 HSOB
Washington DC 20510

NQN

RE: BIA/Swinomish Tribe
Land Leases
LaConner, Washington

Dear Senator Gorton,

We are writing to you to ask for your help in saving our home on the Swinomish Reservation. We entered into a lease with the Land Owner to be administrated by the Tribe and BIA in 1986. We felt that the rent amount was fair. We had no indication at the time from either the Tribe or BIA that we would have anything but a fair and reasonable rent increase at time an adjustment was called for by the lease. Then at that time we were stunned by the notice that our lease rent would increase almost 400%! We find this to be excessive and without merit. On top of that, we have also been charged with the cost to construct a sewer system even though we are the Tenants. We've attempted to appeal the rental increases, but to no avail.

We are trapped and in jeopardy of losing our property. We can't sell it because of the unreasonable lease and accordingly, we have lost our equity. Now we understand the Tribe will declare Sovereign Immunity, blocking any action we may wish to take against the Tribe.

As a member of the Senate Committee on Indian Affairs and our Senator, we are asking for your help.

Thank you,

August 20, 1996

The Honorable Slade Gorton
730 Hart Senate Building
Washington, DC 20510

NQN/51

Dear Senator Gorton:

We live at 2214 Lummi Shore Road and we have recently built a new house that is within the exterior boundaries of the Lummi Reservation. We heard that you are planning to have hearings about the abuse that occurs by the Lummi Indian Business council as it pertains to Non-tribal members living on Fee Patent land.

I want to relate to you a situation that happened with our new house that needs to be addressed in the hearings.

We made application to the Whatcom County Building and codes for our new house. We of course had to show that we could get water and sewer before we could proceed. We arranged for a well driller to drill a well on the property and we discovered that we did not need a water right or permit to drill a well since our use would be under the 5,000 gallons per day waiver set by the Washington State Department of Ecology.

We found out that the Whatcom County Building and codes department routinely send the Lummi Tribe a copy of the building application as a goodwill effort to co-manage building and zoning with the tribe on the reservation. Also, it is standard practice for the department of ecology to send the tribe notification of an impending well drilling even if it is under the 5,000 gallon personal use waiver.

What happened during the next few weeks was bizarre to say the least. We noticed that a van was parked near our new home during the day and night and inside were tribal members watching to see if the well driller was coming to drill the well. We put up with this spying for approximately 1 week before the well driller arrived. When the well driller arrived the Lummi Law and Order came onto our property to see what he was doing and told us that we should not be drilling a well. We asked the Lummi Law and Order to leave and they did but they remained near our home constantly until the well driller left.

My question to you and this hearing board is; "Is this not an abuse of power and authority of the Lummi Indian Business Council?" I feel as though we are living inside of a police state and we have no recourse or say in how individual rights are being violated and we want it addressed!

Sincerely,

Gail and Wes Whitney
2214 Lummi Shore Road
Bellingham, WA 98226
360-758-2833

August 19, 1996

Honorable Slade Gorton:
730 Hart Senate Building
Washington, D.C. 20510

Dear Senator Gorton:

We are very pleased that you are reviewing the impact of Sovereign immunity with the Indian tribes, across the nation. We feel this federal law is one of the worse forms of racial discrimination that this government has ever imposed.

It is our understanding that the Lummi Tribe can put water and sewer lines or what ever they wish in front of our house and then deny us hook-up, because we are non-tribal members. Whatever services that are made available should be for the benefit of the whole community, not just a certain group of people. The Lummi tribe also has imposed taxes on businesses that in turn pass these taxes on to non-tribal members and non-tribal members are not allowed to be on the Tribal Councils and have equal representation. This is a system that perpetuates racial discrimination and the only recourse available for non-tribal members is to sue the Federal government.

If our city councils, county councils or school boards were to govern in this manner they would be held liable for their actions and this type of abusive system would be stopped immediately.

It is time to stop the give away to all tribes of this nation and teach them to be economically and socially responsible.

Sincerely

Wes and Gail Whitney
2214 Lummi Shore Road
Belllingham, WA 98226
360-758-2833

Chappelle Arnett
4136 Saltspring Dr.
Ferndale, WA 98248

8/19/96

Senator Slade Gorton
730 Hart Senate Office Building
Washington, D. C. 20510-4701

JAN 15!

Dear Senator Gorton:

Whatever reasoning prevailed to allow sovereign immunity for Indians needs to be reexamined. No other "nation" or government enjoys such status and for good reason. There are a number of situations which have developed within the so-called boundaries of the Lummi Reservation which have resulted in major problems for fee-land owners.

Among these, the following are of major importance in recent years.

1. Tribal drilling of illegal wells without permits in Georgia Manor and Sandy Point on residential zoned fee land. They obviously have been able to continue pumping **threatening the water supply for all;** this is also a special problem for people who purchased property with the understanding that water would be available. They continue to pay property taxes, water/ sewer assessments, and community assessments. This is most unfair and a real financial burden for many as they are unable to build or to even sell the property without sustaining a substantial loss.
2. The Tribe ignores contracts and court orders for county parks such as Portage Island, Bellingham City water, and sewer/water hookups.
3. Tidelands issues problems increase. I live on Saltspring Dr. which is adjacent to a prime clam area. This year was one of the best ones attracting 50-100 tribe members on weekend days over a two-three week period with fewer on some week days. They park cars/trucks on private property, have walked through mine and neighbor's yards without permission. And in the past, during a salmon fishing time, they "camp" on so-called tidelands at South Cape which no-doubt are using the private property there which is undeveloped. This camping occurs with children, and no sanitary facilities, and after doing this for a couple of weeks, they leave household furniture such as mattress, folding chairs, and even a stuffed chair. All of this I have witnessed on walks and cycling in this area.
4. Tribally passed taxes affecting non-Indians is taxation without representation.

There are other situations that could be addressed, however, I will limit this and ask why the Tribe is able to rule over non-Indians? It is time to move into the 21st Century in view of equal rights and responsibilities of all citizens; reexamine treaties in light of changes in society without endangering true tribal jurisdiction and property. Furthermore, the goal of the American way is to integrate all peoples; we seem to encourage Indians to remain a separate culture--however, many Tribal members have left the reservation to follow the American dream?

A complex situation which will not improve as long as Tribes enjoy such exclusive status as sovereign immunity! Thank you for your attention to this request.

Yours truly,

Chappelle Arnett

Chappelle Arnett

K. Jeff McKay
4693 Sucia Dr.
Ferndale, WA 98248
(360) 384-1863

August 16, 1996

Hon. Slade Gorton
United States Senate
730 Hart Senate Office Bldg.
Washington, DC 20510

NAN/S1

Dear Senator Gorton:

I am writing to support efforts in the Senate to waive sovereign immunity for Indian Tribes. The doctrine of sovereign immunity is founded on the ancient belief that "the King can do no wrong", and when applied to Indian Tribes has caused great harm to Indian tribal members and non-tribal citizens who reside on or near Indian reservations. It is time to leave behind this antiquated concept and move forward in the spirit of equal justice for all citizens of this Nation.

In our community, tribal sovereign immunity has allowed Lummi Nation to threaten and to cause real harm to its neighbors. Those who are harmed and threatened have no recourse in common courts to defend themselves. Examples of the abuses that have occurred because of the inability of the citizens to protect themselves in court are:

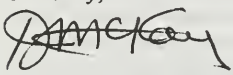
- Threats by Lummi Tribal leadership to close public roads, denying us access to our homes.
- Attempts to ruin the Sandy Point and Georgia Manor community wells; actions that would almost certainly be declared illegal in a court of law.
- Imposition of utility taxes on those who have no voice in Tribal government (taxation without representation).
- Continual threats to initiate law suits against our water associations and local government entities. This is a form of "legal blackmail" as we can not afford the exorbitant costs of defending our rights in Federal Courts.

On the personal level, I was threatened by Lummi Tribal Officers acting under the authority of the Lummi Indian Business Council while drilling a well on my fee-owned private property. This well was fully permitted under the laws of the State of Washington, yet the well driller and I were both harassed and intimidated by Lummi authorities. I can attest to the apprehension that anyone would feel, knowing that the Constitutional Rights and access to channels of legal grievance which are taken for granted in our society are denied when dealing with Indian tribal authorities.

It is time for our Government to protect the rights of all it's citizens equally. Every level of government, every public official, and every individual in this Nation is subject to the same legal system with the exception of tribal governments which are the last vestige of "sovereign immunity". The only comparable exceptions are foreign diplomats who can evade our laws by claiming "diplomatic immunity".

Removing the "sovereign immunity" of tribal governments is not an attempt to interfere with the ability of the tribes to govern their own people. It simply makes tribal government accountable for it's actions as is every other level of government in our Nation. Discrimination in favor of Indian tribes is just as wrong as discrimination agains Native Americans.

Sincerely,



K. Jeff McKay

NQN-31

August 17, 1996

To: Senator Slade Gorton

cc: Senator Patty Murray
cc: Congressman Jack Metcalf

From: Dale R. Petersen at Sandy Point, 4052 Saltspring Dr, Ferndale, WA 98248

Subject: Tribal Sovereign Immunity

Thank you, Senator, for "staying with us" as we fee land owners continue to fight for our water, property, and constitutional rights at Sandy Point within the original external boundaries of the Lummi Reservation. Section 115 in the budget bill offers us some relief in that the war-like actions of the Lummi Indian Business Council has ceased for the moment.

Our biggest problem is that of sovereign immunity enjoyed by the LIBC. The enclosed page on this subject highlights the need to have this provision removed from Indians. If there were no sovereign immunity, we could sue and resolve in court matters that Whatcom County will not touch and we must rely on Congress to resolve. If Congress and the tribes themselves really believe in self-governace, then they should want sovereign immunity removed. The Lummis claim they want more independence. If they do, they need to "grow-up" and accept full responsibility for their actions and have sovereign immunity removed just like the United States and Washington State governments have done. Certainly the Point Elliot Treaty of 1855 did not give the Lummis this right.

Encl - 1

Waiving tribal sovereign immunity would enable those harmed or threatened by tribes' or tribal officials' actions to have recourse in the state or district court systems. Federal courts have consistently ruled the tribal governments are immune from lawsuits, unless Congress specifically waives such immunity. (Federal and State governments and their officials are no longer able to claim such sovereign immunity for their actions.)

Some specific instances where sovereign immunity has impacted us are: 1.) tribal spot zoning in residential areas (fish plant, casino, bingo hall, RV trailer park), and agricultural flood plain areas (gas station with in ground tanks); 2) tribal excusing of themselves from getting the environmental permits which all others must get for projects in shoreline, flood plain, wetland and other areas; 3) tribal ignoring of contracts and court orders for county parks, Bellingham City water, and sewer and water hookups 4.) tribal representatives creating fear by threatening access by non-Indians to utilities and their homes; 5.) tribal drilling of illegal wells without permits in Georgia Manor and Sandy Point on residential zoned fee land; 6.) tribal government threatening of well drillers with confiscation of equipment for drilling on fee lands; 7.) tribal refusal to get county building permits in fee land areas affects assured quality of construction and county govt. oversight/accountability in residential neighborhoods 8.) tribally passed taxes affecting non-Indians is taxation without representation. 9.) tribally passed laws affecting non-Indians and refusal to allow access to those laws is discriminatory lack of due process. we believe that waiving sovereign immunity will improve the self-government of Indian tribes. It will make tribal governments responsible for their actions in the same ways as other governments within the US. Additionally, it may help tribes attract businesses which presently are wary about dealing with them due to lack of accountability because of sovereign immunity.

Peg Norheim

4269 Sucia Drive Ferndale, Washington 98248 (206)384-4497

August 20, 1996

NQN/51

Senator Slade Gorton
730 Hart Office Bldg.
Washington, D.C., 20510

Dear Senator Gorton,

My name is Peg Norheim and I live within the political boundaries of the Lummi Nation in Washington State.

I'm writing to you to encourage you to support the **waiver of Tribal Sovereign Immunity.**

As you well know, for the past few years, our community has faced several challenges from the Lummi Indian Business Council and Lummi Nation which continue to put stress on me as an individual fee land owner and the demeanor of our community as a whole.

I worry that under Sovereign Immunity the tribe will usurp my water rights and I will have no legal recourse. I worry that additional taxes will continue to be levied and raised without my consent or my voice in the levy process. I worry that the tribe will continue to deplete the natural aquifer upon which we rely for water to slow new development(okay by me) and to eventually drive the nonnative population off the reservation. What will stop the drilling of additional illegal wells on fee land?

There are a number of issues which impact me and I want an assurance that, if necessary, I can fight back - legally.

Please support the waiver and encourage those committee members with whom you serve to do the same.

Thank you in advance for your support.

Respectfully,

Peg Norheim

Peg Norheim

cc: Senator Patty Murray

August 8, 1996

SENATOR SLADE GORTON
730 Hart Senate Bldg.
Washington, DC 20510

NQN/51

We wish to thank you members of the Senate for having the hearing on waiving the sovereign immunity of the Indian Tribes. This waiver is badly needed and long overdue.

We fee land owners are harrassed, threatened and intimidated by the tribes in many ways and tribes cannot be held accountable for their actions like all other Governmental entities and we citizens.

The Lummi tribe has levied an unconstitutional utility tax on us and we can not take them to court to prove that it is taxation without representation. You and Congressman Jack Metcalf seem to be our only help in congress but you are hamstrung. If tribal sovereign immunity were to be waived, perhaps we would be able to solve some of our own problems with them.

We do not like having our water supplies threatened and we do not like being intimidated on our own beaches. Please do every thing in your power to see this thing through.

Thank you again for all of your efforts on our behalf.

Sincerely

Robert L Trumble

Mickie Trumble
4850 Beach Way
Ferndale, WA 98248

cc. Citizens Equal Rights Alliance Inc.

August 19, 1996

Honorable Slade Gorton:
730 Hart Senate Building
Washington, D.C. 20510

NGN/SG immunity

Dear Senator Gorton:

Please find enclosed with this letter substantial documentation on past incidences I have experienced on the Lummi Reservation. I own property at 2233 Lummi Shore Road which is within the exterior boundaries of the reservation on Fee Patent land.

I have spent an incredible amount of both time and money trying to correct the racial discrimination that is perpetuated by the Lummi Indian Business Council against non-tribal members that live within the boundaries of the reservation.

The first incident is about an abuse of the Lummi Law and Order trying to stop me and my family from walking on the beach. I have included a description in my own words about the situation and attached a letter from my attorney and pictures of the Lummi Law and Order physically abusing me.

The second incident is regarding an incident where the Lummi Law and Order came onto our property and put out our legal beach fire. Attached is a letter from you from a previous communication. I never heard back from Sheriff Brandland but I was too busy to follow up on this matter.

The third incident also involves the Lummi Law and Order in a traffic incident where they are using the state computer traffic network to scare and intimidate non-tribal members into thinking they are legitimate law enforcement officers. Please refer to the attached notes for full detail.

The fourth case is involving yet another traffic infraction and how the Lummi Law and Order Officer followed me to my house and entered my property unlawfully. You will find my attorney's notes and the officer's notes on the incident in the attached pages.

The fifth incident involved yet another traffic incident where they saw me driving my fathers old beat up truck with my two boys in the truck. They were sitting on the seat and not in an approved child seat even though technically they were both above the age and weight of a child restraint system. I was not speeding but the Lummi Law and Order had been so upset with me because of past incidences that they just waited for me on the road and stopped me frequently for no reason. I believe it is a form of harassment and abuse of their power over me.

They asked me for my license and I said no and I requested that a sheriff deputy be dispatched because I did not recognize their jurisdiction over me. The officer went ballistic and told me and my two young boys that if I did not give him the license that I would be hauled off to jail and my kids would be taken away from me. My boys started to scream and became hysterical and I insisted that he call a Sheriff deputy and he said once again that he would not and asked me to step out of the car so he could arrest me and take me to jail. He started pulling on my mirror and tried to pry the door open but I had it locked. Luckily I had a cellular phone with me and I called 911. A sheriff deputy arrived 40 minutes later and spent 20 minutes calming me and my children down.

To this day my two boys do not have a good understanding of who is a good police officer and who is a bad police officer. I have very little documentation on this case as the Sheriff office somehow decided to not send out a warrant for this traffic infraction. I believe the reason for this is because it would have been such an embarrassment to the Sheriff office because if it ever became public which is what I was prepared to do, it could look as if the Sheriff actually condoned this abuse of power because of their long-standing

agreement with the Lummi Law and Order to handle traffic infractions for the Sheriff office within the reservation boundary.

I have written enough about our woes as a minority in the foreign country of Indian Land. As much as all of you in Washington would like me to believe that I do live in a foreign country and that my rights are subject to the laws of the Lummi Nation, I still refuse to believe it. I will continue to fight for the day when all people residing within the reservation believe and understand that we are one nation under God, indivisible with liberty and justice for all.

Sincerely,

Michael G. Bezona
2233 Lummi Shore Road
Bellingham, WA 98226
360-758-2566

April 30, 1991

At 10:30 a.m., I was walking south on the beach. approximately 10 feet from the road, with Bob Bezona, Kay Clark, and Jeff Clark.

A Lummi Law and Order officer riding a 3 wheel ATV, told us that we were trespassing. We told him that we were not trespassing and he pulled in front of us blocking our path.

I asked, by what authority he was stopping us by, and he didn't answer me. He was joined by officer Yamada, who was in a car on the road. My Dad asked them by what authority, and they would not answer. They told us we were being detained and to wait for a Sheriff Deputy. After 10 minutes, I said that I was going to continue to walk on and they had no right to detain me, I was on fee patent land. They said that we were committing civil trespass. When I attempted to walk on, Officer Johns grabbed my arm and wrenched it behind my back and told me they were going to handcuff me. I relaxed and then attempted to exit the beach onto the road. When I reached the road, both officer, Johns and Yamada, grabbed men and pulled me back onto the beach and told me that I was to remain there until the Sheriff came. My Dad took pictures and they threatened him and told him that he'd better not take any more pictures of the incident.

We waited 45 minutes without incident for the Sheriff to come. At 11:15, the two Lummi officers asked us to give our names and information. I said; "no". The officer said; "well, we already have your information (names and addresses)". He said, "our Chief said to wait a reasonable amount of time for a Sheriff to come, but if you give names, you can go".

At 11:25, deputy Bradshaw and a tall officer with back hair arrived and talked with the Lummi police for 5 minutes. I stood up and yelled across the road for assistance. The officers came down and asked us if we were aware that we were trespassing. We told them we were not aware. We were not on the tidelands.

Our neighbor, Tina Ellen-Bass, came down and told the Sheriff that we were on her property and she did not care if we were on it. I asked officer Bradshaw if they were arresting or citing us. They said, "only if you don't give you name". I said; "then arrest me". She would not do it. I asked her to take my statement, and she wrote very few words down on paper. She continued to lecture on trespassing on Indian property without any concern for my own property rights. She would not allow me to file a harassment complaint against the Indian police, we gave officer Bradshaw our names and they let us go.

SKEEL, HENKE, EVENSON & ROBERTS
ATTORNEYS AT LAW
3801 BANK OF CALIFORNIA CENTER
SEATTLE, WASHINGTON 98164
TEL:(206) 623-1031
FAX (206) 628-2033

April 12, 1991

Mr. Larry Mount, Sheriff
Whatcom County
Whatcom County Courthouse
311 Grand Avenue
Bellingham, Washington 98225

Re: **Michael Bezona**
Information Report No. 91A-04336
Incident March 30, 1991

Dear Sheriff Mount:

Please be advised that the undersigned has been retained by Michael Bezona concerning the events of March 30, 1991, which resulted in the referenced information report. Mr. Bezona did not receive a copy, and, on his behalf, we herewith request that a copy be forwarded to this office.

Mr. Bezona informs me that on March 30, 1991, two Lummi tribal officers stopped him and several others walking with him on the seaward side of Lummi Shore Road and forcibly detained them until county officers arrived, after which Deputy Sheriff Carol Bradshaw took his name and reprimanded him for trespassing on tribal property.

From the information we have, it appears that Mr. Bezona was not on tribal property. We understand that he and the people who were with him are prepared to testify they were walking well upland of the point normally reached by the high tides. The owner of the residential property at that point, Tina Ellen-Bass (2117 Lummi Shore Road, 758-7376), who observed the group after the tribal officers detained them, states that they were on her land, which includes the upland on the seaward side of the road. Mrs. Ellen-Bass also states that she informed the tribal officers that these persons and others peaceably walking along the shore had her permission to be there. Whether the tribal officers informed Officer Bradshaw of that is not known.

Mr. Bezona and his neighbors strongly believe that the county should not aid the Lummi Tribe in attempts to extend its tideland ownership claims to the extreme high waterline. The Lummis have

apparently adopted the practice of other Puget Sound Indian tribes of posting signs claiming exclusive tribal rights to the extreme high waterline.[1] Such claims are entirely without legal foundation. On Mr. Bezona's behalf, we respectfully request that you consider, after appropriate consultation with the prosecutor's office, offering guidance to your officers on this matter.

We understand that the Lummi Indian Reservation includes the tideland along the waterfront, and that the waterfront allotments patented to members of the tribe, to which Mr. Bezona and the property owner at the point he was detained are successors in interest, do not include tideland. We also understand that the boundary between the tideland and the upland allotted property shifts along the water with accretions and erosion. *United States v. Boynton*, 53 F.2d 297 (9th Cir. 1931). The elevation of the boundary, however, is the "ordinary," *i.e.*, mean (not extreme) high waterline. *United States v. Pacheco*, 2 Wall. 587 (1865). More precisely, it is the mean of all high tides over an 18.6 year period. *Borax Consolidated v. Los Angeles*, 296 U.S. 10 (1935). We believe that the above principles, generally applicable to the shore boundary of all government survey lots conveyed by federal patents, are fully applicable to Indian allotment patents adjoining tideland or a riverbed within a reservation, whose title remains in the United States in trust for the tribe. *Puyallup Tribe v. Port of Tacoma*, 717 F.2d 1251, 1261 (9th Cir. 1983).

It should also be noted that the allottees and their successors in interest within an Indian reservation also have, as an incident of the allotment grant, a vested federal common law riparian right of access and wharfage across the tideland. *Confederated Salish and Kootenai Tribes v. Namen*, 380 F. Supp. 452 (D. Mont. 1974), *aff'd per curiam* 534 F.2d 1376 (9th Cir. 1976) (*Namen I*). It follows that as to the actual tideland, below the mean high waterline, abutting owners and their permittees have access rights, even though the beach is owned in trust for the

---

[1]The posted sign near Mrs. Ellen-Bass' property reads:

> **Restricted Area**
> **No Trespassing**
>
> **Lummi Reservation tidelands are reserved for use by Lummi tribal members only. All other persons are prohibited from entering upon or using the tidelands for any purpose unless specifically authorized by the Lummi Indian Business Council. Tribal tidelands include all areas between the extreme high and extreme low water marks. Tribal and federal laws prohibit trespass, hunting and fishing, and destruction of this sign on tribal tidelands.**
>
> **For leasing and other information, call Lummi Land office at: 734-8180 or 384-1489.**

tribe. An Indian tribe was held to have power to regulate the erection of certain structures on its tidelands by nonmembers, because of their potential impact on tribal welfare, in *Namen II*, 665 F.2d 951, 962 (9th Cir. 1982), but the continued validity of this ruling is now doubtful in view of *Brendale v. Confederated Yakima Nation*, 492 U.S. ___, 196 L. Ed.2d 343, 109 S. Ct. 2994 (1989). The propriety and practicality of the county attempting to ascertain and police the limits of nonmembers' riparian access rights through the application of state criminal trespass laws to persons merely present on the beach would seem to be equally doubtful.

In the past, we are told by Mr. Bezona, your deputies have generally not aided the Lummi Tribe in its sporadic harassment of non-Indian property owners and their guests along the shoreline of their lots. Again, on Mr. Bezona's behalf, we respectfully suggest the county return to its past practices in this regard.

Very truly yours,

Eric Richter

ER/sab
003D0230

cc: David McEachran, Whatcom County Prosecutor
Carol Bradshaw, Deputy Sheriff
Mike Bezona

Restricted Area
No Trespassing

Lummi Reservation tidelands are reserved for use by Lummi tribal members only. All other persons are prohibited from entering upon or using tidelands for any purpose unless specifically authorized by the Lummi Indian Business Council. Tribal tidelands include all areas between the extreme high and extreme low water marks. Tribal and federal laws prohibit trespass, hunting and fishing, and destuction of this sign on tribal tidelands.

For leasing and other information, call Lummi Land office at: 734-8180 or 384-1489

Tina Ellen-bass
2117 Lummi Shore Rd.
Bellingham, wa. 98226

Eric,
Pictures not developed. will follow next week.
Thanks.
M. B.

On Friday, July 21, 1995, we checked with the Department of Natural Resources as to whether there was a burn ban on recreational fires on our property. We were told that there was no ban. The burn ban limitations in the Herald said that fires had to be in a pit, 16" high on three sides, with one side open, and ten (or fifteen) feet away from combustable materials. There also had to be a bucket of water available near the fire. Our pit was properly constructed, we had a bucket of water available, and we also had our hose for backup available.

That evening, we were having a family gathering around a small fire in our burn pit on our beach property, above the mean high tide line, at 2219 Lummi Shore Road.

Lummi tribal representatives from the Lummi Fish and Game Department, Mr. Hillaire and another man, told us we had to put the fire out because of the county burning ban.

We told them that we had checked that day, and there was no ban for recreational burning, and that we were legal. They said that we were on Indian land, and had to put the fire out. We refused, and told them that if they wanted the fire out, they would have to do it. They not only put out the fire, they destroyed the fire pit also. We called the sheriff.

The sheriff's deputy and another man, not in uniform, arrived. The deputy first talked to us about what happend and what was going on, and then they talked to the tribal representatives. The deputy then came back to us and said that this was not a land use issue – if it were, the county had jurisdiction. He said that the tribal representatives did say to him that they clearly knew that we were on our own land, that were no land use issues involved at all – they said that we owned to the mean high tide. But the deputy said that this was another issue, and involved a tribal resolution which applied to the whole reservation and showed us a copy of a tribal document to that effect which he had received from the tribal representatives, dated July 18th. That document was lengthy, but the first paragraph said, that in a spirit of cooperation with Whatcom County, the Lummi Tribe would allow no burning on the reservation. It was in memo form, and I believe that it was from the Lummi Indian Business Council (I do not remember to whom it was addressed). I asked for a copy of the document, but was told I could request a copy from the tribal center on Monday, and was not allowed to keep a copy of the document. The deputy told us to go to the tribe on Monday and get a copy if we wanted one, and he gave the copy which I had been reading, back to the tribal representatives. The tribal representatives apologized for destroying the fire pit and said they would fix it.

While we feel that we are making progress with the tribal representatives as to the fact that this is the first time that they have admitted that we own to the mean high tide line (and not the previously claimed vegetation line), we are still very concerned that Whatcom County Sheriff's deputies would tell us that in a "spirit of

cooperation" tribal resolutions apply to our lands, and would show us a tribal document in "proof", but would then refuse to let us have a copy of said document.

We are asking, is this the new sheriff's policy now, that fee lands are subject to tribal resolutions, or did the deputies misunderstand? Did Whatcom County issue a reservation wide recreational burning ban? If so, why weren't residents and the DNR notified, and why didn't the deputy have a county copy of the resolution available, or at least send me to the county on Monday for a copy rather than to the tribe?

Would you please send me a copy of the county resolution declaring the reservation wide burning ban.

Sincerely,

Michael Bezona

SLADE GORTON
WASHINGTON

730 HART SENATE OFFICE BUILDING
(202) 224-3441

TDD 202-224-8273

United States Senate

WASHINGTON, DC 20510-4701

COMMITTEES:

APPROPRIATIONS

BUDGET

COMMERCE, SCIENCE, AND TRANSPORTATION

INDIAN AFFAIRS

LABOR AND HUMAN RESOURCES

July 31, 1995

Michael Bezona
The Cellular Programming Center
1334 King Street, Suite 1
P.O. Box 5584
Bellingham, WA 98227

Dear Mr. Bezona:

Thank you for the copy of your letter addressed to Dale Brandland of the Whatcom County Sheriff's Office, regarding a recreational fire beld on your property and your request for a copy of the tribal resolution prohibiting any burning on reservation lands. I appreciate your bringing this matter to my attention.

Please contact me again if you do not receive a response from Mr. Brandland and the Whatcom County Sheriff's Office or if the response is unsatisfactory. Again, thank you for the letter.

Sincerely,

SLADE GORTON
United States Senator

SG:zcc

3206 JACKSON FEDERAL BUILDING
915 SECOND AVENUE
SEATTLE, WA 98174
(206) 553-0360

11120 GRAVELLY LAKE DRIVE SO.
SUITE #8
TACOMA, WA 98499
(206) 581-1648

130 FEDERAL BUILDING
500 WEST 12TH STREET
VANCOUVER, WA 98660
(206) 696-7838

887 U.S. COURT HOUSE
W. 920 RIVERSIDE AVENUE
SPOKANE, WA 99201
(509) 353-2507

BOX 4083
402 EAST YAKIMA AVENUE
YAKIMA, WA 98901
(509) 248-8084

1350 GRANDRIDGE BLVD.
SUITE #212
KENNEWICK, WA 99336
(509) 783-0640

MORRIS BUILDING, ROOM 119
23 SOUTH WENATCHEE AVENUE
WENATCHEE, WA 98801
(509) 663-2118

PRINTED ON RECYCLED PAPER

RECEIVED
APR 28 1995
WHATCOM COUNTY
COUNCIL

April 18, 1995

Barbara Brenner
County Council
311 Grand Avenue
Bellingham, WA 98225

Dear Ms. Brenner:

I was riding in my father's car on Easter Sunday, April 16, 1995, when a Lummi Nation police officer stopped my father and told him that he was speeding.

He told my father that if he had a good driver record and his license showed that there were no warrants for his arrest that he would let him go with only a warning. This officer then went back to his car and checked his on-board computer and came back to my father and said that his record was clear and that he could go.

My question to you is; What abilities have you given Lummi Nation Police officers to access confidential records such as driving record and other confidential information that shows up on state, local, and Federal computer systems? Who is paying the cost for the Lummi Nation Officers to use State, Local and Federal airwaves and antennas? Can I, as a citizen, have access to driving records and other personal information on these computer systems. If so please let me know in writing how I can do this.

In another traffic stop, the same Lummi Nation Officer asked a person for his social security number. The person refused and he asked again and the person refused to give it to the Lummi Officer. The officer then proceeded to interrogate the person with personal questions and made threats about going to jail.

Please do not write back to me and say that I should ask the Lummi Nation first. Also, I do not give you authorization to copy or send this letter to any Lummi Nation Government entity or representative or Representative of the Lummi Nation. You are my elected representative and I am asking that you look into this matter and let me know what solution, if any, you see for this situation.

Sincerely,

Michael G. Bezona

Michael G. Bezona
2233 Lummi Shore Road
Bellingham, WA 98226
360-733-6400

IN REPLY REFER

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Puget Sound Agency
3006 Colby Avenue - Federal Building
Everett, Washington 98201

August 9, 1995

Honorable Slade Gorton
United States Senator
c/o Christy Crawford
33206 Jackson Federal Building
915 Second Avenue
Seattle, WA. 98174

Re: Your Anonymous Constituent Inquiry

Dear Senator Gorton:

We have reviewed your letter of August 2. 1995. Your constituant asks several questions. first of which was, **what rights have been afforded to the Lummi Nation Police Officers to access confidential information derived from Local, State, and Federal computer systems?** The Lummi Tribal Police Department, like all law enforcement agencies. made application through the Washington State Patrol (WSP) Office, Olympia, WA to gain access to such information. The patrol's General Law Enforcement Recognition Board reviews such applications and conducts an investigation of the law enforcement agency and issues the Originating Office Requesting Information (ORI) number. This allows the police department to gain access to the computer system.

The second question was. **who is paying the cost for the Lummi Nation Officers to access Local, State and Federal airwaves and antennas?** The Lummi Tribal Police Department absorbs the cost.

Finally he asks. **can he, as a Citizen, also have access to driving records and other personal information on the computer system?** In a word. no. Private citizens and the general public cannot access these confidential records.

Concerning the Social Security Number request. when citing a non-Indian. the Washington State Uniform Citation has a block for the Social Security Number (SSN). The police officer is instructed to fill in that space. If the police officer fails to obtain the SSN. he indicates. "does not know or refused to provide" in the SSN block. If he puts nothing, the State Jurisdiction will call wanting to know what to put in the blank block. It is a requirement to which the officer must comply.

Regarding Lummi Tribal Police Jurisdiction over Whatcom County Residents. the Tribe has a Mutual Aid Agreement with Whatcom County. Also, the Supreme Court of the United States refused to hear the David P. Schmuck case which made its way through the Washington State judicial system and also the United States Federal Court Appeal Process. This case reaffirmed tribal police authority to stop, detain, investigate and hand over to the proper authority non-Indian violators.

Should you have any questions or need further clarification. please do not hesitate to call me or Mr. Phillip Charles, Senior Criminal Invistigator at (206) 258-2651 Ext. 232 or 256 respectively.

Sincerely,

William A. Black
Superintendent

STATE REPRESENTATIVE
42nd DISTRICT
PETE KREMEN

State of
Washington
House of
Representatives

RULES
AGRICULTURE & ECOLOGY
ENERGY & UTILITIES
LEGISLATIVE TRANSPORTATION
COMMITTEE

May 1, 1995

Michael Bezona
2333 Lummi Shore Road
Bellingham, WA 98226

Dear Michael:

In follow-up to my earlier correspondence, I discussed the issues which you raised with Don Clawson, Legislative Liaison at the Department of Licensing. As you can appreciate, it is difficult to respond to briefly outlined situations. However, I will respond in general terms to the issues raised in your correspondence.

Generally speaking, law enforcement officials are allowed to access driving records from the Department of Licensing; it is considered appropriate for them to utilize this information in the performance of their responsibilities. Private citizens are not granted this privilege. Additionally, Bill Perry, Counsel for the House Law & Justice Committee, believes that the Lummis are acting via an agreement with local law enforcement.

Your question about the ability of a Lummi officer to ask for an individual's social security number is a federal issue, dependent upon specific situations. Therefore, I referred your inquiry to Senator Patty Murray; upon receipt of a response, I will be back in touch.

Thank you for drawing my attention to your concerns.

Sincerely,

Pete Kremen
State Representative
42nd District

PK:le

LEGISLATIVE OFFICE: 308 JOHN L. O'BRIEN BUILDING, OLYMPIA, WA 98504-0600 • (360) 786-7854 • DURING SESSION 1-800-562-8000
RESIDENCE: 3283 NORTH SHORE ROAD, BELLINGHAM, WA 98226 • (360) 734-3802 • (360) 384-5297

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SLADE GORTON
WASHINGTON
730 HART SENATE OFFICE BUILDING
(202) 224-3441
TDD 202-224-8273

United States Senate

WASHINGTON, DC 20510-4701

COMMITTEES
APPROPRIATIONS
BUDGET
COMMERCE, SCIENCE, AND TRANSPORTATION
INDIAN AFFAIRS
LABOR AND HUMAN RESOURCES

August 2, 1995

Michael Bezona
2233 Lummi Shore Road
Bellingham, WA 98226

Dear Mr. Bezona:

Thank you for your letter regarding recent traffic incidents with the Lummi Nation Police Department. I appreciate your bringing this matter to my attention and will do what I can to see that your concerns are addressed and explanations given for the behavior of the Lummi Nation Police. I apologize for my delayed response.

In an effort to assist you, I have contacted Mr. William Black, Director of the Bureau of Indian Affairs, Everett Office, to express my interest in this situation. I have informed Mr. Black of the questions you posed in your correspondence - questions pertaining to the jurisdiction of the Lummi Nation Police Department over Whatcom County residents and access given to said police officers for local, state, and federal informational computer systems.

When I receive a reply, I will contact you. In the meantime, if you should have any additional questions or require further assistance, please do not hesitate to contact Christy Crawford in my Seattle office. Thank you for your patience.

Sincerely,

SLADE GORTON
United States Senator

SG:zcc

3206 JACKSON FEDERAL BUILDING
915 SECOND AVENUE
SEATTLE, WA 98174
(206) 553-0350

11120 GRAVELLY LAKE DRIVE SO.
SUITE 88
TACOMA, WA 98499
(206) 581-1646

130 FEDERAL BUILDING
500 WEST 12TH STREET
VANCOUVER, WA 98660
(206) 696-7838

697 U.S. COURT HOUSE
W. 920 RIVERSIDE AVENUE
SPOKANE, WA 99201
(509) 353-2507

BOX 4083
402 EAST YAKIMA AVENUE
YAKIMA, WA 98901
(509) 248-8084

1250 GRANDRIDGE BLVD
SUITE #212
KENNEWICK, WA 99336
(509) 783-0840

MORRIS BUILDING, ROOM 119
23 SOUTH WENATCHEE AVENUE
WENATCHEE, WA 98801
(509) 663-2118

PRINTED ON RECYCLED PAPER

SLADE GORTON
WASHINGTON

730 HART SENATE OFFICE BUILDING
(202) 224-3441

TDD 202-224-8273

United States Senate

WASHINGTON, DC 20510-4701

COMMITTEES:

APPROPRIATIONS

BUDGET

COMMERCE, SCIENCE, AND TRANSPORTATION

INDIAN AFFAIRS

LABOR AND HUMAN RESOURCES

August 15, 1995

Michael Bezona
2233 Lummi Shore Road
Bellingham, WA 98226

Dear Mr. Bezona:

I have received the enclosed reply from William A. Black, Superintendent, Bureau of Indian Affairs, regarding your inquiries into the activities of the Lummi Nation Police Department and their involvement in traffic violations. I trust that the information provided will answer your questions to your satisfaction and clarify the Lummi Nation's law enforcement role in Whatcom County.

I appreciate your bringing this matter to my attention. I was glad to be of assistance to you. If you should have any additional questions or require further assistance, please do not hesitate to contact Christy Crawford in my Seattle office.

Sincerely,

SLADE GORTON
United States Senator

SG:zcc
Enclosures

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(509) 783-0640

MORRIS BUILDING, ROOM 119
23 SOUTH WENATCHEE AVENUE
WENATCHEE, WA 98801
(509) 663-2119

PRINTED ON RECYCLED PAPER

Washington State Senate

Olympia Office:
P.O. Box 40442
Olympia, WA 98504-0442

Senator Ann Anderson
Republican Whip
42nd Legislative District

Phone Numbers:
Senate Office: (360) 786-7682
Hotline: 1-800-562-6000

May 18, 1995

Michael G. Bezona
2233 Lummi Shore Road
Bellingham, WA 98226

Dear Michael:

Thank you for writing me regarding your experience with the Lummi Police Department. I am happy to answer your questions about the general nature of tribal policing.

Many of Washington's twenty-six indian tribes have entered into agreements with local law enforcement agencies to provide police services on their reservations. The terms of each agreement can vary based upon the needs and desires of the tribe and local law enforcement. The state Criminal Justice Advisory Council, an eleven member commission headed by the Washington State Patrol, certifies that an entity may act as a law enforcement agency and obtain criminal history and driver information from the state computer system.

Generally, records of criminal convictions and outstanding warrants are not confidential information. However, the state's law enforcement telecommunication system (ACCESS) is restricted to use by law enforcement agencies. Agencies pay for access to the system based upon their needs and requirements. In the case of the Lummi's, they have entered into an agreement with the Whatcom County Sheriff, and the police departments of Bellingham, Everson, and Ferndale for dispatch services and driving record checks.

Attached are copies of Washington laws which pertain to an individual seeking to obtain criminal record information from the state. In addition to these provisions, it should be kept in mind that court proceedings are public in nature and those records are kept by the clerk of each court.

I hope this information is helpful to you. If you have any additional questions please contact me at your convenience.

Sincerely,

Ann Anderson

Senator Ann Anderson
42nd Legislative District

WHATCOM COUNTY SHERIFFS OFFICE
Public Safety Building
311 Grand Avenue
Bellingham, Washington 98225-4078
DALE BRANDLAND, Sheriff

RECEIVED
MAY 16 1995
WHATCOM COUNTY
COUNCIL

MEMORANDUM

TO: Council Members Barbara Brenner & Marlene Dawson

FROM: Sheriff Dale Brandland

DATE: May 12, 1995

SUBJECT: Response to Letter from Mr. Bezona

This is a response to your request for a comment on the attached letter from Mr. Bezona. Lummi Law and Order is a recognized law enforcement agency in Washington State and is therefore entitled to have access to information via the states "access" system. They also pay for dispatch services through "What-Comm". I am sorry but these services are not available to citizens.

If I can be of further service to you please do not hesitate to ask.

Phone: (206) 676-6650 County: (206) 384-5360 SCAN: 769-6650 JAIL: (206) 676-6909 County: (206) 384-3291

CLERK OF THE COUNCIL
Ramona Reeves
BUDGET/PROGRAM ANALYST
Bob Woods

WHATCOM COUNTY COUNCIL
COURTHOUSE
311 Grand Avenue
Bellingham, WA 98225-4038

COUNCIL MEMBERS
Barbara E. Brenner
Marlene Dawson
Larry Harris
Kenneth R. Henderson
Robert A. Imhof
Ward Nelson
Alvin Starkenburg

May 8, 1995

MEMORANDUM

TO: Dale Brandland, Sheriff

FROM: Barbara Brenner, Council Member

SUBJ: Michael Bezona Complaint

Could you please answer the questions posed in Mr. Bezona's letter? I am not aware of what, if any, confidential information we share with other jurisdictions.

Thank you for your assistance.

c: Michael Bezona
Dana Brown-Davis, Clerk of the Council
Correspondence file
Brenner

BB/jkn

g:\bb\bezone.mem

Phone: (206) 676-6690 County: (206) 384-6637 TDD: (206) 738-4555 FAX: (206) 738-2550 SCAN: 769-6690

SLATER & SLATER
Attorneys At Law
418 Bellingham National Bank Bldg.
Bellingham, Washington 98225
(206) 734-5980

John T. Slater
J. Timothy Slater

February 28, 1992

David McEachran
Whatcom County Prosecutor
311 Grand Avenue
Bellingham, Washington 98225

Re: Michael Bezona

Dear Dave:

I am writing in follow-up to our phone conversation of earlier today regarding Michael Bezona. As you will recall, Mr. Bezona was issued a speeding citation by Sergeant McSwain, of the Whatcom County Sheriffs Office based upon the written report of a Lummi Tribal officer.

It is Mr. Bezona's position that the Sheriffs Department is not authorized under the applicable statute (RCW 46.63.030) to issue notices of infraction based upon the written statements of a tribal officer. RCW 46.63.030(1) provides that only a law enforcement officer in whose presence the infraction has occurred may issue a notice or a law enforcement officer may issue a notice based upon the written statement of another law enforcement officer in whose presence the infraction was committed. In either case, the infraction must have been committed in the presence of a law enforcement officer.

It is my understanding that historically Lummi law enforcement has simply referred written reports to the Sheriffs Department whereupon review the Sheriffs Department will issue the notice of infraction. Presumably the Lummi law enforcement does not issue the notice of infraction directly in that both the tribe and the county acknowledge that the Lummi tribal officers have no authority over non-indians. This being the case, it is our position that the Sheriffs Department cannot rely upon the written statement of a "non-law enforcement officer" as the basis for issuing a notice of infraction. Again, if tribal officers were in fact "law enforcement officers" for purposes of RCW 46.63.030, they could issue the notice of infraction directly without the need to refer it to the Sheriffs Department.

If there is any question whether Lummi tribal officers constitute "law enforcement officers" for purposes of Title 46, I would direct your attention to RCW 46.90.157 which defines "police or police officer". I would also direct your attention to Op. Atty. Gen. 1978, L.O. No. 18, wherein it is the position of the Attorney General's Office that tribal police officers do not constitute "law enforcement personnel" for purposes of RCW 43.101.010 so as to require the Washington Criminal Justice Training Commission to provide them with access to it's basic law enforcement training programs.

I would also direct your attention to our Supreme Court's decision in Queets Band of Indians v. the State of Washington, 102 Wn. 2nd 1 (1984), wherein the court held that a federally recognized indian tribe is not a "jurisdiction" within the meaning of RCW 46.85.020(2) and .080, which define jurisdiction and provide for vehicle registration reciprocity with other jurisdictions. In Queets, the court stated that if the legislature had intended to include indian tribes within the meaning of the statute, it would have expressly referred to indian tribes in the statute as it had done in other legislation. Likewise, inasmuch as neither Title 46.63.030 nor 46.90.157 specifically include tribal officers, it is clear that the legislature did not intend for tribal officers to have enforcement authority under Title 46.

Although I am writing on behalf of Michael Bezona and his particular situation, I do know that this issue is of great concern to many non-indians both on and off the reservation (ie: Lummi Island for example). If Lummi law enforcement believes that the county will act upon their written reports, it will continue to stop non-indian vehicles. I am concerned that if Lummi law enforcement continues to stop non-indians for minor traffic infractions, that a confrontational situation could develop where somebody is injured or killed.

I would suggest that if the only purpose for the stop is to determine whether the driver of the vehicle is an indian, that the same information can be obtained by simply checking the licence number to ascertain whether the vehicle is registered to an indian. Another option would be for the indian officer to simply follow the vehicle and talk to the driver once the vehicle has reached it's destination. If the tribe is to continue to stop non-indian vehicles, I think it should do so at it's own risk without any support from Whatcom County and that Whatcom County should disassociate itself with this practice.

Mr. Bezona's case is set for a contested hearing in Whatcom County District Court on March 17th. I understand that you have a very busy schedule however, if you could

have one of your deputies review this matter and get back to me prior to Mr. Bezona's hearing, it would be greatly appreciated. I would also appreciate it if you would have one of your deputies review the trespass question which we discussed. As I explained over the phone, the tribal officers own report acknowledges that he was aware that Mr. Bezona's property was private property, that he had been instructed to stay off Mr. Bezona's property and despite Mr. Bezona's admonition to keep off his property, the tribal officers proceeded to enter onto the property. Although the trespass situation in this case may not seem serious, it is a concern to both Mr. Bezona and to other fee land owners residing on the reservation. Obviously, if the tribal police officers have no criminal jurisdiction over non-indians, they have absolutely no right to enter onto private property over the objections of the property owner.

Again, thank you for your attention to this matter and I shall look forward to receiving a response from your office.

Very truly yours,

SLATER & SLATER

By:_____
J. Timothy Slater

JTS:psd
cc: Mike Bezona
Dale Brandland

Laws 1990, ch. 96, § 3, inserted the subsection pertaining to the wrongful installation of sunscreening material.

Laws 1990, ch. 250, § 59, in subsec. (12), added "or statue", and deleted a subsec. relating to RCW 46.20.416.

Reviser's Note: This section was amended by 1990 c 96 § 3 and by 1990 c 250 § 59, each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Severability—Laws 1990, ch. 250: See Historical and Statutory Notes following § 46.16.301.

Severability—Effective date—Laws 1989, ch. 353: See §§ 46.30.900 and 46.30.901.

Severability—Effective dates—Laws 1989, ch. 178: See §§ 46.25.900 and 46.25.901.

Severability—Laws 1987, ch. 388: See Historical Note following § 46.16.710.

Effective dates—Laws 1987, ch. 244: See Historical Note following § 46.12.020.

Cross References

Allowing unauthorized persons to drive, see § 46.20.344.

Notes of Decisions

Costs 3

3. Costs

Where a city or town has repealed a portion of its municipal code, defining a crime or crimes equivalent to offenses listed in West's RCWA 46.63.020, but has not reached agreement with the county for apportionment of costs associated with those offenses, the county may not unilaterally assess costs against the city or town; the county may bring a court action to force the city or town to meet its obligations under the Court Improvement Act of 1984 (Laws of 1984, Chapter 258), and may be entitled in appropriate cases to recoup portions of costs incurred since the effective date of the Act. AGO 1988, No. 9.

46.63.030. Notice of traffic infraction—Issuance

(1) A law enforcement officer has the authority to issue a notice of traffic infraction:

(a) When the infraction is committed in the officer's presence;

(b) When the officer is acting upon the request of a law enforcement officer in whose presence the traffic infraction was committed; or

(c) If an officer investigating at the scene of a motor vehicle accident has reasonable cause to believe that the driver of a motor vehicle involved in the accident has committed a traffic infraction.

(2) A court may issue a notice of traffic infraction upon receipt of a written statement of the officer that there is reasonable cause to believe that an infraction was committed.

(3) If any motor vehicle without a driver is found parked, standing, or stopped in violation of this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution, the officer finding the vehicle shall take its registration number and may take any other information displayed on the vehicle which may identify its user, and shall conspicuously affix to the vehicle a notice of traffic infraction.

Amended by Laws 1987, ch. 66, § 2.

Historical and Statutory Notes

1987 Legislation

Laws 1987, ch. 66, § 2, in subsec. (1), inserted designation "(a)"; inserted subd. (b); and inserted designation "(c)".

46.63.110. Monetary penalties

Notes of Decisions

Late penalty 3

3. Late penalty

Fact that motorists who failed to pay late penalty on unpaid traffic infraction fines could not renew their driver's licenses did not deny motorists due process due to fact that they were not entitled to hearing prior to imposition of late penalty; motorists received notice of unpaid fine, and number of individuals adversely affected was extremely small. Burman v. State (1988) 50 Wash.App. 433, 749 P.2d 708.

Fact that motorist could not appeal imposition of late penalty on unpaid traffic infraction fines did not deny motorist of due process, given availability of procedures for vacation of judgment, writ of certiorari, or informal resolution to correct clerical error. Burman v. State (1988) 50 Wash.App. 433, 749 P.2d 708.

Notice of imposition of late penalty on unpaid traffic infraction fine which was contained on citation itself satisfied due process notice requirements. Burman v. State (1988) 50 Wash.App. 433, 749 P.2d 708.

46.63.150. Repealed by Laws 1989, ch. 9, § 1

CHAPTER 46.64—ENFORCEMENT

Section

46.64.036. Posting of security or bail by nonresident—Penalty.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

46.64.015. Citation and notice to appear in court—Issuance—Contents—Written promise—Arrest—Detention

Whenever any person is arrested for any violation of the traffic laws or regulations which is punishable as a misdemeanor or by imposition of a fine, the arresting officer may serve upon him or her a traffic citation and notice to appear in court. Such citation and notice shall conform to the requirements of RCW 46.64.010, and in addition, shall include spaces for the name and address of the person arrested, the license number of the vehicle involved, the driver's license number of such person, if any, the offense or violation charged, the time and place where such person shall appear in court, and a place where the person arrested may sign. Such spaces shall be filled with the appropriate information by the arresting officer. The arrested person, in order to secure release, and when permitted by the arresting officer, must give his or her written promise to appear in court as required by the citation and notice by signing in the appropriate place the written citation and notice served by the arresting officer, and if the arrested person is a nonresident of the state, shall also post a bond, cash security, or bail as required under RCW 46.64.035. An officer may not serve or issue any traffic citation or notice for any offense or violation except either when the offense or violation is committed in his or her presence or when a person may be arrested pursuant to RCW 10.31.100, as now or hereafter amended. The detention arising from an arrest under this section may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice, except that the time limitation does not apply under any of the following circumstances:

(1) Where the arrested person refuses to sign a written promise to appear in court as required by the citation and notice provisions of this section;

Laws 1990, ch. 95, § 3, inserted the subsection pertaining to the wrongful installation of sunscreening material.

Laws 1990, ch. 250, § 59, in subsec. (12), added "or status"; and deleted a subsec. relating to RCW 46.20.416.

Reviser's Note: This section was amended by 1990 c 95 § 3 and by 1990 c 250 § 59, each without reference to the other. Both amendments are incorporated in the publication of this section pursuant to RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

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Severability—Effective dates—Laws 1989, ch. 178: See §§ 46.25.900 and 46.25.901.

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Cross References

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Notes of Decisions

Costs 3

3. Costs

Where a city or town has repealed a portion of its municipal code, defining a crime or crimes equivalent to offenses listed in West's RCWA 46.63.020, but has not reached agreement with the county for apportionment of costs associated with those offenses, the county may not unilaterally assess costs against the city or town; the county may bring a court action to force the city or town to meet its obligations under the Court Improvement Act of 1984 (Laws of 1984, Chapter 258), and may be entitled in appropriate cases to recoup portions of costs incurred since the effective date of the Act. AGO 1988, No. 9.

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(b) When the officer is acting upon the request of a law enforcement officer in whose presence the traffic infraction was committed; or

(c) If an officer investigating at the scene of a motor vehicle accident has reasonable cause to believe that the driver of a motor vehicle involved in the accident has committed a traffic infraction.

(2) A court may issue a notice of traffic infraction upon receipt of a written statement of the officer that there is reasonable cause to believe that an infraction was committed.

(3) If any motor vehicle without a driver is found parked, standing, or stopped in violation of this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution, the officer finding the vehicle shall take its registration number and may take any other information displayed on the vehicle which may identify its user, and shall conspicuously affix to the vehicle a notice of traffic infraction.

Amended by Laws 1987, ch. 66, § 2.

Historical and Statutory Notes

1987 Legislation

Laws 1987, ch. 66, § 2, in subsec. (1), inserted designation "(a)"; inserted subd. (b); and inserted designation "(c)".

Notes of Decisions

Late penalty 3

3. Late penalty

Fact that motorists who failed to pay late penalty on unpaid traffic infraction fines could not renew their driver's licenses did not deny motorists due process due to fact that they were not entitled to hearing prior to imposition of late penalty; motorists received notice of unpaid fine, and number of individuals adversely affected was extremely small. Burman v. State (1988) 50 Wash.App. 433, 749 P.2d 708.

Fact that motorist could not appeal imposition of late penalty on unpaid traffic infraction fines did not deny motorist of due process, given availability of procedures for vacation of judgment, writ of certiorari, or informal resolution to correct clerical error. Burman v. State (1988) 50 Wash.App. 433, 749 P.2d 708.

Notice of imposition of late penalty on unpaid traffic infraction fine which was contained on citation itself satisfied due process notice requirements. Burman v. State (1988) 50 Wash.App. 433, 749 P.2d 708.

46.63.150. Repealed by Laws 1989, ch. 9, § 1

CHAPTER 46.64—ENFORCEMENT

Section
46.64.035. Posting of security or bail by nonresident—Penalty.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

46.64.015. Citation and notice to appear in court—Issuance—Contents—Written promise—Arrest—Detention

Whenever any person is arrested for any violation of the traffic laws or regulations which is punishable as a misdemeanor or by imposition of a fine, the arresting officer may serve upon him or her a traffic citation and notice to appear in court. Such citation and notice shall conform to the requirements of RCW 46.64.010, and in addition, shall include spaces for the name and address of the person arrested, the license number of the vehicle involved, the driver's license number of such person, if any, the offense or violation charged, the time and place where such person shall appear in court, and a place where the person arrested may sign. Such spaces shall be filled with the appropriate information by the arresting officer. The arrested person, in order to secure release, and when permitted by the arresting officer, must give his or her written promise to appear in court as required by the citation and notice by signing in the appropriate place the written citation and notice served by the arresting officer, and if the arrested person is a nonresident of the state, shall also post a bond, cash security, or bail as required under RCW 46.64.035. An officer may not serve or issue any traffic citation or notice for any offense or violation except either when the offense or violation is committed in his or her presence or when a person may be arrested pursuant to RCW 10.31.100, as now or hereafter amended. The detention arising from an arrest under this section may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice, except that the time limitation does not apply under any of the following circumstances:

(1) Where the arrested person refuses to sign a written promise to appear in court as required by the citation and notice provisions of this section;

WHATCOM COUNTY PROSECUTING ATTORNEY

DAVID S. McEACHRAN

Whatcom County Courthouse
311 Grand Avenue
Bellingham, Washington 98225-4079
(206) 676-6784

COPY

March 18, 1992

J. Timothy Slater
Slater and Slater, Attorneys at Law
418 Bellingham National Bank Bldg.
Bellingham, WA 98225

Dear Mr. Slater:

This letter is in response to your letter dated February 28, 1992 addressed to David McEachran and also to our phone conversation on March 16, 1992. Essentially, you have raised the issue of whether or not Lummi Law and Order has the authority to stop non-tribal members within the reservation boundary and further, whether or not they are authorized to furnish a written report to Whatcom County Sheriff's Department regarding infractions witnessed by Lummi Law and Order so that Whatcom County can then prosecute the infractions in Whatcom County District Court.

I have read all of the cases and statutes you cited in your letter, including RCW 46.63.030, the "notice of traffic infraction issuance" statute. That statute essentially authorizes a law enforcement officer to issue a notice of traffic infraction when ...the officer is acting upon the request of a law enforcement officer in whose presence the traffic infraction was committed. I believe the focus of your inquiry is upon the definition of "law enforcement officer", and whether or not Lummi Law and Order police officers are considered to be "law enforcement officers", for that purpose.

As I read the statutes, (RCW 46.63.030, 43.101.010, 46.90.157, 46.61.021, and 46.63.010 (legislative intent), it appears that Lummi Law and Order fits the definition of "a law enforcement officer".

I believe the two cases you cited, Aglo,1978 No. 18 (Attorney General opinion), which is a one paragraph opinion regarding a first class city's police officer's service retirement allowance and Queets v. Muckleshoot, 102 Wn 2d 1, 1984, which examines a limited issue of whether or not Indian tribes have jurisdiction to allow for vehicle registration reciprocity with other jurisdictions, are not on point to the present issue. Therefore, I believe we must look further.

I believe an additional case of relevant value is Oliphant v. Suquamish, 98 S Ct 1011, 435 U.S. 191, 55 L.Ed 2d 209 (1978).

The Oliphant case essentially held that Indian tribes do not have jurisdiction to arrest and try non-Indian intruders who come within their reservation. (As you know, this holding has been expanded to include non-tribal members and non-Indian intruders).

However, the Supreme Court ruling clearly states that the Indian tribes are "necessarily dependent on the United States for their protection from lawless and injurious intrusions into their country". 98 S Ct at 1020. The court continues and states essentially that the tribes recognize "that the United States would arrest and try non-Indian intruders who came within their reservation...and that the tribes "are to promptly deliver up any non-Indian offender, rather than try and punish him themselves". Id.

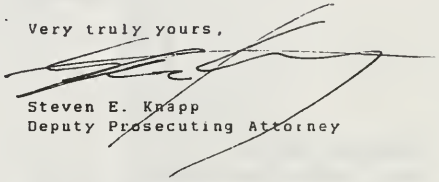
Thus, I believe that based upon the Oliphant case, and its progeny, as well as the Washington statutes cited above, Lummi tribal law and order has the authority to stop persons within the reservation boundary, (whether or not tribal members or Indians or not) if the tribal officer observes an infraction committed in their presence.

After making the initial stop, however, the officer must determine whether or not the person is a tribal member. If it is a tribal member, the officer may cite or arrest that person, depending on the circumstances. In the event the person is a non-tribal member or a non-Indian, I believe the tribal officer would have to release that person at that time and not make any arrest or citation. The officer would then forward a report to the local sheriff's office for prosecution through the state court system.

Indian reservations, being a third sovereignty within our nation, (federal, state and "Indian"), certainly presents a challenge in determining jurisdictional issues. If you are aware of any other sources of information which would help us determine these issues, I certainly would appreciate hearing of them.

I look forward to your response.

Very truly yours,



Steven E. Knapp
Deputy Prosecuting Attorney

SLATER & SLATER
Attorneys At Law
418 Bellingham National Bank Bldg.
Bellingham, Washington 98225
(206) 734-5980

John T. Slater
J. Timothy Slater

April 3, 1992

Michael Bezona
2233 Lummi Shore Road
Bellingham, Washington 98226

Dear Mike:

Enclosed herewith please find a copy of the letter dated March 31, 1992, which I received from Steven Knapp, Deputy Prosecuting Attorney.

I will leave it up to your discretion as to whether you want to provide copies of this letter to Floa and other interested persons/parties.

Also enclosed please find a copy of the Notice of Hearing setting the hearing date on your Notice of Infraction for April 20, 1992.

Please give me a call on Monday.

Very truly yours,

SLATER & SLATER

By: J. Timothy Slater
J. Timothy Slater

JTS:psd
Enc.

WHATCOM COUNTY DISTRICT COURT
COUNTY OF WHATCOM
311 GRAND AV

BELLINGHAM, WA 98225

Date: 03/17/1992

NO. WCS 77741

NOTICE OF HEARING

This is notification of the date for your CONTESTED HEARING **hearing.**

YOU MUST APPEAR ON Monday (day of week) April 20, 1992 (date) **at** 08:30 AM (time) **(am/pm).**

Room: courtroom

BEZONA, MICHAEL G
2233 LUMMI SHORE RD
BELLINGHAM, WA 98226

FAILURE TO APPEAR ON THE ABOVE DATE WILL RESULT IN THE NON-RENEWAL OF YOUR DRIVER'S LICENSE UNTIL THE ORIGINAL PENALTY PLUS $47.00 HAS BEEN PAID.

OD: 02/18/1990
YAMADA, I

BE PREPARED TO PAY YOUR PENALTY

NOTICE OF HEARING (JTIR 2.6)

JTIR -02.0200-1/81-WPF

DAVID S. MC EACHRAN
Prosecuting Attorney

APR 16 1992

Whatcom County
Bellingham, Wash.

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

'92 APR 16 PM 12 03

WHATCOM COUNTY
DISTRICT COURT

COUNTY OF WHATCOM, Plaintiff,	No. WCS77741
vs.	MOTION TO DISMISS
MICHAEL G. BEZONA, Defendant.	

COMES NOW, the above named Defendant acting by and through his attorney, J. Timothy Slater, and respectfully moves the court for an Order of Dismissal of the Notice of Infraction dated February 18, 1990, and which is the focus of the contested hearing scheduled for April 20, 1992, before the above entitled court. This Motion to Dismiss is based upon defects in the substance of the above referenced Notice of Infraction as well as in the procedure by which the Notice of Infraction was issued. This Motion is supported by the Defendant's attached Memorandum.

RESPECTFULLY SUBMITTED this 15 day of April, 1992.

J. Timothy Slater
J. Timothy Slater /WSBA #16524
Attorney for Defendant

SLATER & SLATER
ATTORNEYS AT LAW
418 Bellingham National Bank Bldg.
Bellingham, Washington 98225
(206) 734-5990

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

COUNTY OF WHATCOM, Plaintiff, vs. MICHAEL G. BEZONA, Defendant.	No. WCS77741 MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS NOTICE OF INFRACTION

BACKGROUND

On February 18, 1990, Michael Bezona was stopped by a Lummi law enforcement officer (Officer Yamada) while driving his car on Lummi Shore Road. According to officer Yamada's report, he stopped Mr. Bezona for allegedly going 45 miles per hour in a 25 mile per hour speed zone. Without summarizing the sequence of events which followed the initial stop, suffice it to say that officer Yamada wrote out what appears on it's face to be a State of Washington uniform citation/traffic infraction together with a written narrative.

Officer Yamada's infraction and written narrative was then apparently forwarded to the Whatcom County Sheriff's Department where Sargeant McSwain reviewed the paperwork prepared by officer Yamada. Based upon a review of officer Yamada's written report, Sargeant McSwain made a one sentence finding of probable cause for the issuance of a Notice of

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ATTORNEYS AT LAW
418 Bellingham National Bank Bldg.
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(206) 734-5980

Infraction to Mr. Bezona for speeding. A copy of officer Yamada's infraction, written narrative and Sargeant McSwain's finding of probable cause are attached hereto collectively as Exhibit "A".

PROCEDURAL DEFECTS

RCW 46.63.030 provides;

> (1) A law enforcement officer has the authority to issue a Notice of Infraction:
>
> (a) When the infraction is committed in the officer's presence;
>
> (b) When the officer is acting upon the request of a law enforcement officer in whose presence the traffic infraction was committed; or
>
> (c) If an officer investigating at the scene of a motor vehicle accident has reasonable cause to believe that the driver of a motor vehicle involved in the accident has committed a traffic infraction.
>
> (2) A court may issue a notice of traffic infraction upon receipt of a written statement of the officer that there is reasonable cause to believe that an infraction was committed. [Emphasis added]

In this particular case, the State concedes that Lummi law enforcement officers are not law enforcement officers for purposes of issuing Notice of Infractions under RCW 46.63.030. This position would also be born out by the practice which has existed for many years whereby Lummi law enforcement does not issue the Notice of Infraction directly to the alleged violator but rather forwards a written report to the Whatcom County Sheriff's Department. The Sheriff's Department, based upon the written report of the Lummi law enforcement officer, would then make a finding of probable

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cause an infraction had occurred and would issue the Notice of Infraction.

In Mr. Bezona's case, Lummi law enforcement did in fact forward a written report to the Sheriff's Department, with Sargeant McSwain making a finding of probable cause. However, Sargeant McSwain himself did not issue the Notice of Infraction. Furthermore, in as much as 46.63.030(1)(b) requires that the infraction occurred in the presence of a "Law Enforcement Officer" Sargeant McSwain lacked the authority to issue a Notice of Infraction.

It is anticipated that the State will attempt to argue that the Notice of Infraction was actually issued pursuant to RCW 46.63.030(2) however, that section of the statute does not apply in this case for several reasons. First, section 46.63.030(2) provides that the court may issue a Notice of Infraction upon receipt of a written statement of "the" officer that there is reasonable cause to believe that an infraction was committed. Defendant would submit that this section clearly envisioned that the statement of reasonable cause would be made by the officer in whose presence the infraction occurred. Again, the alleged infraction did not occur in Sergeant McSwain's presence and therefore his finding of probable cause would not constitute grounds for the court to issue a notice of infraction.

Second, the statement of reasonable cause made by Sargeant McSwain is in itself insufficient to support the issuance of a Notice of Infraction. Sargeant McSwain's one

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(206) 734-5980

sentence finding of reasonable cause is not based upon first hand knowledge nor even the sworn statement of another law enforcement officer. If Sargeant McSwain is going to be allowed to rely upon the written statement of a non-law enforcement officer, that statement should at least be made under oath.

Thirdly, RCW 46.63.030(2) provides that the court may issue a Notice of Infraction. In this particular case, the only paperwork prepared resembling a Notice of Infraction was the form filled out by officer Yamada. That form together with the supporting written narrative was processed through the Whatcom County Sheriff's Office and apparently at some point made it's way to Whatcom County District Court. There is no evidence that the court actually issued a Notice of Infraction. As will be discussed later in this memorandum, there is also no evidence that the Notice of Infraction prepared by officer Yamada was even mailed out by Whatcom County District Court to Mr. Bezona. However, assuming that District Court did in fact place the Notice of Infraction in an envelope and deposit it in the mail addressed to Mr. Bezona, this would hardly constitute having been "issued" by the court. Clearly, if the court is going to issue Notices of Infraction, those notices should be signed by the court or there should at least be some evidence that the court has reviewed the officer's finding of reasonable cause.

Finally, there is absolutely no evidence in the court's file to indicate that the Notice of Infraction was ever

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418 Bellingham National Bank Bldg.
Bellingham, Washington 98225
(206) 734-5980

mailed to Mr. Bezona as required by JTIR 2.2. In reviewing the court's file with the court clerk, the undersigned was advised that standard District Court procedure is to place in the court file a form such as that which is attached hereto as Exhibit "B" evidencing the date the Notice of Infraction was mailed. The court will note that no such notice appears in Mr. Bezona's court file and again, there is no evidence that the Notice of Infraction was ever mailed to Mr. Bezona as required by court rules.

SUBSTANTIVE DEFECTS

JTIR 2.1 sets forth the required contents for a Notice of Infraction. The form prepared by officer Yamada does not comply with Rule 2.1(a) in that it is not entitled "Notice of Traffic Infraction". It also does not comply with 2.1(b)(5) in that it does not direct Mr. Bezona to appear within 14 days. Finally, JTIR 2.1(b)(9) was not complied with in that the notice did not contain the statements required by RCW 46.63.060.

CONCLUSION

For the foregoing reasons, both procedural and substantive, the charge currently pending against Mr. Bezona in Whatcom County District Court for speeding, and which is based upon the notice prepared by Lummi law enforcement officer Yamada on February 18, 1990, should be dismissed.

DATED this 15 day of April, 1992.

J. Timothy Slater WSBA #16524
Attorney for Defendant

SLATER & SLATER
ATTORNEYS AT LAW
418 Bellingham National Bank Bldg.
Bellingham, Washington 98225
(206) 734-5860

Exhibit "A"

☒ INFRACTION ☐ CRIMINAL ☒ TRAFFIC ☐ NON-TRAFFIC 0077741

☒ STATE OF WASHINGTON
☒ COUNTY OF WHATCOM
☐ CITY/TOWN OF _____

6. NAMED DEFENDANT

IN THE ☒ DISTRICT ☐ MUNICIPAL COURT OF WHATC[redacted]-25, WASHINGTON

STATE OF WASHINGTON COUNTY OF WHATCOM — LEA NCIC NO WA0370000 — COURT NCIC NO WA037013J

THE UNDERSIGNED CERTIFIES AND SAYS THAT IN THE STATE OF WASHINGTON

DRIVER'S LICENSE NO	STATE	EXPIRES	SOCIAL SECURITY NUMBER
BEZONMG429DP	WA	93	NOT AVAILABLE

NAME LAST: BEZONA, FIRST: MICHAEL, INITIAL: G. ☐ INTERPRETER NEEDED

ADDRESS: 2233 LUMMI SHORE RD ☐ IF NEW ADDRESS ☐ PASSENGER

CITY: BELLINGHAM, STATE: WA, ZIP CODE: 98226, EMPLOYER: NOT AVAILABLE

SEX	RACE	DATE OF BIRTH	HEIGHT	WEIGHT	EYES	HAIR	RESIDENTIAL PHONE NO.
M	W	03/17/58	505	143	BLU	BRN	758-7345

VIOLATION DATE ON OR ABOUT: MONTH 02 / DAY 18 / YEAR 90 — TIME 24 HOUR 1311

AT LOCATION: M.P. — CITY/COUNTY OF: 2900 LUMMI SHORE DRIVE

DID OPERATE THE FOLLOWING VEHICLE/MOTOR VEHICLE ON A PUBLIC HIGHWAY AND

VEHICLE LICENSE NO	STATE	EXPIRES	VEH YR	MAKE	MODEL	STYLE	COLOR
EWF041	WA	12/90	70	PLY	VOL	2DR	RED

TRAILER #1 LICENSE NO	STATE	EXPIRES	TR YR.	TRAILER #2 LICENSE NO	STATE	EXPIRES	TR YR
N/A							

OWNER/COMPANY IF OTHER THAN DRIVER — ADDRESS — CITY — STATE — ZIP CODE

N/A

ACCIDENT ☐ P D O ☐ P I F — BAC READING N/A — COMMERCIAL VEHICLE ☐ YES ☒ NO — HAZARD PLACARD ☐ YES ☒ NO — EXEMPT VEHICLE ☐ FARM ☐ N.V. ☐ FIRE ☒ OTHER

DID THEN AND THERE COMMIT EACH OF THE FOLLOWING OFFENSES/INFRACTIONS

1. VIOLATION/STATUTE CODE	DESCRIPTION	VEHICLE SPEED	IN A ZONE	☒ RADAR ☐ PACE ☐ AIRCRAFT
46.61.400(2)	SPEED VIOLATION	44 / 35		

90A2691

2. VIOLATION/STATUTE CODE	DESCRIPTION

PENALTY/BAIL U.S. FUNDS $ 47.00

APPEARANCE DATE MO. DY. YR. — TIME A.M. P.M. — BOOKING DATE — DATE NOTICE ISSUED 02/18/90

WITHOUT ADMITTING HAVING COMMITTED EACH OF THE ABOVE INFRACTIONS/OFFENSES, I PROMISE TO RESPOND AS DIRECTED ON THIS NOTICE.

I CERTIFY (OR DECLARE) UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT I HAVE REASONABLE GROUNDS/PROBABLE CAUSE TO BELIEVE AND DO BELIEVE THE ABOVE NAMED PERSON COMMITTED THE ABOVE INFRACTION(S) AND/OR OFFENSE(S) CONTRARY TO LAW

OFFICER I. YAMADA — NUMBER 4I97

X SUMMONS
DEFENDANT'S SIGNATURE

DATE 02/18/90 PLACE BELLINGHAM, WA

ABSTRACT OF JUDGEMENT

INFRACTION INF	RESPONSE	DISPOSITION	COMPLAINT/CITATION CRG	PLEA	CNG	FINDING	PENALTY FINE	SUSPENDED	SUB-TOTAL
1	C NC	C NC D P	1	G NG		G NG D BF	$	$	$
2	C NC	C NC D P	2	G NG		G NG D BF	$	$	$
							$	$	$

FINDING/JUDGMENT DATE — TO SERVE — WITH DAYS SUSPENDED — CREDIT FOR TIME SERVED — OTHER COSTS $

ABSTRACT MAILED TO OLYMPIA — RECOMMENDED NONEXTENSION OF SUSPENSION — LICENSE SURRENDER DATE — TOTAL COST $

UU1141

WASHINGTON UNIFORM COURT DOCKET-COURT COPY

OFFENSE DESCRIPTION: ASSIST AGENCY/TRIBAL/TRAFFIC 381E25

17. HAZARD	OFFICER ASSIGNMENT	SPONDING TO	ZYLNE NUMBER
☐ COMBATIVE RESISTANCE ☐ PHYSICAL AGGRESSION ☐ THREATS ONLY ☐ FIRE ARM ☐ KNIFE ☐ OTHER DANGEROUS WEAPONS ☐ HANDS, FISTS, FEET, ETC.	☐ UNIFORM ☐ FOOT ☐ NON-UNIFORM ☐ OFF DUTY ☐ DETECTIVE ☐ ONE OFFICER CAR ☐ TWO OFFICER CAR ☐ OFFICER ALONE ☐ OFFICER ASSISTED OFFICER INJURED ☐ YES ☐ NO SUSPECT INVOLVED IN HAZARD ☐ YES ☐ NO	☐ DISTURBANCE CALL ☐ BURGLARY IN PROGRESS ☐ ROBBERY IN PROGRESS ☐ ATTEMPTING OTHER ARREST ☐ CIVIL DISORDER (RIOT) ☐ HANDLING PRISONER	90A2691 ☐ SUSPICIOUS CIRCUMSTANCES ☐ AMBUSH - NO WARNING ☐ MENTALLY DERANGED ☐ TRAFFIC STOPS ☐ ALL OTHERS

18. CODE S-SUSPECT, C-CONTACT, W-WITNESS, I-INFORMANT, P-PARENT, V-VICTIM (CIRCLE CODE IF ADDITIONAL PAGES ARE NEEDED)

CODE	NO	LAST NAME	FIRST	MI	SEX	RACE	AGE
C	1	Bezona	Michael	G	M	C	31

RESIDENCE ADDRESS	CITY	STATE	ZIP	RES PHONE (AREA CODE)
2233 Lummi Shore Rd	D'ham	Wash.		758-7348

BUSINESS ADDRESS	CITY	STATE	ZIP	SCHOOL ATTENDED

HAIR	EYES	HEIGHT	WEIGHT	DOB	AKA/NICKNAME	DRIV LIC & STATE
Brn	Blu	5 5	143	3-17-58		429DP

OBSERVABLE PHYSICAL ODDITIES - DESCRIPTION	CLOTHING	BUS PHONE

CODE	NO	LAST NAME	FIRST	MI	SEX	RACE	AGE

RESIDENCE ADDRESS	CITY	STATE	ZIP	RES PHONE (AREA CODE)

BUSINESS ADDRESS	CITY	STATE	ZIP	SCHOOL ATTENDED

HAIR	EYES	HEIGHT	WEIGHT	DOB	AKA/NICKNAME	DRIV LIC & STATE

OBSERVABLE PHYSICAL ODDITIES / DESCRIPTION	CLOTHING	BUS PHONE

CODE	NO	LAST NAME	FIRST	MI	SEX	RACE	AGE

RESIDENCE ADDRESS	CITY	RES PHONE (AREA CODE)

BUSINESS ADDRESS	CITY	SCHOOL ATTENDED

HAIR	EYES	HEIGHT	WEIGHT	DOB	AKA/NICKNAME	DRIV LIC & STATE

OBSERVABLE PHYSICAL ODDITIES / DESCRIPTION	CLOTHING	BUS PHONE

CONFIDENTIAL INFORMATION
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LARRY MOUNT, SHERIFF
WATCOM COUNTY SHERIFF'S OFFICE

20. CODE, LIST 1 THROUGH 6 BELOW - USE N/A IF NOT APPLICABLE

1. RECONSTRUCT INCIDENT AND DESCRIBE INVESTIGATION
2. VICTIM'S INJURIES - DETAILS AND WHERE MEDICAL EXAM OCCURRED
3. PROPERTY DAMAGED - DESCRIBE AND INDICATE AMOUNT OF LOSS
4. IF SIGNIFICANT, DESCRIBE VEHICLE
5. IDENTIFY UNDEVELOPED LEADS
6. LIST STATEMENTS TAKEN
7. LIST PERSONS FROM WHOM STATEMENTS NEED TO BE TAKEN LATER
8. PHYSICAL EVIDENCE - DETAIL WHAT AND WHERE FOUND, BY WHOM, AND DISPOSITION

ADDITIONAL COPIES TO: DISTRICT COURT

NARRATIVE: I HAVE REVIEWED TRIBAL NOTICE OF INFRACTION NUMBER 77741 AND FIND PROBABLE CAUSE EXISTS FOR ISSUANCE OF N.O.I. TO C 01 FOR THE VIOLATION OF Speed

Sgt D. McSwain 757

90A2691

REVIEWING OFFICER

X-BIA-6833

OFFENSE/INCIDENT REPORT

C

5-BIA-82-(68-06)

DEPARTMENT: Law-Order

Page 1 of

1 RESERVATION NAME	Lummi
2 ORGANIZATION CODE	L019
3 DATA ENTRY NUMBER	4912510
4 DATE AND TIME REPORTED (Month / Day / Year / Time)	02 18 90 1311
5 LPD OFFENSE-INCIDENT NUMBER	0I0867
6 NATURE OF OFFENSE INCIDENT	Speeding
7 OFFENSE-INCIDENT CODE	T30
8 DATE AND TIME OF OCCURRENCE (Month / Day / Year / Time)	02 18 90 1311
9 DAY OF WEEK	Sun
10 DATE AND TIME OF INITIAL INVESTIGATION (Month / Day / Year / Time)	02 18 90 1311
11 ALCOHOL DRUG RELATED (1) Yes (2) No	2
12 OFFENSE (1) Federal (2) CFR (3) State (4) Tribe (5) Traditional	3
13 CASE DISPOSITION (Code / Month / Day / Year)	01 02 18 90
14 TOTAL HOURS INVESTIGATION	0005

VICTIM/WITNESS/PARENT/COMPLAINANT/REPORTING PARTY

15 NAME Last First Middle	16 RACE (1) Indian (2) Other	17 SEX	18 AGE	19 BIRTHDATE (Month Date Year)
LPD				

20 RESIDENCE ADDRESS	21 RES PHONE	22 OCCUPATION	23 BUSINESS (or school) ADDRESS	24 BUS PHONE

PERSON ARRESTED/CITED/SUSPECTED

25 CUSTODY STATUS (1) Arrest Jail Number _____ (2) Arrest Bail Bond (3) Citation Number 0077742 (4) Suspect 3

26 NAME Last First Middle	27 RACE (1) Indian (2) Other	28 SEX	29 AGE	30 BIRTHDATE (Month Day Year)
Bezona, Michael G	2	M	31	03 17 58

31 HT (inches)	32 WT (Pounds)	33 HAIR	34 EYES	35 OTHER IDENTITY DATA
65	143	Brn	Blue	n/a

36 RESIDENCE ADDRESS	37 RES PHONE	38 OCCUPATION	39 BUSINESS (or school) ADDRESS	40 BUS PHONE
2233 Lummi Shore	758 4348			

PROPERTY STOLEN/DAMAGED/LOST

41 DESCRIPTION	42 VALUE
43 TOTAL VALUE	
44 PROPERTY CODE OF HIGHEST VALUE	

PROPERTY RECOVERED/CONFISCATED

45 DESCRIPTION (R) Recovered (C) Confiscated	
47 TOTAL VALUE	
48 PROPERTY CODE OF HIGHEST VALUE	

INFORMATION NOT TO BE RELEASED TO ANY OTHER AGENCY OR INDIVIDUAL FOR ANY PURPOSE WITHOUT WRITTEN APPROVAL. LARRY MOUNT, SHERIFF WHATCOM COUNTY SHERIFF'S OFFICE

49 THIS SUBMISSION IS (A) ADD (C) CHANGE (D) DELETE 38-16-25 A

50 NARRATIVE Include WHO WHAT WHEN WHERE HOW WHY use Supplement I Narrative Continuation if additional space is needed

On 2-18-90 at 1311 hours, I was on patrol northbound Lummi Shore Road. In the 2900 block of Lummi Shore Road I did observe a vehicle traveling southbound at an excessive rate of speed. I applied the "mph" speed measuring device in the patrol unit, it read patrol unit 25 mph target vehicle 44 mph. This was consistent with my visual observation. The doppler audio signal was clear and coherent, indicating the vehicle was along in the beam and without interference. As the suspect's vehicle, passed there were no other vehicles behind it. I made a U-turn and stopped vehicle licensed EWF-041 in the 2700 block of Lummi

51 FURTHER ACTION Yes ___ No ✓

52 COPIES TO OTHERS 1080

53 INVES OFFICER AND ID NUMBER	54 DATE AND TIME	55 REVIEWED BY AND DATE
[illegible]	[illegible]	[illegible]

X-BIA-6833

FFENSE/INCIDENT REPORT
SUPPLEMENT I - NARRATIVE CONTINUATION

5-BIA-82-(68-06)

DEPARTMENT: Law & Order Page 2 of 4

1. RESERVATION NAME	2. ORGANIZATION CODE
Lummi	L019

3. DATA ENTRY NUMBER	4. DATE AND TIME REPORTED (Month / Day / Year / Time)	5. LPD OFFENSE/INCIDENT NUMBER
4912510	02 18 90 1311	0108 67

6. NATURE OF OFFENSE/INCIDENT	7. OFFENSE/INCIDENT CODE
Speeding	30

8. DATE AND TIME OF OCCURENCE (Month / Day / Year / Time)	9. DAY OF WEEK
02 18 90 1311	Sunday

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LARRY MOUNT, SHERIFF
WHATCOM COUNTY SHERIFF'S OFFICE
BELLINGHAM, WASHINGTON

50. NARRATIVE - Include WHO, WHAT, WHEN, WHERE, HOW, WHY; use separate sheets of paper if additional space is needed.

Shore Road. I activated the emergency equipment and attempted to make the traffic stop. The driver Mr. Michael G. Bezona, 3-17-58, appeared to be talking into cellular phone.
He was inattentive to the patrol unit with emergency lights flashing and siren.
Approximately 1/2-1 mile from the point at which I had activated the emergency equipment. Mr. Bezona did pull over to the right. I contacted him and explained why I had pulled him over. He denied exceeding the posted speed limit. I continued to explain I had locked his speed on a speed measuring device in the patrol unit. I invited Mr. Bezona to visually inspect the speed reading device in the car. He was not interested. I requested a drivers license twice from Mr. Bezona. He did not produce any type of identification. Mr. Bezona then said I had no right to detain him and that he was going to leave. I then told him if he left he may receive an additional charge. He then told me he was going to his house and if I wanted to follow him, to go ahead. He then left. I informed dispatch I was in pursuit of the suspect vehicle which had fled during my traffic stop. I requested Officer Conway to assist me. I followed the vehicle to 2233 Lummi Shore Road, where Mr. Bezona advised me to stay off of his property. He then went into the house at that location. I waited on the County Roadway at the bottom of the driveway for Officer Conway to arrive. When he arrived I explained the circumstances surrounding the incident. Officer Conway identified the location to be associated with non-tribal members, and thus had dispatch contact the on duty W.C.S.O. Sgt. Officer Conway and myself then went up to the house, and knocked on the door. A female answered the door, she said Michael was inside, on the phone, at this same moment a gentleman from next door came over. Officer Conway made contact with this individual while I stood near the door of the residence with the woman. We waited for approximately 10 minutes, Mr. Bezona never came out to talk to us. Dispatch advised us they had Mr. Bezona on the phone, and they would take the information and relay it to us. We then left the location.

Earlier in the morning, I had observed this same vehicle with the same person driving it. He again appeared to be speaking on a cellular phone. He was exceeding the posted speed limit 45/35 mph zone. This was indicated by the speed reading device in the patrol unit, in addition to my visual observations,

51. FURTHER ACTION: Yes ___ No ✓	52. COPIES TO OTHERS: WCSO

53. INVES. OFFICER AND ID NUMBER	54. DATE AND TIME	55. REVIEWED BY AND DATE	
[illegible]	[illegible]	Larry D. Sutton	2-21-90

Exhibit "B"

DISTRICT COURT
WHATCOM COUNTY

NO.

NOTIFICATION

DATE MAILED	DUE DATE

PLEASE READ

A Notice of Traffic Infraction has been issued to you by a law enforcement officer and filed with this court.

Your copy is enclosed.

PLEASE READ CAREFULLY all of the instructions on the Notice of Infraction.

IF YOU DO NOT RESPOND BY THE DUE DATE INDICATED ON THIS FORM, THE COURT MUST ADD AN ADDITIONAL PENALTY OF $ TO THE ORIGINAL PENALTY.

DEFENDANT NAME

INFRACTION NOTICE (JTIR 2.2(3)) JTIR 02.0100-1/81-WPF

X-BIA-6833

5-BIA-82-(68-06)

OFFENSE/INCIDENT REPORT
SUPPLEMENT II - MULTIPLE ARREST

DEPARTMENT: Law-Order Page ____ of ____

1. RESERVATION NAME: Lummi

2. ORGANIZATION CODE: 2019

3. DATA ENTRY NUMBER: 4912510

4. DATE AND TIME REPORTED: Month 02 Day 18 Year 90 Time 1311

5. LPD OFFENSE/INCIDENT NUMBER: 0I0867

6. NATURE OF OFFENSE/INCIDENT: Speeding

7. OFFENSE CODE: T80

8. DATE AND TIME OF OCCURRENCE: Month 02 Day 18 Year 90 Time 1311

9. DAY OF WEEK: Sun

10. DATE AND TIME OF INITIAL INVESTIGATION: Month 02 Day 18 Year 90 Time 1315

PERSON ARRESTED/CITED/SUSPECTED

25 CUSTODY STATUS (1) Arrest/Jail Number ____ (2) Arrest/Bail Bond (3) Citation Number ____ (4) Suspect: 3

25A. MULTIPLE ARREST/CITATION NUMBER: 02

7 OFFENSE CODE: T99 Obstruction

13 CASE DISPOSITION: Code 01 Month 02 Day 18 Year 90

26 NAME - Last, First, Middle: Bezona, Michael G

27 RACE (1) Indian (2) Other: 2

28 SEX: M

29 AGE: 31

30 BIRTHDATE (Month-Day-Year): 03 17 58

31. HT (Inches): 65

32 WT (Pounds): 143

33 HAIR: Brn

34 EYES: Blue

35 OTHER IDENTITY DATA:

36. RESIDENCE ADDRESS: 2233 Lummi Shr

37 RES PHONE: 758 7348

38 OCCUPATION:

39 BUSINESS (or school) ADDRESS:

40 BUS PHONE:

PERSON ARRESTED/CITED/SUSPECTED

25 CUSTODY STATUS (1) Arrest/Jail Number ____ (2) Arrest/Bail - Bond (3) Citation Number ____ (4) Suspect

25A. MULTIPLE ARREST/CITATION NUMBER

7 OFFENSE CODE

13 CASE DISPOSITION Code Month Day Year

26 NAME - Last, First, Middle

27 RACE (1) Indian (2) Other

28 SEX

29 AGE

30 BIRTHDATE (Month-Day-Year)

31. HT (Inches) 32 WT (Pounds) 33 HAIR 34 EYES 35 OTHER IDENTITY DATA

36. RESIDENCE ADDRESS 37 RES PHONE 38 OCCUPATION 39 BUSINESS (or school) ADDRESS 40 BUS PHONE

PERSON ARRESTED/CITED/SUSPECTED

25. CUSTODY STATUS: (1) Arrest/Jail Number ____ (2) Arrest/Bail - Bond (3) Citation Number ____ (4) Suspect

25A. MULTIPLE ARREST/CITATION NUMBER

7. OFFENSE CODE

13. CASE DISPOSITION Code Month Day Year

CONFIDENTIAL INFORMATION
NOT TO BE RELEASED TO ANY OTHER
AGENCY OR INDIVIDUAL FOR ANY
PURPOSE WITHOUT WRITTEN APPROVAL
LARRY HIGHT, SHERIFF
JACKSON COUNTY SHERIFF'S OFFICE

26. NAME - Last, First, Middle

27. RACE (1) Indian (2) Other

28. SEX

29. AGE

30 BIRTHDATE (Month-Day-Year)

31. HT (Inches) 32. WT (Pounds) 33. HAIR 34. EYES 35. OTHER IDENTITY DATA

36. RESIDENCE ADDRESS 37. RES. PHONE 38. OCCUPATION 39. BUSINESS (or school) ADDRESS 40. BUS. PHONE

49. THIS SUBMISSION IS: (A) ADD (C) CHANGE (D) DELETE 38-1E-25 A

51. FURTHER ACTION: Yes ____ No ✓

52. COPIES TO OTHERS: WCSO

53. INVES. OFFICER AND ID NUMBER: T Vamodel [illegible]

54. DATE AND TIME: [illegible]

55. REVIEWED BY AND DATE: [signature] Sutton 2-21-90

X-BIA-6833

OFFENSE/INCIDENT REPORT
SUPPLEMENT I - NARRATIVE CONTINUATION

5-BIA-82-(68-06)

DEPARTMENT: Law & Order Page 3 of 4

1. RESERVATION NAME	2. ORGANIZATION CODE
Lummi	L019

3. DATA ENTRY NUMBER	4. DATE AND TIME REPORTED (Month / Day / Year / Time)	5. LPD OFFENSE/INCIDENT NUMBER
9125 10	02 18 90 3 11	0 I 0 8 6 7

6. NATURE OF OFFENSE/INCIDENT	7. OFFENSE/INCIDENT CODE
Speeding	7 3 0

8. DATE AND TIME OF OCCURENCE (Month / Day / Year / Time)	9. DAY OF WEEK
02 18 90 3 11	Sunday

80. NARRATIVE - Include WHO, WHAT, WHEN, WHERE, HOW, WHY: use separate sheets of paper if additional space is needed.

Mr. Bezona vehicle was northbound while I was southbound in the patrol unit. Due to the narrow roadway and blind corners at this location Lummi Shore Road, I could not safely turn around and pursue his vehicle on this occasion.

I cited Mr. Bezona for exceeding the posted speed limit by 9 mph and an obstructing violation for refusing to give identification (driver's license or registration).

The digital readouts, internal and external calibration were checked at 0836 and again after the traffic stop. The device was found to be in proper working condition.

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AGENCY OR INDIVIDUAL FOR ANY
PURPOSE WITHOUT WRITTEN APPROVAL.
LARRY MOUNT, SHERIFF
WHATCOM COUNTY SHERIFF'S OFFICE
BELLINGHAM, WASHINGTON

81. FURTHER ACTION: Yes ___ No ✓	82. COPIES TO OTHERS: WCSO

John McCain Chairman
and Members of the Senate Indian Affairs
Committee

NQN/S.I.

Aug 19, 1996

Dear Senator:

Until we make all
Indian Tribes accountable for
their actions by removing
Sovereign Immunity, we are
perpetuating a system that allows
a few people in powerful position
to maintain a type of Dictatorship
The property on the reservation is
blamed on the White man. I
have had my property leased at
Sandy Point for 33 years. It is
clearly time to remove tribal
Sovereign Immunity.

Sincerely
Mrs Jean McCall
4177 Garcia Dr.
Ferndale, Wn.
98248

8/1/96

Senator Slade Gorton
730 Hart Senate Office Bldg.
Washington D.C. 20510

NGN/Sov. Immunity

Dear Senator Gorton;

I am requesting your help with a serious and ongoing situation that recently has even more potential to become violent. The Colville Tribe has on more than one occasion tried to force me into a situation which could become deadly. The problem begins with the question; Who has legal jurisdiction over private fee land within the boundaries of the Colville Indian Reservation: The tribe claims jurisdiction and Ferry County claims jurisdiction. It appears that our County Government is so deeply entrenched with the tribe that it is refusing to acknowledge my problem or help me resolve it. Our Ferry County prosecutor, Allen Nielson, has advised the County Commissioners office that my case is not the "right" case to use as a precedent. Only one of the 3 commissioners has voiced support in my behalf. Jim Hall feels that the County should intervene for me and fight the battle instead of expecting me to go it alone. The remaining two commissioners, Ed Winsor and Gary Kohler, have made it clear that they will not support me and prefer to leave me to pursue the fight alone. I can't help but be suspicious that Gary Kohler's unwillingness to support me as one of his constituants and a private land owner has to do with the fact that he is a brother of the Vice Chairman to the Colville Tribal Council. The question of tribal jurisdiction over private property owners supposedly was settled in recent Supreme Court decisions. However, it appears that the Colville tribe chooses to ignore this.

Last January I requested application from Ferry County to subdivide my land, paid all fees, and obtained all the necessary legal permits which were filed with the Ferry County Auditor. However, after all this was completed the Colville Tribe attempted to block this endeavor by filing a Lis Pendens on my property. THey also sent me a notice that I was to appear in tribal court to force me to comply with tribal land use regulations.

When two tribal law enforcement officers (game wardens) attempted to serve me with their court summons on the county road a few miles from my home, and I refused to accept the papers, they began to pursue us with red lights, sirens, and a bullhorn. They not only did not stop at the boundary of my property, but continued to chase us all the way to my front door. When we got out and ran into the house, they jumped out of their vehicle with guns drawn and pointed straight at us. (See copies of our statement given to the Ferry Co. Sheriff's office, and Ferry Co. prosecutor's office.) I also sent a copy to the U.S. Attorney General's office in Spokane after contacting Bruce Ditich at that office of whom I am aware was a Colville Tribal attorney for a number of years. Whether or not this was a factor in the fact that he did not respond to my request into an investigation the bottom line is that he did not acknowledge that request.

It seems to me that serving a summons at gun point goes far beyond the limits of normal procedure, and it was a very frightening experience for both me and my friend. In fact I continue to be in fear for my safety. I've had harrassing phone calls threatening to burn me out and run me off my land. In addition I requested and received copies of the tribal police report which was written after they had read our statement of complaint. That report was appalling in it's erroneous detail and total falsification of the facts. The fabrication was obiously designed to make it appear that I was acting in a "suspicious" or unlawful manner in order to justify their horrifying behavior that afternoon. The truth is that my friend and I were simply out for an afternoon of wildlife observation. In my opinion what they did should be addressed as a serious criminal assault upon our persons, and a violation of our rights as citizens of Ferry County. Obviously the County prosecutor, Allen Nielson, does not intend to charge these two with what is obviously a felony assault with a deadly weapon. To date I have heard nothing which would indicate that he intends to follow up on our complaint.

I respectfully request your attention and assistance in helping to resolve this matter. Copies of the Lis Pendens, my statement of complaint, and Summons by Publication by the tribe are enclosed.

Thank You

Sincerely,

Daniel J. Hoover

Daniel J. Hoover
HC1 Box 362
Inchelium, Wa. 99138
(509-722-3115)

Civil Action to enforce CTC Title 50 begun by Confederated Tribes of the Colville Reservation.

In The Tribal Court For The
Confederated Tribes of the Colville Reservation

No. CV96-16042
SUMMONS BY PUBLICATION

Confederated Tribes of the Colville Reservation, Plaintiff
vs.
Daniel and Ellen Hoover, Individually and as a marital community, Defendants

The Confederated Tribes of the Colville Reservation to said Daniel Hoover:

YOU AND EACH OF YOU ARE HEREBY SUMMONED to appear within sixty (60) days after the date of the first publication of this Summons, to wit, within sixty (60) days after the 21st day of March, 1996,(first publication in the Republic Miner), and defend the above entitled action in the above entitled Court, and answer the Complaint of Plaintiff above described, and serve a copy of your answer upon the undersigned attorneys for Plaintiff, TIM BREWER and STEPHEN SUAGEE, at the office below stated; and in case of your failure to do so, judgment will be rendered against you according to the demands of the Complaint in this action, which has been filed with the Clerk of said Court.

This Summons by publication is issued purusant to an Order of the Colville Tribal Court dated March 12, 1996. A copy of the Complaint may be obtained from the Colville Tribal Court or the Attorneys for Plaintiff.

The object of this action is to enjoin defendants and all those in active concert or participation with them from improving, developing, subdividing, selling, constructing or altering buildings, clearing, grading, moving or otherwise changing the use of their land located in the Hellsgate Game Reserve District of the Colville Indian Reservation without first obtaining the necessary permits from the Colville Tribes as required by CTC Title 50; and for such other further relief as the Court may deem proper. The plaintiff is requesting that the Court issue a preliminary injunction and such other temporary or preliminary injunctive relief as may be sought as the need arises, and an order permanently enjoining and restraining defendants from subdividing or otherwise changing the use of their land with out first obtaining the necessary permits under CTC Title 50.

TIM BREWER
STEPHEN SUAGEE
Attorneys for Plaintiff
Confederated Tribes
of the Colville Reservation
PO Box 150
Nespelem, WA. 99155
(509) 634-8834

ORIGINAL FILED
WITH C[illegible]

FEB 15 1996

OF WHIC[illegible] IS A
TRUE COPY

IN THE TRIBAL COURT
FOR THE
CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, Plaintiff	)	CASE NO. CV 96-16042
v.	)	LIS PENDENS
DANIEL and ELLEN HOOVER, Individually and as a marital community, Defendant(s).	)	

NOTICE IS HEREBY GIVEN that an action has been commenced and is now pending in the Tribal Court for the Confederated Tribes of the Colville Reservation, upon the complaint of the plaintiff against the above defendants, and all other persons acting in concert or in active participation with them with regard to the proposed subdivision and development of the Real Estate described in the Complaint, and that the object of the action is to enjoin any subdivision, development, sale of lots, construction or other land use changes until such time that defendants comply with the Colville Tribes Land Use and Development Code by applying for and obtaining all necessary land use permits. This action affects land use and title to any subdivided lots on the following described real property located in the Colville Reservation and Ferry County:

That portion of SW 1/4 SE 1/4, SE 1/4 SE 1/4, Section 2, and the NW 1/4 NE 1/4, NE 1\4 NE 1\4, Section 11 Township 28 North, Range 35 East, W.M. known as: TRACT B of the Record of Survey filed August 29, 1991, page 202, Book 2 of Surveys, under Ferry County Auditor's File No. 218799;

which is also referred to as the Lagoon Point Short Plat.

All persons in any manner dealing with the real estate subsequent to the filing hereof will take subject to the rights of the plaintiff as established in this action.

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

DATED this 14 day of February, 1996.

COLVILLE TRIBES OFFICE OF THE
RESERVATION ATTORNEY

By _____

Steven Suagee
Tim Brewer
Attorneys for Plaintiff

Filed for record
at the request of:

Tim Brewer
COLVILLE TRIBES OFFICE OF THE
RESERVATION ATTORNEY
P.O. Box 150
Nespelem, WA 99155
(509) 634-8834

After Recording Return to:

Tim Brewer
COLVILLE TRIBES OFFICE OF THE
RESERVATION ATTORNEY
P.O. Box 150
Nespelem, WA 99155
(509) 634-8834

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

NINA

SEP 0 3 1996

August 28, 1996

Senator Slade Gorton
10900 NE Fourth Street
Suite 2110
Bellevue, WA 98004

Re: Swinomish Tribe
La Conner, WA

Dear Senator Gorton,

I know you are very aware of the unfortunate situation my Sister Sharon and her husband Stewart Wright have found themselves in regarding their home in LaConner, WA.

My husband and I used to be homeowners on leased land from the Swinomish Tribe and we thank God every day that we were able to sell our lease before all of this injustice happened. We are writing to you on behalf of my sister Sharon and her husband Stewart to enforce their position of no representation and apparently no legal resources to help them keep their home. Do they have any rights as American citizens and if so, what are they? Their lease has increased 500% and as a result, the value of their property's marketability has decreased conversely. This puts them in a catch twenty two situation . They can't buy their land, nor can they sell their lease --- who would buy it??? The BIA, apparently, can put any price on the lease that they wish and the tenants are legally bound to accept it, or lose their homes. Where is the justice in America, Senator Gorton?

Can you, as their Senator, assist them in the logical solution to be able to purchase their land at the appraised value, or at the very least rectify the unfair increase in their lease.

Sincerely,

Shirley and John Barry

cc: Senator John McCain, Arizona
Senator Daniel K. Inouye, Hawaii

SENATE COMMITTEE OF INDIAN AFFAIRS
838 HART SENATE OFFICE BUILDING
WASHINGTON D.C. 20510-4701
ATTENTION: NINA

DEAR SENATOR SLADE GORTON,

I AM A TAX PAYER AND A PROPERTY OWNER AT SANDY POINT, THAT LIVES WITHIN THE LUMMI INDIAN RESERVATION. I HAVE PERSONALLY READ OUR CONSTITUTION AND ALSO MANY OF THE TREATIES WITH THE LOCAL INDIAN TRIBES. AND I AGREE WITH YOU ON . IT IS TIME TO MOVE ON AND RESOLVE OUR PREJUDICE BETWEEN WHITES AND INDIANS. OUR FOREFATHERS FELT AT THE TIME THAT BY GIVING THE INDIANS A FEW EXTRA RIGHTS THEY WOULD HAVE THE OPPORTUNITY TO AMERICANISE THEMSELVES AND FIT INTO SOCIETY. WELL, 100 YEARS LATER THE EXPERIMENT IS OVER AND THE OUTCOME IS NEGATIVE.

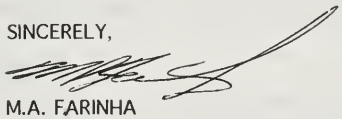
LAST YEAR I DECIDED TO PLACE MY HOUSE UP FOR SALE. MY WIFE AND I MET WITH A FEW REAL ESTATE AGENTS TO DISCUSS WITH THEM OUR DECISION. WE WERE INFORMED THAT THE MARKET WAS VERY POOR IN OUR AREA DUE TO THE PROBLEMS WITH THE INDIANS (WATER RIGHTS, BEACH RIGHTS, THREATS TO BLOCKADE OUR ROAD, AND THE CLOSING OF OUR CANAL), SO AFTER MUCH THOUGHT WE DECIDED NOT TO SELL.

SIR, WHEN MY WIFE AND I FIRST ENTERED SANDY POINT CANAL,12 YEARS AGO IT WAS A LIFE THREATENING EMERGENCY. OUR BOAT'S GAS TANK DEVELOPED A SEVERE LEAK AND THE WEATHER WAS FOUL AND THE ONLY PLACE TO SEEK SAFETY WAS SANDY POINT CANAL. THIS SAFE HAVEN, WAS WHERE THE COAST GUARD INFORMED US TO GO. AT THE TIME THE CANAL WAS ABOUT 5 TIMES WIDER AND MUCH DEEPER THAN IT IS NOW. THIS CANAL IS DANGEROUSLY SHALLOW AND NARROW AND SHOULD BE DREDGED FOR SAFETY. THE LOCAL INDIANS AGREE THAT THERE IS A PROBLEM, BUT THERE TRIBAL COUNCIL FEELS THAT IT IS A BARGAINING CHIP TO USE AGAINST THE LOCAL INHABITANTS (NON INDIANS). NOT GOOD POLITICS IF YOU WANT TO GET ALONG IN HARMONY I'D SAY.

I WOULD LIKE TO PROPOSE AN IDEA THAT WOULD MAKE EVERYONE HAPPY. LET A LOCAL GRAVEL COMPANY (LUMMI ISLAND GRAVEL COMPANY) DREDGE THE CANAL AND SPLIT THE PROCEEDS WITH THE INDIANS. THIS WOULD MAKE THE INDIANS HAPPY, THE LOCALS WOULD GET A SAFER CANAL,

NO INCREASED TAXES, A LOCAL STRUGGLING COMPANY WOULD GET A BOOST, AND YOU WOULD GET A PAT ON THE BACK AS A GREAT POLITICIAN, WHICH YOU ARE TO ME.

SINCERELY,



M.A. FARINHA
P.O. BOX 28722
FERNDALE, WA 98248

SKAGIT COUNTY
FIRE PROTECTION DISTRICT #13
Box 532
LaConner, WA 98257

August 19, 1996

The Honorable Slade Gorton
United States Senator
10900 NE 4th Rm 2110
Bellevue, WA 98004

Dear Senator Gorton:

Regarding sovereignty for Indian Tribes, please be advised of the following views from my Fire Commissioners:

This district has an existing agreement with the Swinomish Tribe for fire protection and emergency medical services. The Tribe is now two quarters behind in their agreed payments, which were supposed to have been based on the net win from the casino. The district has no recourse. We cannot stop responding to calls, so the local tax payer winds up paying for Swinomish calls. The Fire Commissioner strongly believe that if the Swinomish Tribe cannot pay for fire and EMT services, then the BIA should contract with this district.

The economic reality is that the Swinomish people remain wards of the federal government. Although the Swinomish Indian Senate has been recognized by Skagit County and the Town of LaConner as a sovereign government, it has been impossible to deal with the Tribe's managers regarding zoning, sewer services, and fire/EMS.

If they are a sovereign government, then they should honor their agreements. Otherwise, all funding, agreements, and management should come from the BIA.

Sincerely,

Dan O'Donnell
Secretary

Memorandum of Understanding

This Memorandum of Understanding is entered into between the Swinomish Indian Tribal Community (the "Tribe" or "Grantor"), a federally recognized Indian Tribe organized pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476, acting through the Swinomish Gaming Commission, the Tribe's gaming regulatory agency, and Fire District #13 ("Grantee").

Recitals

A. Pursuant to Section XIII.C. of the Tribal-State Compact for Class III Gaming entered into between the Tribe and the State of Washington, the Tribe has agreed to set aside 2% of the net win from Class III gaming at the Swinomish Casino as a Community Contribution to provide assistance to non-tribal law enforcement and other government services that are affected by the Casino.

B. Pursuant to the Compact, first priority for funding from the Community Contribution fund is the Skagit County Sheriff's Office, for costs related to hiring on one additional deputy, so that monitoring, routine patrol, and response services will be available to cover the Casino and to respond promptly as needed. An additional priority pursuant to the Compact is funding for fire protection and emergency medical services for the Casino. provided by Fire District #13 and Anacortes Fire Department EMS. respectively.

C. Pursuant to the Compact, a Community Contribution Committee consisting (CHAIR of a representative of the Tribal Senate, the Swinomish Chief of Police, the Skagit County Sheriff, the ~~Chief~~ of Fire District #13, and a representative of the Washington State Gambling Commission has made allocations of the Community Contribution fund for the period July 15, 1995, through July 14, 1996 (the "Grant Period"), based on projections of Casino revenues for that period. The Committee recognized that if revenues during any of the four quarters of the grant period are less than the projected revenues on which the allocations were based, then allocations may need to be reduced in order to fulfill the funding priorities set out above and in the Compact.

WHEREFORE, Grantor and Grantee agree as follows:

1. Grantee has received a tentative allocation of $25,000.00 for the Grant Period. First quarter funding of $6,250.00 will be paid by Grantor on or about November 15, 1995, or within twenty days of execution of this MOU, whichever is later.

2. Second, third, and fourth quarter funding, in amounts equal to the first quarter funding, will be paid on or about February 15, May 15, and August 15, 1996, respectively, provided that sufficient funds are available.

3. Grantee acknowledges that if Casino revenues during any quarter are less than the projected Casino revenues on which the tentative allocation was based, funding to Grantee may be reduced in order to fully fund the priority programs set out above. However, any such reduction in funding will be made up at the first opportunity, to the extent that funds become available.

4. Grantee agrees that funding under this MOU will not be used to supplant other funding for Fire District #13, but rather, in order to offset impacts from the operation of the Casino, will be used to increase the amount of funds that would, in the absence of the grant, be available to Fire District #13.

5. Grantee agrees to maintain accurate records of the use of the grant funds, and will make such records available to the Community Contribution Committee upon request.

6. Grantee agrees to make reasonable efforts to quantify impacts of the Casino on the program funded with the grant, and understands that such quantification will be considered by the Community Contribution Committee in allocating future Community Contribution funds.

7. Grantee agrees to provide to Community Contribution Committee, on or before July 1, 1996, a brief written report containing the following information: (a) amount of grant already expended and purposes for which the funds were expended; (b) amount of grant yet to be expended and purposes for which the funds will be expended; (c) any information available on the impacts of the Casino on the program funded with the grant; and (d) amount of grant funds sought for the period July 15, 1996, through July 14, 1997, and the purposes for which the requested grant will be expended. Such report shall be mailed to:

Community Contribution Committee
c/o Swinomish Gaming Commission
P.O. Box 698
LaConner, WA 98257-0698

FOR THE GRANTOR:
SWINOMISH INDIAN TRIBAL COMMUNITY

By: Lorraine Loomis Date: 12-5-95
Lorraine Loomis, Chair
Swinomish Gaming Commission

FOR THE GRANTEE:
FIRE DISTRICT #13

By: Doug Avery Date: 12-14-95
Doug ~~Avery~~, ~~Chief~~ CHAIR

20
Summary of Swinomish Contributions 8/8/96

Date	Amount	To	For
10/24/91	10,000	Dist	Village
1992	0		
1/7/93	10,000	Dist	Village
1/17/94	5,500	Dist	Village
1/17/94	4,500	Assoc	Village
1/13/95	5,000	Dist	Casino MOU
2/23/95	5,000	Dist	Casino MOU
4/25/95	2,500	Dist	Village
4/25/95	2,250	Assoc	Village
6/1/95	5,000	Dist	Casino MOU
7/31/95	5,000	Dist	Casino MOU
1/25/96	6,250	Dist	Casino MOU
2/12/96	250	Dist	Balance from 95
2/12/96	500	Dist	Village
2/12/96	4,500	Assoc	Village
7/25/96	5,198	Dist	Casino MOU due 2/15/96
MOU payment missed			
5/15/96	6,250		
MOU payment ~~due~~ MISSED			
8/15/96	6,250		

SKAGIT COUNTY
FIRE PROTECTION DISTRICT #13
Box 532
LaConner, WA 98257

August 20, 1996

Mr. Brian Cladoosby
Assistant Manager
Swinomish Tribal Community
Box 817
LaConner, WA 98257

Dear Mr. Cladoosby:

Enclosed is a copy of the May 6, 1996, letter which you requested. This letter was sent to you, but evidently was not received.

Based on coordination between you and the District Secretary, I understand that a meeting, as suggested by Chairman Wa Walton in his letter dated July 18, 1996, is not feasible during the period of August 21 through August 23. You have suggested a morning meeting sometime during the week of August 26 through August 30, and that it could coincide with a special meeting of the Swinomish Indian Senate. That would be ideal.

Please be advised that the Fire Commissioners can be available during that period, but would appreciate the courtesy of at least two days advance notice so that our work schedules can be adjusted. Please contact the Secretary at 466 3181 or call me at 293 3451.

Sincerely,

James L. Grove
Commissioner in charge of
Indian Affairs

September 09, 1996

SENATE COMMITTE ON INDIAN AFFAIRS
838 Hart Senate Office Building
Washinton D.C. 20510-6450

Dear Members of the Senate Committe:

Thank you for considering this letter, it is in regard to Sovereign immunity for Indian Reservations.

I live on the disputed land of the West Bank of the Colorado River Indian Tribes near Blthe, CA.

We have no rent control. The indians have raised our rent to an unreasonable high, and I understand they want to increase rent to three times the current high. When I called the Colorado River Indian Tribes to complain they said "Pay or be evicted". I have no recourse, just as the rest of my neighbors have no recourse.

Also, we receive no services fnom C.R.I.T. (Colorado River Indian Tribes) ie.: Trash pick-up, fire department ect.

We need representation in the courts, please work to abolish Sovereign Immunity for Indian Reservations.

Thank you very much, I hope you will help us with this matter.

Respectfully Yours,

A WEST BANK HOMEOWNER

CC: Senator Slade Gorton
730 Hart Senate Office Building
Washington, D.C. 20510-4701

Attn: Nina

BIG HORN COUNTY ELECTRIC
Cooperative, Inc.
P.O. Box 410
Hardin, Montana 59034-0410
Quality Service Since 1941

September 13, 1996

The Honorable Slade Gorton
United States Senate
Room 703 Hart Senate Office Building
Washington, D.C. 20510-8450

Dear Senator Gorton:

This letter is offered for presentation at the September 24, 1996 Senate Committee on Indian Affairs hearing on tribal sovereign immunity. Please relay the frustration Big Horn County Electric Cooperative has experienced in dealing with the **Crow tribe** and their **Tribal Utility Tax.**

Big Horn provides electric service to two sovereign Indian tribes in south central Montana. We serve the vast majority of the **Crow Indian Reservation** and a portion of the **Northern Cheyenne Indian Reservation.** Big Horn has a long tradition of providing quality electric service to our valued Native American consumers and our Trustees have maintained a clear focus on keeping rates affordable, and protecting the interest of **all** our consumers.

The issue of Tribal taxation has driven a "wedge" into our member/tribal relations. As an attribute of sovereignty tribal governments have the authority to tax on Indian trust land. The extent of this authority, however, must be legislatively placed within parameters that protect non-tribal members from taxes enacted for the purpose of generating revenue for the provision of services to which non-tribal members are denied access.

I realize that the issues of tribal taxation, and jurisdiction over non-tribal members on fee lands, are very "thorny" from a political perspective. However, if left unresolved families and businesses will be severely damaged - harmed by a situation that if it were anywhere else in the world the federal government would condemn the affair as a violation of human rights.

Big Horn County Electric Cooperative is dedicated to reaching a higher level of understanding between the cooperative and the Crow tribe on all issues. Unfortunately, that will only happen if Congress establishes clearly defined principles under which the tribes exercise their right of self governance.

Sincerely,

T R Gregori

Tim R. Gregori
Manager

cc Senator John McCain
Senator Conrad Burns

Phone (406) 665-2630 FAX (406) 665-2641

August 26, 1996

Dear Senator;

I urge you to support Senator Gorton of Washington in his effort to waive the sovereign immunity of any tribe that violates the property rights of non-members.

In July of this summer, my name was brought up for ridicule and slander by Tribal Spokespersons at a public gathering at the National Bison Range.

When I asked a lawyer if I could hold them accountable, I was told no, because the Tribes have the right of Sovereign immunity, and Federal courts do not handle the type of lawsuit I was speaking of. The lawyer told me that slander is something that Tribal spokespersons can simply get away with.

I realize that Sen. Gorton is focusing on violations of property rights, and that I would probably have not gotten relief through Sen. Gorton's bill either. But I see it as a step toward justice, and I urge you to take it.

Lisa Morris
10207 Wheatland Rd.
Moiese, MT 59824

September 6, 1996

Senator Slade Gorton
730 Hart Senate Office Building
Washington, D C. 20510

Attn: Nina Nguyen

RE: Sovereign Immunity

Dear Senator:

This letter is in regard to the Sovereign Immunity of the Navajo and Zuni Tribes. As we are in business in the area surrounding these two mentioned reservations, this has presented a serious problem for us.

The laws of the State of New Mexico and the laws of the Navajo Tribe and Zuni Pueblo are conflicting. We would like to know who has jurisdiction over us. Are we citizens of the State of New Mexico or of the Navajo Tribe or Zuni Pueblo

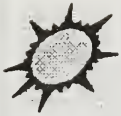
Being non-indian, doing business in Gallup, NM off of the reservation we find ourselves confused. The main question here is, "Who has jurisdiction over us.

Thank you fro your time

Very truly yours,,

Bruce and Jenny Williams

P.O. BOX 898 • GAMERCO, NEW MEXICO 87317. TELEPHONE (505) 722-2038



SUNDANCE MOTORS

DARREN BAADE
PRESIDENT
1121 N. HWY 666
GALLUP N.M. 87301

Telephone 505-863-4068
Fax 505-726-1027

TO: SENATOR SLATE GORDON
RE: TRIBAL POLICIES

THE LAST TIME WE (SUNDANCE MOTORS) TRIED TO GET A COURT ORDER TO REPOSSESS A VEHICLE IN TRIBAL COURT, THE COURT WAS UNABLE TO SERVE OUR CUSTOMER BECAUSE SHE HAD A BOGUS ADDRESS OR JUST WOULD NOT ACCEPT THE LETTER.
WELL !!! WE LOST BY DEFAULT, ALSO LATER I FOUND OUT THAT THE NAVAJO AUTHORITIES WERE NEVER EVEN ORDERED TO SERVE THE CUSTOMER.
ANYWHERE ELSE IN THE WORLD THE CUSTOMER WOULD HAVE LOST BY DEFAULT CONSIDERING THE CUSTOMER WAS $ 1700.00 BEHIND AT THE TIME AND HADN'T MADE A PAYMENT IN SIX MONTHS.
THIS IS JUST A VERY SMALL EXAMPLE OF THE INJUSTICE WE DEAL WITH DOING BUSINESS ON THE RESERVATIONS IN THIS AREA

I LOVE NATIVE AMERICANS AS A WHOLE, BUT I THINK THEY ARE BELITTLING THEMSELVES BY ALLOWING OUR AND OTHER GOVERNMENTS TO TELL THEM THAT ITS OK NOT DO WHAT IS RIGHT, AND THAT THEY DON'T NEED TO HONOR THEIR AGREEMENTS.

HERE ARE SOME EXAMPLES OF WHAT I AM TALKING ABOUT.
ENCLOSED IS A TYPICAL FLYER PUT OUT BY THE D.N.A. (FEDERALLY FUNDED LEGAL AID) ON HOW TO GET OUT OF MAKING YOUR CAR PAYMENT AND AVOID REPOSSESSION.

THANK YOU, SUNDANCE MOTORS

DARREN BAADE (OWNER)

REPOSSESSION

When you buy property (a truck, mobile home, furniture) and can not pay the entire amount for the property, the dealer or a bank will lend you the money to pay off the property. This is called financing. In return for lending you the money, the dealer or bank will take a "security interest" in the property. A security interest is a guarantee to the dealer or bank that you will pay back the money. If you do not, then the dealer or bank has the right to take back the property. This is called repossession.

In the Navajo Nation, however, there is a special repossession law. The Navajo Nation law says that your property can not be repossessed from the Navajo Nation without one of two things:

1) your written consent at the time of the repossession;

2) or a Navajo Court order.

NO ONE CAN FORCE YOU TO GIVE UP YOUR PROPERTY EXCEPT THE POLICE OR A SHERIFF WITH A NAVAJO COURT ORDER. YOU SHOULD NEVER GIVE UP YOUR KEYS TO ANY COLLECTOR OR LET ANY COLLECTOR TAKE YOUR TRUCK. THERE IS NO LAW THAT SAYS YOU HAVE TO.

Let's say that you are buying a truck, the dealer has financed the loan for you, and you get behind on payments. At that point, it is common for a repossession man to come to your house and tell you that he has to take the truck back. He can not take the truck unless you sign a paper telling him that he can take it or unless he has a Navajo court order.

DNA RECOMMENDS THAT YOU NOT SIGN ANYTHING IF A REPOSSESSION MAN TRIES TO TAKE YOUR TRUCK.

Tell him to go get a court order instead. If he will not leave your home or he harasses you, call the Navajo police. Even if you are behind on payments, the repossession man can not take your truck if you do not sign the paper saying that he can. If he does take your truck even though you did not sign the paper, you can take him to court for money damages.

Sometimes a car dealer will have you sign the consent to repossession when you buy the truck. This consent is not good enough. The repossession man can only take the truck if you sign the consent at the time of repossession.

After you refuse to sign the consent, the only way your truck can be repossessed is for the dealer to get a Navajo court order. A state order is not good enough. If the dealer does go to court, you will receive a notice from the court, telling you when there will be a hearing. The hearing will be in front of a Navajo judge to whom you can speak in Navajo. You will be given a chance to tell the judge why you are behind on payments and how you plan to get caught up on payments. Then it is up to the judge to decide whether to allow the repossession.

It is important to remember that this law is a Navajo Nation law that does not apply outside of the Navajo Nation. Once you leave the Navajo Nation, a repossession man can take your truck as long as he does not 'breach the peace." Nobody knows exactly what"breaching the peace" means, and courts decide on a case-by-case basis. However, it is clear that breaking the law is "breaching the peace." If the repossession man hits you or makes a lot of noise, that is breaching the

peace.

Because it is easier for the repossession man to take your truck once you leave the Navajo Nation, DNA recommends that if you are behind on payments, you should not take your truck off the reservation. Try to get rides from someone else or borrow a truck.

If you do have to take the truck off the reservation, do not take it near the car dealer's lot. Also, if you go somewhere to shop, leave a person in the car at all times. Tell the person that if a collector comes, they should stay in the car, lock the doors and roll up the windows. If you do not leave someone in the car, you may find that your car has been repossessed while you were shopping and that would be a legal repossession.

Whenever you have any problems with repossession, it is important that you see legal counsel as soon as possible.

The Community Legal Education is a joint project of Southern Arizona Legal Aid and DNA-People's Legal Services, Inc.

DNA is funded in part by the Arizona, Utah and New Mexico Bar Foundations.

HOW TO AVOID REPOSSESSION

Published by the Community Legal Education Program,
DNA-People's Legal Services, Inc.
Post Office Box 306
Window Rock, AZ 86515

20 Lincoln Ave.
Salamanca, NY 14779
Sept. 24, 1996

Honorable Slade Gorton
Senate Select Committee on Indian Affairs
730 Hart Building
Washington DC 20510

Dear Senator Gorton:

I was born in Salamanca February 25, 1919 and have resided here all of my life. I married and raised 5 children in this city, and each is a contributing member of society.

I served in World War II, 4th armored division, with a full year of combat; landing at the Normandy beaches, traveling through Germany into Chekoslavakia where we met the Russians.

I worked here in Salamanca at Fancher Furniture Company and McMillan Supply as well as a construction worker building stores, homes, bridges, and adding additions to factories in this city.

I did not sign the 40/40/0 lease because it is clearly unconstitutional, takes away the ownership of my home and because of the sovereign immunity of the Senenca Nation of Indians, does not give me the constitutional right of due process.

The Salamanca Indian Lease Authority and the 1990 city government had no right to interfere with my property interest. They had no right to sign an agreement with the Seneca Nation about which I was never informed.

If I had signed the lease that was offered to me, and then sold my house, I would still be responsible for that house for the next 40 years.

I think that the government of the United States should be protecting my rights as an American. The only thing I want is a reasonable and justifiable solution to this issue.

Very truly yours,

Nathan C. Frank

Nathan C. Frank

35 Central Avenue
Salamanca, NY 14779
September 12, 1996

Senator Slade Gorton
Room 730 Hart Bldg.
Washington, DC 20510

Dear Senator Gorton:

As home owners in the city of Salamanca, NY, we have been advised that you are addressing the issue of Sovereign Immunity with regards to Native Americans.

Our home is in a city whose land is on an Indian reservation. We have been under unbelievable stress over the past six years with regards to the most recent 40/40 Indian Lease, which we feel is unconstitutional. S.I.L.A., a committee whose assignment was to research the upcoming lease when it was due, instead signed a lease on our behalf.....we then formed a Citizens Group and to date we have spent over $300 thousand dollars and for what.....BECAUSE OF SOVEREIGN IMMUNITY, we never had the opportunity to have our case even heard.

We are senior citizens and we held out until the very last offered signing. That was only because our health has deteriorated and we just couldn't face another day of stress. We had gone so far as to buy a small trailer out of the city limits and we kept our important documents in the trunk of our car because of the constant rumors...YOU WILL BE EVICTED ANY DAY NOW BECAUSE YOU DIDN'T SIGN THE LEASE. Instead of enjoying our twilight years, we live with constant turmoil over the results of this lease and our inability to solve the issue of the Sovereign Immunity.

There are still 16 courageous homeowners who have refused to sign the lease; there are hundreds more home owners who were not able to hold out but who still feel very strongly that the issue of Sovereign Immunity must be resolved. Our own federal government is now in the process of evictions against its own citizens. IS THIS JUSTICE?????

Anything you can do on our behalf is very greatly appreciated.

Sincerely,

Eva & Harry Poole

EVA & Harry Poole

cc: Senator Alfonse D'AMATO
Senator Daniel PATRICK MOYNIHAN

Senator Slade Gorton
United States Senate
Room 703 Hart Senate Office Building
Washington, D.C. 20510-8450

September 18, 1996

Dear Senator Gorton:

This letter is for presentation at the Sept. 24th , Senate Committee on Indian Affairs hearing, on tribal sovereign immunity.

As president of the Big Horn Livestock Association, I would support legislation granting immunity to non-Indian citizens on the reservations.

These issues of jurisdiction, taxation, tribal sovereignty and tribal courts on "Open Reservations" are critically different than on "Closed Reservations". The U. S. Senate Committee on Indian Affairs needs to educate themselves on the differences between "Open and Closed" reservations, before recommending remedies for both.

The non-Indians residing within the "open" reservations, some homesteading, were granted that right by the U.S.A. They homesteaded, with the belief they were under the U.S. flag, under the jurisdiction of the United States. If legislation granted tribes on "open" reservations sole sovereignty, this action will put these non-Indian citizens under tribal jurisdiction. This would in essence, "abandon" these U.S. citizens. The way things are now, there is little or no law in these tribal lands. Nobody knows who has jurisdiction over who. Examining past tribal court rulings over non-Indian litigation in this county, the non-Indians were treated quite severely.

I do not support "denying" tribal sovereignty, over themselves. But please give the non-Indian residents the protection state jurisdiction would give them. This is what their tax dollar provides for.

Sincerely,

Miles Torske
Big Horn Livestock Assoc.
Hardin, MT

cc Senator John McCain
Senator Conrad Burns

1996 AUG 19 1:58

6353 NE Balzow Rd.
Suquamish, WA 98392
360-598-4432
August 13, 1996

NQN/Indians

Senator Slade Gorton
730 Hart Senate Off. Bldg.
WAshington, D.C., 20510

Dear Senator Gorton:

We understand that you will be looking into some of the impacts of congressional actions on non-tribal members living on fee patent land lying within the original boundaries of Indian reservations. There are so many such impacts that it is hard to know where to begin.

One of the most obvious is the impact of the Indian Gaming Law which usurped states' rights to control gambling within their own borders. In spite of all claims to the contrary, Indian tribes are allowed to operate under conditions unavailable to any other citizen. They are allowed to flout state laws regarding health and safety (i.e. food service, sewage disposal, fireworks, etc.) even though they are catering to the general public.

When tribes transgress the conditions of their mandated compacts, the federal government makes no effort to uphold its responsibility. This is partially due to Congress's failure to address the bogus claim of sovereignty. Congress has the power and authority to unilaterally alter or even abrogate Indian treaties. It is high time that they declared the sovereignty of Congress over the whole country. The treaties negotiated by Stevens in fact include the agreement of the tribes to be dependent. Courts treat all Indian treaties as though they were the same even though they obviously are not.

Tribes such as the Suquamish which allotted land to tribal members (by treaty agreement) were then allowed, with the approval of the federal government to have their land taken out of reserve to make it available for sale to any buyer. Now the tribe claims jurisdiction over that land and its owners by declaring that it is still reservation even though it is not reserved. This becomes the basis for claims of water rights, zoning rights, civil jurisdiction, etc. ad nausium.

We are constantly being confronted with "deals" or agreements made with tribes by unelected bureaucrats on both state and federal levels without the knowledge or consent of the legislature or congress. At the state level are such arrangements as memorandums of agreement or understanding between PUD officials and tribes or DOE and tribes. At the federal level we have such fiascos as the EPA granting state status to a tribe in Wisconsin without the consent or apparent knowledge of the requirements laid down by the Supreme Court in South Dakota v. Bourland, Brendale v. Confederated Yakima Nation and Montana v. United States concerning "consensual agreements" and they are being snowed by tribal attorneys.

Another sore point that is becoming explosive is the question "Who is an Indian?". As tribes expand their memberships with more and more people with less and less Indian ancestry attracted by the tax-free living and millions of dollars in grants and special programs, other citizens feel the extra burden and will eventually revolt over the inequity. It is one thing to support real Indians, but it is quite another thing to support free-loaders with less than one-quarter Indian ancestry.

We have spent thousands of dollars defending ourselves against unfounded claims and lawsuits brought by the tribes and the justice department over the years all because of the failure of Congress to address these basic issues. Billions of tax dollars have been expended and all that has been accomplished is a proliferation of the problems. Congress must seek a solution!

Sincerely,

Virginia Whiteley
William H. Whiteley

1995 [illegible] 5 [illegible] 12:57

PO Box 54
Bellingham, WA 98227
August 8, 1996

US Senator Slade Gorton
Attn: Nina Nguyen
730 Hart Senate Office Building
Washington, DC 20510-4701

Dear Senator Gorton:

I am writing to request that you consider helping eliminate the status of sovereign immunity for Native American tribes.

It seems to me that the efforts to provide special privileges to the Native American tribes because of past wrongs should now be over. Apparently, all of the special privileges have not produced the desired results anyway.

As a group, the Native Americans are being devastated. The rate of substance abuse, familial dysfunction, illiteracy, lack of achievement, and dependence on welfare for survival have made the once proud Native Americans little more than a group of sniveling wards of the state, for the most part.

For a group of people to exist in this manner is an embarrassment and an insult.

I have lived and worked with Native Americans for more than 25 years. I have seen, first hand, the effects of "protection" offered by the United States government.

I realize that the support cannot just stop abruptly. However, the weaning process must begin sometime and part of the process involves making the Native Americans accountable for their actions. As long as the Native Americans are not held accountable for their actions, the quality of life of average tribal members will continue to decline.

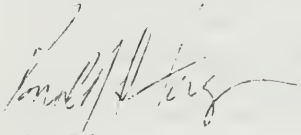
If a Native American tribe opts to be a sovereign nation, that sovereign nation should be required to, at least, pay its own way. With the government opportunities offered to tribes of financial assistance for business ventures, gambling casinos, industrial development, etc., there should be no reason for a welfare state to continue in Indian Country.

In all honesty, a very compelling reason for my interest in cutting off financial support to Native American tribes is that my own tax dollars end up being used against me. As sovereign nations, the Native American tribes cannot be sued, but they can sue and create legal roadblocks for non-tribal people. My taxes end up supporting these efforts and some of the efforts are aimed directly at me and intended to do damage to me and mine.

Where I live, on the Lummi Indian Reservation, I am the target of discrimination. Efforts are being made to devalue my property and force me from my home through intimidation, threats, and actions that I, as a non Lummi, would surely have to answer to the government for. Outright statements of racism have been made by the Lummi tribal leadership. I have not even had the courtesy of a response to letters I have written to the Lummi leadership and the BIA about my concerns. Once again, these are the entities that are being supported by my tax dollars. I believe that the status of sovereign immunity has created this mentality for doing business in the Native American leadership.

This is 1996. Enough time, money, and energy has been devoted to "helping" the Native American people become productive, self-sufficient citizens of our country. Now let's change our approach and see if a difference can be made before it's too late.

Sincerely,



Ron Feiger

Mrs. Jean Saw,
3791 Sinclair Drive,
Ferndale, Washington
98248

1996 AUG 27 1:08

NQN / Indians

COPY

August 19th, 1996

Committee of Indian Affairs
Senate Hart Office Building
Constitution Avenue, 2nd Street, N.E.
Washington, D.C.

Dear Sir/Madam;

My husband and I bought our primary residence at Sandy Point Heights 24 years ago. We also purchased an adjacent property 14 years ago. These properties unfortunately lie within the Lummi Indian Reservation Boundaries.

My husband passed away 2 years ago and I can no longer afford the taxes, nor the sewer fees which are paid to the Lummi Nation, on the adjacent property, however, I am prevented from selling because the Lummi Indians will not allow me to have water provided by federal funds!

I am pleading with you to please remove Sovereign Immunity before I am forced to sell my home.

Yours sincerely,

Jean Saw

Mrs. Jean Saw

CC: Governor Mike Lowry
Senator Slade Gorton
Senator Patty Murray
Representative Jack Metcalf
Representative Pete Kremen
Senator Ann Anderson
Representative Gene Goldsmith
Senator Harriet Spanel

Herbert E. Nelson
Director, Quinault Property Owners Assn.
1371 Olympic Street
Aberdeen, Wa 98520

1996 AUG 23 1:10

August 20, 1996

Honorable Slade Gorton
S- 128 Capitol Building
Washington D.C. 20510-6025

Subject: Non-Indian property rights on Indian Reservations.

Dear Senator Gorton:

I noted with interest that your proposal to allow non-Indians to take Tribes to State Courts to resolve private property issues was jettisoned from the Interior Departments funding bill.

There are about 800 fee patent land owners on the Quinault Indian Reservation and the Tribe has zoned our recreational property "Wilderness", meaning literally NO-USE!

The Allotment Act of 1887 (a Congressional Act) provided for the allotment of Reservations to the individual members of the Tribes involved. The fish eatings tribes of western Washington involved in the Quinault Reservation elected to allot the entire Reservation to the members of these tribes.

As time passed many of the allottees on the Quinault Reservaton took their fee patents out of trust and sold these properties to non-indians and they went on the States tax rolls, and it seems then should be subject to State jurisdiction.

If Congress is not willing to recognize we non-indian land owners by putting our lands under the control of the States then the Federal Government should provide the funds to purchase these properties and return them to the Tribes. After all Congress provided for allotting the Reservations and creating the dilemma we find ourselves in.

Either pass provisions to establish our property rights or allocate funds for the purchase of these properties. As it now stands we fee-patent land owners are being discriminated against.

sincerely,

Herbert E. Nelson

August 20, 1996

1996 AUG 27 PM 1:09

SENATOR SLADE GORTON
730 Hart Office Bldg.
Washington, DC 20510

NQN/Sov. Immunity

We certainly hope the Senate takes the lead in waiving Indian Tribal Sovereign Immunity. This is an issue that must be resolved. Everyone in this country must be held accountable for their actions.

We are having our water supply threatened, our road use is being threatened, we are being kept from enjoying our beaches, we are being threatened and intimidated with law suites,and we are being illegaly taxed (this is keeping us from enjoying natual gas service). All of this from the Lummi Indian Business Council. The really hard part of this scenario is, We can not help ourselves. We can not stop it. Tribal sovereign immunity precludes that.

We truly and fervently hope that you folks in congress are about to change that.

Thank you very much.

Sincerely

Mickie Trumble

Mickie Trumble

Robert L Trumble

Robert L Trumble
4850 Beach Way
Ferndale, WA 98248

Mr. and Mrs. Dale V. Salhus, Sr.
HCR-1 Box 338
Inchelium, WA 99138
(509) 722-3421 Fax (509) 722-3529

August 12, 1996

Senator Slade Gorton
10900 NE 4th Street
Suite 2110
Bellevue, WA 98004

NOW / tribal lands

Dear Senator Gorton:

In August of 1995 my wife and I purchased a home and 32 acres of land in Ferry County, Washington. This is our life dream and we put everything we had into it anticipating a pleasant and secure retirement environment.

Upon receiving our deed, we found we are subject to terms and conditions of Land Use formulated by the Confederated Tribes of the Colville Reservation and to conditions contained in the Intergovernmental Land Use Planning Agreement of 1993.

We have fee land title, pay our taxes to Ferry County and are registered voters in same. By owning our property outright, we thought there would be no encumbrances. Enclosed is a copy of our deed showing these. Now we find we cannot even hunt or fish on our own land and are subject to laws and regulations of a jurisdiction in which we have no representation or voting privilege. Our property rights have been infringed upon! Where are our Constitutional rights?

We have no ill will for the Indian and do not believe in violence as a way of settling anything. Laws should be made to encourage peace and harmony. However, it is regulations and encroachments of the type we see being perpetrated in our County that foster ill will and violence.

We want the rights and privileges that our Constitution and 14th Amendment gives us and we appeal to you to represent our concerns at the hearings in September.

Respectfully,

Dale Salhus Sr.
Marjory Salhus

Dale and Marjory Salhus

Enclosure: Deed

COPY

FILED FOR RECORD AT REQUEST OF:

Shok & Monasmith, P.S.
P.O. Box 6
Chewelah, Washington 99109

DEED OF TRUST
(For Use in the State of Washington Only)

THIS DEED OF TRUST, made this 21 day of August, 1995, between DALE V. SALHUS, SR. and MARJORY M. SALHUS, husband and wife, Grantor, whose address is 15253 S.E. 171st Place, Renton, Washington 98058, TICOR TITLE INSURANCE COMPANY OF CALIFORNIA, a corporation, Trustee, whose address is P.O. Box 349, Colville, Washington 99114, and WESTERN PACIFIC TIMBER, L.L.C., an Oregon limited liability company, Beneficiary, whose address is 114 SW Second Avenue, Portland, Oregon 97204,

WITNESSETH: Grantor hereby bargains, sells and conveys to Trustee in Trust, WITH POWER OF SALE, the following described real property in Ferry County, Washington:

That part of the W1/2 of the NW1/4 of Section 14, Township 30 North, Range 35 East, W.M., lying and being North of the Wilmont County Road No. 47.

EXCEPTING therefrom the right of way for Wilmont County Road No. 47.

SUBJECT to the terms and conditions of the Land Use formulated by the Confederated Tribes of the Colville Reservation as per recorded document numbers 189434, 189435 and 190108.

SUBJECT to Colville Confederated Tribes Resolution No. 1985-20.

SUBJECT to the terms and conditions contained in the Intergovernmental Land Use Planning Agreement filed July 1, 1993 under Ferry County Auditor's File No. 224624.

SUBJECT to right of way easement, including the terms and conditions thereof, as shown of record under Auditor's File No. 120402.

Which real property is not used principally for agricultural or farming purposes, together with all tenements, hereditaments, and appurtenances now or hereafter thereunto belonging or in any wise appertaining,and the rents, issues and profits thereof.

This deed is for the purpose of securing performance of each agreement of grantor herein contained, and payment of the sum of Forty-Three Thousand Six Hundred Dollars ($43,600.00) with interest, in accordance with the terms of a promissory note of even date herewith payable to the Beneficiary or order, and made by Grantor, and all renewals, modifications and extensions thereof, and also such further sums as may be advanced or loaned by Beneficiary to Grantor, or any of their successors or assigns, together with interest thereon at such rate as shall be agreed upon.

August 8, 1996

1996 AUG 12 AM 5:55

SENATOR SLADE GORTON
730 Hart Senate Bldg.
Washington, DC 20510

We wish to thank you members of the Senate for having the hearing on waiving the sovereign immunity of the Indian Tribes. This waiver is badly needed and long overdue.

We fee land owners are harrassed, threatened and intimidated by the tribes in many ways and tribes cannot be held accountable for their actions like all other Governmental entities and we citizens.

The Lummi tribe has levied an unconstitutional utility tax on us and we can not take them to court to prove that it is taxation without representation. You and Congressman Jack Metcalf seem to be our only help in congress but you are hamstrung. If tribal sovereign immunity were to be waived, perhaps we would be able to solve some of our own problems with them.

We do not like having our water supplies threatened and we do not like being intimidated on our own beaches. Please do every thing in your power to see this thing through.

Thank you again for all of your efforts on our behalf.

Sincerely

Robert L Trumble

Mickie Trumble
4850 Beach Way
Ferndale, WA 98248

cc. Citizens Equal Rights Alliance Inc.

August 12, 1996

Senator Slade Gorton
10900 NE Fourth St.
Suite #2110
Bellevue, Wa. 98004

RE: Swinomish Tribe
LaConner, Wa.

Dear Senator Gorton,

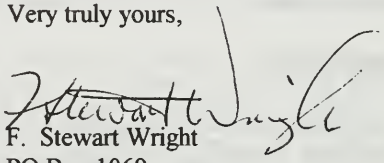
Your file contains numerous letters from my wife and me and also from some of the other tenants on the Morris Dan Tract with respect to our attempt to purchase the land on which we reside from the Indian land owners. Although 11 of the 14 land owners have agreed to our offer, the BIA and the Tribe have coerced and convinced the 3 remaining not to sell. We have undergone this type of harassment since we initiated the offer to buy in June of 1995.

The other on-going struggle as you are also aware is with the BIA and the Tribe over the horrendous increase in lease rents that have been imposed on all of the Tenants in this area. This prompted the formation of the West Shore Tenants Association [WSTA]. As the sale is currently being blocked by the BIA and the Tribe we have broadened our energies to force the issue on the rent factor and other associated wrong doings such as the imposition of a Sewer System charge which in its self is fraudulent. Here in lies the problem. We Tenants are not allowed a voice or representation on any of the decisions the Tribe and BIA have made to impose these charges. It is akin to taxation without representation! What makes matters worse is that the Tribe considers itself a Sovereign Nation and accordingly claim Sovereign Immunity, blocking any avenue we have to assert legal action. Every day we

see projects going on - on the Reservation paid for by our tax dollars that seem in some ways a waste of these tax dollars. If the Tribe declares itself a Soverneigh Nation, then let them stand alone and cut or hold off funding until they act responsibly.

We need your help, Senator Gorton and we need you to inform your colleagues of the injustices we are experiencing. The Tribe & BIA opened the Reservation to Tenants at reasonable rent rates. Now we are trapped by increases over 500%. We have lost our equity, we have no representation and we apparently have no legal recourse. We are in a Foreign Country funded by ourselves!!

Very truly yours,



F. Stewart Wright
PO Box 1069
LaConner, Wa. 98257

MANDAN, HIDATSA, & ARIKARA NATION

Three Affiliated Tribes • Fort Berthold Indian Reservation

HC3 Box 2 • New Town, North Dakota 58763-9402

TRIBAL BUSINESS COUNCIL
(701) 627-4781
Fax (701) 627-3805

September 23, 1996

Senator Daniel Inouye
Vice-Chairman
Senate Indian Affairs Committee
Senate Hart Office Building, SH 722
Washington, D.C. 20510

Re: Statement for the Record Concerning
Hearing Before Senate Indian Affairs Committee
September 24, 1996 Regarding Sovereignty of
Indian Tribes and Nations

Dear Senator Inouye:

On behalf of the Three Affiliated Tribes, the Mandan, Arikara and Hidatsa Nations of the Fort Berthold Reservation located in northwest North Dakota, we greatly appreciate the hearing you are holding regarding the sovereign status of the Indian nations and tribes within the United States. It is our understanding that this hearing came about because of the fear of some members of the Senate Committee on Indian Affairs and other members of Congress that Indian tribes were taking advantage of their sovereign status and asserting their "sovereign immunity" inappropriately . The implication of at least one amendment to the Interior Appropriations bill seen by the tribal governments is that the tribes were, or would likely be, shirking legitimate financial responsibilities to local, state and federal governments.

This statement is meant to dispel the fear that tribes, and in this case, the Three Affiliated Tribes, are acting irresponsibly with regard to the exercise of their sovereignty. We are hopeful that your hearing as well as this statement will begin to dispel many myths and misconceptions that have been created in recent years about the nature of "tribal sovereignty", and "sovereign immunity", and will begin to show the relevance, and in fact, the usefulness, of tribal sovereignty as we approach the 21st century

These comments are submitted for the record of your hearing on behalf of the Three Affiliated Tribes. It is my understanding that they will be made available to the entire Senate Indian Affairs Committee.

"Sovereignty" defined simply is: "The right of the people of a nation to govern themselves." This is a right the Indian nations of the western hemisphere enjoyed for millennia prior to the arrival of the European. This is a right that was forcibly taken away from the Indian nations during the past 500 years.

This general sovereign right of the Indian nations to govern themselves was guaranteed for many tribes by treaty, including the Three Affiliated Tribes in the 1851 Fort Laramie Treaty. While the boundaries of the Fort Berthold Reservation set aside for the Three Affiliated Tribes were reduced by statute following the Fort Laramie Treaty, and, in fact, in violation of that treaty, the right of the Three Affiliated Tribes to govern themselves within the reservation boundaries generally was not affected by such legislation.

Today, as tribal governments are acutely aware, the remaining Indian nations in the United States have been defined by the United States Supreme Court for more than 150 years as "dependent sovereign nations". The meaning of the phrase "dependent sovereign nation", as the attorneys tell us, is subject to Congressional interpretation because under United States law, Congress retains full power over the affairs of the dependent Indian nations, if it wishes to exercise such power.

The key element of the power of Congress over the sovereigns status of the Indian nations in the United States is that in general, the Indian nations may exercise such sovereign rights as Congress, or the Supreme Court, has not taken away. It is this fundamental doctrine which led to Indian gaming and which is now also leading to a tremendous increase in economic activity on the reservations of many Indian nations, directly benefitting the Indian and non-Indian people on, and in many cases, off the reservations. For example, the Three Affiliated Tribes owns a full serviced casino and lodge, which it will soon be operating on its own, owns and operates an electronics firm, a radio station and newspaper and a construction firm, among other Tribal entities, all of which contribute amounts in the tens of millions of dollars to the local economy.

As a part of their governmental development, and in the exercise of the sovereign right of the Three Affiliated Tribes to govern themselves, the Tribes have enacted a complex set of laws and established a Tribal court in which many types of disputes may be heard. Not only does the Tribal Court hear the usual criminal and civil suits between Tribal members, but it also hears more complicated commercial disputes. For example, as a matter of law, the 8th Circuit Court of Appeals, in the case of ***Bruce H. Lien Co. v. Three Affiliated Tribes***, et al., on August 28, 1996 ruled that the Tribal Court was the proper forum to initially hear a dispute between the Tribe and the company which is managing its casino about the validity of the management contract between the parties. The Court ruled, in essence, and consistent with the U.S. Supreme Court's prior rulings in a number of decisions, that the Tribe had the sovereign right to have disputes which arise under its own constitution determined in its own Tribal court.

Thus, in the commercial setting, and in its relations with the state in which it is located and with other states, and, indeed, even with the United States government, the Three Affiliated Tribes expect to be treated no less equally that any other foreign country; that is, it expects commercial and governmental disputes arising out of transactions which occur on the reservation to be determined in its Tribal Court. But the tribal government is also sophisticated enough to know that in order for substantial commercial activity involving the Tribe to take place on the reservation, it cannot hide behind a shield of "tribal sovereignty" as it enters into multi-million dollar commercial ventures. Like most tribes, therefore, in order to participate in various commercial ventures, the Three Affiliated Tribes has found it necessary from time to time to waive its sovereign immunity, the waiver limited to the amount of the capital borrowed.

Also, like most other tribal governments that are now actively developing their local economies, the Three Affiliated Tribes is rapidly developing its tribal laws to be able to handle more sophisticated

commercial transactions, both for the benefit of Tribal commercial entities and for its members. The Tribes fully expect that over time, disputes arising from commercial transactions on the reservation will be decided in Tribal court, rather than State or Federal court. For example, in North Dakota, tribal financial planners and other tribal leaders have been actively meeting with North Dakota bankers to determine how best to make capital available on the reservation, both for tribal projects and for the benefit of individual tribal members. The tribes have understood that development of their tribal commercial codes is essential for the financial community to have confidence that any disputes that arise regarding transactions taking place on the reservation will be decided under a commonly understood set of legal principles.

The sovereignty of the Indian nations has also provided special opportunities for economic development because the Indian nations are not generally subjected to state, local or federal taxation. Many tribes, including the Three Affiliated Tribes, have therefore established their own tax system – an illustration of the doctrine that if Congress has not exercised its right to limit tribal sovereignty, the tribes may exercise it.

But exercising such sovereignty in the commercial setting brings with it special responsibilities, which the Three Affiliated Tribes understand fully. For example, the Three Affiliated Tribes is contributing a substantial amount of funds to the local Ambulance District, which serves many Tribal members, and which is also partially dependent for its funding on local property taxes to which Tribal members are not subject. The Three Affiliated Tribes has entered into various cross-deputization agreements with local law enforcement agencies to allow more uniform law enforcement. It has also entered into a number of self-determination contracts with the Federal government, which contain a limited waiver of sovereign immunity, and the resulting local control over these governmental functions not only contributes to the local economy and provides essential services, but also again contributes greatly to a responsible tribal government.

To put it another way, the Three Affiliated Tribes believes it is in the best interest of it members to cooperate with the local, state and Federal governments as each attempts to provide various governmental services and fulfill vital governmental functions. There is simply no advantage for the Three Affiliated Tribes to avoid its governmental responsibilities by failing to work with other governmental entities to solve common problems.

We firmly believe that tribal governments nationwide are also similarly situated. We strongly resist any notion that our governments lack the ability to act responsibly in the modern business world in which we find ourselves. As Chairman of the Three Affiliated Tribes, I firmly believe that our tribal government, with its unique advantages, is well on its way to meeting the challenges of the 21st century as a vital part of a growing economy, both locally, state-wide and nationally.

Sincerely yours,

Russell D. Mason, Sr.
Chairman
Three Affiliated Tribes

BLACKFEET NATION
P.O. BOX 850
BROWNING, MONTANA 59417
(406) 338-7179
FAX 338-7530

EXECUTIVE COMMITTEE

EARL OLD PERSON, CHAIRMAN
BERNARD ST. GODDARD, VICE-CHAIRMAN
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BLACKFEET TRIBAL BUSINESS COUNCIL

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JIMMY ST. GODDARD
GABE GRANT
CARL KIPP

September 20, 1996

Senator Daniel K. Inouye
United States Senate
722 Hart Senate Office Building
Washington, D.C. 20510

Re: Position Paper on Civil Jurisdiction on Indian Lands

Dear Senator Inouye:

Enclosed please find the Position Paper of the Blackfeet Tribe on the above topic. The Position Paper sets forth the views and perspectives of the Blackfeet peoples and is representative of the collective thoughts of the Blackfeet Tribal Business Council. Feel free to share this Paper with other members of the United States Congress.

Thank you very much for your consideration.

Sincerely,

Earl Old Person, Chairman
Blackfeet Tribal Business Council

BLACKFEET NATION
P.O. BOX 850
BROWNING, MONTANA 59417
(406) 338-7179
FAX 338-7530

EXECUTIVE COMMITTEE

EARL OLD PERSON, CHAIRMAN
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POSITION PAPER ON CIVIL JURISDICTION
ON INDIAN LANDS

The Blackfeet Tribe has been involved in many matters regarding civil jurisdiction within the exterior boundaries of the Blackfeet Indian Reservation. These matters include but are not limited to environmental issues, taxation, civil litigation, reserved water rights, mutuality and enforcement of state and tribal judgments, and natural resource use and management. The Blackfeet Tribe has litigated many of these issues all to the way to the United States Supreme Court in order to protect the recognized sovereignty of the Blackfeet people.

Indian tribes of course do not exist in a geographical and political vacuum, and it is important that the rights of all residents of Indian country be protected and preserved. However, it is of equal importance that the sovereign status of Indian tribes be recognized and respected. The Blackfeet Tribe has always attempted to accommodate Tribal members, non-tribal Indians and non-Indians in its governmental and non-governmental interactions with these individuals. It now appears that a direct attack has been launched against the authority of Indian tribes to exercise jurisdiction over certain of these parties and to basically erode any notions of Tribal sovereignty which have been the foundation of the continued existence of Indian peoples for centuries.

When non-Indians initially encountered Indian tribes and Indian peoples, they had no notion of how to deal with these native peoples. There was simply nothing in Anglo-Saxon jurisprudence to dictate a methodology by which to deprive the native peoples of ownership, occupation and use of their lands. Therefore, the treaty became the mechanism by which the non-Indians could accomplish a means to an end, namely remove from the native peoples any claims to the lands to which they held aboriginal title and provide for occupation of the same lands by non-Indians. Treaties, despite their inherent solemnity, can be best viewed as the formation of a contractual relationship involving an offer, an acceptance and an agreed-upon consideration. A review of treaties and their provisions gives an individual strong indications of the efforts which non-Indians exerted in depriving native peoples of their lands. The provisions of treaties always set forth that a particular Indian tribe was "reserving" onto itself certain lands and/or retained rights of use, and that the remainder of their aboriginal lands were being "ceded" to the United States Government. Other provisions of these treaties provided for monetary consideration, guarantees of educational benefits for the Indian children of the tribe, supplies of food for the entire tribe and mutual respect for the boundaries of the Tribal "reservation" which was very specifically described by the United States' surveyors. It must be emphasized that all too often during the negotiations of treaties, the native peoples did not speak the English language and relied upon translators and interpreters provided by the United States.

Our ancestors were undoubtedly wiser than we, as they could great steps while dealing from a position of definite weakness to ensure that modern-day Indian tribes would have a geographical base of support to rely on as they in turn provide for their tribal members. Now, the very nature of treaties and treaty rights is being undermined, when treaties in fact represent the machinery which guaranteed the existence of non-Indians within this nation. Indian tribes have struggled long and admirably through the courts and via the legislative process in order to continue their existence. Tribal authority to levy taxes upon non-Indians doing business on Indian reservations has been litigated in various scenarios, as has criminal jurisdiction, water rights, employment preference, gaming, environmental regulatory authority and general land use management. The end result has created a maze of jurisdiction, when in fact Tribal governments are entitled to and capable of exercising the necessary civil jurisdiction over all residents of Indian reservations and Indian country. The technical and communicational skills of Indian tribes has increased dramatically in the past decade, and it is clear that Tribal governments will continue to enhance the qualitative delivery of governmental goods and services to all residents of Indian reservations. In the final analysis, it is to the advantage and benefit of non-Indians to work with Tribal governments, since State and local governments can provide only so many services to non-Indians because their limited budgets.

On the Blackfeet Indian Reservation, the vast majority of Reservation residents are members of the Blackfeet Tribe. There is a significant percentage of non-members residing on the Reservation, most of whom rely upon the Blackfeet Tribe for governmental services such as law enforcement. These permanent residents pay little or no monies to the Blackfeet Tribe for these services by way of taxes, fees, assessments for water use and other methods of revenue generation by the Tribe. They also utilize the Tribal courts for dispute resolution and do not pay for these services. The point is that there is often no alternative for all Reservation residents but the Tribal government when assistance is required.

The historical continuum of treaty enumerated rights and contemporary exercise of those rights by way of Tribal governmental authority and jurisdiction has created a method by which Indian tribes can exist peacefully and with a foundation of strength. The United States must recognize the legal, practicable and functional validity of Indian tribes and continue to live up to its obligations of trust and fiduciary. The native peoples of this continent are entitled to this consideration as they search for a harmonious relationship with all peoples of this world.

The Blackfeet Tribe strongly urges the President of the United States and the Congress to recognize the rights, power and authority of Indian tribes to fully and completely exercise civil jurisdiction over all lands, transactions and disputes which are located and occur within the exterior boundaries of the Blackfeet Indian Reservation and other geographical areas throughout the United States which satisfy the definition of Indian Country.

NQR/51

Aug: 15 1996

Dear Senator Daniel K. Inouye;

I don't have to tell you of all people, that this great land is made up of all Races, Colors and Religious denominations. We have been striving for over a hundred years to make this a country of Equals. Some great changes have been accomplished and with a lot of hard work on behalf of all Americans we may see the day that we can truly say "GOD BLESS AMERICA, THE LAND OF THE FREE AND EQUAL".

Most Ethnic peoples, have achieved a recognized place in the makae up of the Mosaic of this great land. The chinese who were brought here to perform the menal labour for the building of our railways. They have grown to be great contributors and respected members of this community. They have not asked for nor received any special status or priviledges. Yet they have mantained their social and ancestoral background without imposing on the rest of the nation.

The same can be said for practicaly all the nationalities that have chosen this great land to be their Home. This has been achieved not only through their own efforts but by all Americans willing to give a little. Some times it takes a little nundge and a few tears but it has happened for the betterment of the whole country. No more Heebs, Kikes, and Polacchs. My father was a pround Orangeman and even that has gone the way of the Do Do Bird.

This brings me to the point of this letter. I find that there is one last battle to be fought to bring all this land under one great Democratic Nation. The question of Sovereign Immunity for a special few Americans is like the sword of Damocles hanging over our heads. If I may I would like to impart to you a view of the two sides of the Sovereign Immunity Coin. On the surface it sounds like a great Motherhood and Apple Pie cause of the Indian Nations. It may give them certain powers to govern themselves. It may give a few Native Indians in the proper places, more power. It sounds great for some, but you are obliged to consider the whole of the Native Peoples. At present, many native people have no recourse for inequities that happen on the Reservation, because they have to go before their own tribal courts and those that have the power in the Tribe can keep others in a subservient postion. There are many cases of this on record and if these people had the same opportunity for Justice that we Americans have, they would be much better off.

Along with this Sovereign Immunity comes a lot of other baggage that is contrary to the constitution of the United States. The fact that they do not have to be accountable for their actions before a Court of Law like the rest of us. When we can sue the President and can't sue and Indian leaves one to wonder what Rocket Scientist designed this philophy. When the mear threat of a Law Suit can stop a government from enforcing its bylaws. When they can threaten whole communities by digging an illegal well close to our water supply and attempting to drain it down to a dangerous level. Imposing taxes without representation. Then to threaten to take our proverty, without compensation, enough is

enough. Sovereign Immunity only means that some of us American Citizens are now the Second Class Citizens. Does it mean that only some of us have to contribute to the Lifestyle that the Indians want to impose of this nation. It is very easy for those who have no contact with a tribe to give lip service to the demands of the tribes. But those of us who bought land in "FEE SIMPLE" within the boundaries of a reservation are being put in an intenable situation. When we bought our properties twenty /thirty years ago, we were lead to beleive we had security in the Laws of this land. We have paid our taxes for all these years and improved our property. Now they decide they want it back and say because it is theirs, they don't have to pay for it. Is this what I went to War for this country. To win freedom for everybody but me. To not have the ability to fight for my rights in a court of Law of my peers.

I pray to God that you will have the forsight to see where this Sovereign Immunity will take this country. The Indian will only survive by becomming part of the fabric of this great nation. He can maintain his heritage and customs like other great nasnnationalities. He will then get back his Pride. He will then be able to take advantage of the great opportunities available in theis great land instead of the confines of the Reservation. He wants only to be accepted and have the rights and freedoms of the nation as a whole and so do I. United we will achieve that goal. Devided we will all suffer and fail.

Sovereign Immunity is not the answer and never will be. For Gods Sake, For the Indians Sake and for My Sake lets make the year 2000 the year we all walk hand in hand as equals.

Yours with great respect and hope;

Roy D. Fletcher
3727 Cyprus Way
Ferndale W.A. 98248

Executive Office of the Chairman
WHITE MOUNTAIN APACHE TRIBE

RONNIE LUPE
CHAIRMAN

October 4, 1996

Senator John McCain, Chairman
Committee on Indian Affairs
United States Senate
835 Hart Senate Office Building
Washington, D.C. 20510-6450

RE: Senator Gorton Amendment: Section 329, H.R. 3662

Dear Chairman McCain:

Please consider this the testimony of the White Mountain Apache Tribe to be submitted as part of the September 24, 1996 Committee Record on Senator Slade Gorton's proposed amendment to waive the sovereign immunity of Indian tribes to damages and Injunctions and to subject tribes to state and federal court jurisdiction when tribal action impacts or "threatens to impact" non-Indian property interests on or off a reservation.

We oppose this ill-advised bill as not only being unnecessary, but as an imminent threat to the very existence of tribal governments. It is unnecessary because under current federal court decisional law, it is clear that if a tribal court exceeds its jurisdiction, the United States Federal Courts may intervene and review a decision of a tribal court. This adequately protects the non-Indian property interests that Senator Gorton seems to be concerned about.

The Indian Civil Rights Act, adopted by many tribes, allows suits by tribal members and others to challenge tribal governmental action in tribal court. Our tribe has also adopted a Tribal Tort Claims Act which allows claims against the tribe for tort claims by Indians and non-Indians alike to the extent we have liability insurance. Most tribes have waived their sovereign immunity to the extent of their insurance coverage, or else have provided that insurance carriers cannot raise the defense of sovereign immunity when insurance claims are filed against tribes arising out of an Indian self-determination, Public Law 93-638 contract.

Furthermore, the White Mountain Apache Tribe, in its dealings with national banks, has negotiated limited waivers of sovereign immunity for commercial and business purposes. However, this is done on a case by case basis and tailored to the individual needs of both the financial institution and the tribe. It has worked very well for us for at least two decades. However, to subject

PHONE (602) 338-1560 P.O. BOX 1150 WHITERIVER, ARIZONA 85941
FAX: (602) 338-1514

tribes to wholesale waiver of their sovereign immunity would allow tribal government treasuries to be plucked like chickens leaving little to run a government. The United States of America retains its sovereign immunity from suit and only provides for a limited waiver in the Federal Tort Claims Act and like statutes. It is not possible to obtain punitive damages against the United States, or any state government, and both federal and state governments have developed extensive defenses through federal and state court decisional law to plaintiff suits.

Every administration since that of President Nixon has strengthened tribal courts through funding and Executive order recognition of a government-to-government relationship with tribes. The express policy of the United States Department of Justice, Department of Energy, Environmental Protection Agency, and the Department of Interior, to name a few, expressly establish and honor this government-to-government relationship with sovereign Indian tribes.

Also, any blanket waiver of tribal sovereign immunity, as proposed by Senator Gorton, runs afoul of Public Law 280 which requires a State Constitutional amendment in the State of Arizona and the consent of Indian people before being subjected to the civil and criminal jurisdiction of the state courts.

We have heard that hand-picked witnesses have appeared before the Senate Select Committee with stories of alleged unfair treatment in tribal courts. We Indian people can bring up hundreds of stories of unfair trials, exclusions from juries, political gerrymandering to deny us the right to vote, and other deprivations of our civil rights. How can anyone say that the Indian people cannot provide equal treatment in their courts when the United States Supreme Court in 1895 ruled that separate was equal for African Americans and waited almost 60 years later before recognizing the most fundamental of all human rights under the United States Government, the right to be treated equally? The U.S. Supreme Court in the past has also upheld slavery. It has also upheld the right to deny a woman the right to practice law. The list goes on and on. Yet, such unfair decisions, which became the law of the land, did not justify the wanton destruction of the sovereign immunity of the United States nor the destruction of its federal court system.

We ask that the Committee on Indian Affairs not condone the wholesale negation of tribal governments and our tribal court system, which the United States has honored for over a hundred years. The one-size-fits-all approach by Senator Gorton ignores efforts in our own State of Arizona where the Arizona Supreme Court together with tribal and lesser state courts have created a forum to implement relationships of comity and full faith and credit of each other's judgments. Senator Gorton's proposal should not be allowed to interfere with the system of federalism that has long respected the role of tribal governments and courts in this great United States.

Respectfully submitted

Ronnie Lupe, Tribal Chairman
White Mountain Apache Tribe

Phone (360) 466-3163
Fax (360) 466-5309

Swinomish Tribal Community
A Federally Recognized Indian Tribe Organized Pursuant To 25 U.S.C. § 476
P.O. Box 817 • 950 Moorage Way
LaConner, Washington 98257

September 20, 1996

The Honorable John McCain
Chairman of the Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

The Honorable Daniel Inouye
Ranking Minority
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510

Re: Senate Committee on Indian Affairs Hearing on Sovereign Immunity

Dear Senators McCain and Inouye, Honorable Members of the Senate Committee on Indian Affairs:

The Swinomish Indian Tribal Community has made significant progress to overcome historic obstacles to its self-governance in order to advance the interests of all residents of the Swinomish Indian Reservation. This Tribe has demonstrated that, through a policy of inter-governmental cooperation and coordination, that the attainment of community betterment goals is indeed possible. The Tribe's exercise of its inherent sovereignty enables it to perform essential governmental services towards those ends.

The federal policy of self-determination and the government-to-government relationship, as you are well aware, has been embraced as the public policy in the State of Washington. As a result, the Swinomish Indian Tribal Community has fully participated in cooperative programs with the agencies of the State. Tribal initiatives have further expanded this policy to relations with local governments. These efforts have resulted to directly benefit non-Indian residents of the Reservation.

In 1987, the Swinomish Indian Senate entered into an historic Memorandum of Understanding with the Skagit County Board of Commissioners. That agreement committed each government to the goals of cooperation and was further manifested in a joint land use planning process that sought to fully coordinate the utilization and protection of Reservation resources. The successful effort was heralded by Governor Gardner and received honorary recognition by the American Planning Association and other state-wide organizations. In 1993, the Skagit County Board of Commissioners signed an historic Resolution recognizing the legitimacy of the Tribal Governments of Skagit County, and offered a commitment to "the nurturing of the bond between the County and Tribes in order to mutually preserve the character of our shared community." Resolution No. 15030 publicly recognized and affirmed that:

> "The Skagit County Government and the three Tribal governments each have a vested interest in the preservation of the natural resources which support and nourish our communities and cultures"; and
>
> "That continued cooperative relationships between County and Tribal governments should be maintained through open communications, inclusive agreements, and information sharing mechanisms, to further this shared responsibility for our community."

Another notable participatory program was the very successful Skagit Fellowship Circle that involved the participation of all governments of Skagit County in a series of meetings intended to foster a meaningful understanding about the goals of the Indian and non-Indian communities. We believed that the parties emerged from the meetings with a much better understanding of each other's goals and values.

A Record of On-Reservation Cooperation:

With respect to activities that have occurred within the Swinomish Indian Reservation, the spirit conveyed in the 1987 Memorandum of Understanding with Skagit County has resulted in numerous measurable and concrete outcomes:

1. A Skagit County building moratorium in a residential subdivision was lifted following the Tribe's extension of water services to that community;

2. A residential subdivision that had been developed through the County's land use program without Tribal involvement received conditional Tribal approval as a non-conforming use. Tribal approval resolved long standing issues between the Tribe and the County over competing regulatory requirements, trespass over Tribal tidelands, and the adequate provision of public health facilities to support construction of additional residences;

3. A County created sewer district was able to fully comply with federal Clear

Water Act standards when it received sewer services from the Tribe's utility transmission system;

4. A private residential planned community on leased tribal lands was unable to meet its continued growth demands without the expansion of its wastewater treatment plant. At its request, the Tribe agreed to charter the private utility under its Tribal Utility Authority to achieve compliance with both state and federal requirements. As a result, the improvements were completed to allow for continued residential construction;

5. In order to facilitate a residential subdivision application, the County and the Tribe worked together to support approval of the subdivision. This also involved delivery of Tribal utilities to meet public water supply requirements;

6. As a partner in the Fidalgo, and later, the Skagit Coordinated Water Systems Plans, the Tribe acknowledged the existing water associations created earlier under State authority, and worked cooperatively with those districts to ensure adequate coordination of water supply services;

7. In response to public and County comments on the pending Tribal Water Code, the Tribe agreed to grandfather existing water use permits previously granted by the State, thereby ensuring that existing uses would continue without disruption. In addition, the Code provides for the participation of fee landowners on an Advisory Board that recommends water use policy and regulations;

8. Marine water quality pollution along Skagit Bay beaches has been abated, which resulted in the re-opening of Reservation beaches for public enjoyment and permitting resumption of the Tribe's important treaty reserved subsistence shellfish harvest;

9. Non-member residents of the Swinomish Reservation comprise the system of Tribal governance through their participation on several appointed governing boards and authorities;

10. Finally, the growth that has occurred within the Tribe's Reservation economy now provides employment for over 500 people. Over 75% of those workers are from the non-Indian labor force of the Reservation and the surrounding community. The Tribe's employment base contributes favorably to the economy of Skagit County.

In order to support the projected population growth within the designated urban residential districts, the Tribe has recently expended over $6 million to finance water, sewer, and road improvements on the Reservation's Westshore district. This is one of

several districts designated to accommodate in-fill growth. The project was supported with over $4 million in grant funds to offset local matching contributions. To further assist low and moderate income residents from financial burden, the Tribe prepared a HUD CDBG application, and requested the County's cooperation to endorse the application, which was subsequently approved. The entire grant was applied to benefit non-Indian Reservation residents to fully pay for their portion of the utility assessment.

Off-Reservation Resource Protection Efforts

The Tribe is strongly committed to fisheries resource protection and restoration activities in the Skagit Basin. These efforts stem from the Tribe's interests in protecting property rights guaranteed under the Treaty of Point Elliot. The approach employed by the Tribe towards those resource protection objectives has been modeled after the philosophy contained in the Tribal-State co-management model known as "Comprehensive Cooperative Resource Management." The success of these Skagit basin efforts are dependent upon the County's involvement, cooperation, and leadership.

We have also attempted to work collaboratively with Skagit County for the restoration of streams damaged by the placement of County-owned culverts. In addition, the Skagit Tribes were awarded a contract for $30,000 that was passed through to the County to improve a culvert located on County property. These contributions go to habitats that the Tribes had no part in degrading. Restoration efforts to date have been undertaken from grant money obtained from outside sources. The Tribe, based on past discussions with the County, obtained nearly $300,000 from the Bureau of Indian Affairs, to assist Skagit County in repairing county roads that were blocking anadromous fish access. We have been involved at the staff level to develop a Memorandum of Understanding that identifies commitments from the Tribe, Skagit County, and the Department of Fisheries.

We have attempted to work collaboratively and within the government-to-government framework in the recent past and those efforts have borne important results. Efforts by the Tribe are supported by Tribal revenue sources that do not include general tax revenues that most other governments rely upon. An excellent example of intergovernmental cooperation is demonstrated in the Tribe's law enforcement agreements with neighboring Skagit County and the Town of LaConner. In recent months, in fact, it was the Tribal police department's prompt response to two separate bank robberies that resulted in the apprehension of criminals. This effort was acknowledged in a tribute to our officers in August 1996 by the Skagit County Sheriff and the LaConner Chief of Police.

Any efforts to diminish the ability of Tribal Governments to fulfill their responsibilities for protecting the public health, safety, and general welfare of the entire Reservation community must not be permitted. Rather, we continue to look to the important work of the Senate Committee on Indian Affairs to further strengthen the goals of Tribal Self-Determination.

Very sincerely,

Wa Walton

WaWalton, Chairman
The Swinomish Indian Senate
file:skcom3-1-96

BNSF

JEFFREY R. MORELAND
Sr. VP-Law and General Counsel

Burlington Northern Santa Fe

1700 East Golf Road
Schaumburg, IL 60173-5860
(847) 995-6000

September 23, 1996

Honorable John McCain
Chairman
Committee on Indian Affairs
United States Senate
838 Senate Hart Office Building
Washington, D.C. 20510-6450

Dear Mr. Chairman:

I understand that a hearing before the Committee on Indian Affairs scheduled for September 24, 1996, will focus on the sovereign immunity of tribal governments in legal actions involving private property rights. As the Committee examines the often troublesome issues presented by a tribe's assertion of sovereign immunity in such cases, the Committee also should keep in mind the need for action to address the legal and procedural barriers that Burlington Northern Santa Fe (BNSF) and other civil litigants face in Indian tribal courts.

- Federal statutes provide that decisions of every other judicial system operating within the territory of the United States -- federal, state, and territorial -- are subject to direct review in the lower federal courts or in the Supreme Court to the extent they involve claims under the Constitution or federal law; no such review is available for decisions by Indian tribal courts. The Committee should take action to correct this very significant loophole in the protection of the fundamental rights guaranteed by the Constitution and federal law.

- Federal statutes provide that in certain circumstances parties may remove civil actions from state and territorial courts to federal court. Again, federal law creates no removal right for actions in Indian tribal courts. The Committee should take action to permit removal from tribal courts.

I have briefly outlined below the disturbing facts of Red Wolf v. Burlington Northern in which fundamental notions of fairness and due process were ignored by the Indian tribal court, and then moved on to a discussion of the legal and procedural problems that confront civil litigants in Indian tribal courts.

I. The Indian Tribal Court Violated BNSF's Fundamental Constitutional Right To A Fair Trial.

A judgment of $250 million in compensatory damages was entered against BNSF in the tribal court of the Crow Nation (located in Montana) on February 6, 1996. The judgment arose out of a 1993 grade-crossing accident between a train and an automobile on the Crow Indian Reservation, which resulted in the deaths of three people, all members of the Crow Nation. The crossing was well-marked and had been accident-free for its entire 50-year existence. A blood alcohol test indicated that the driver of the automobile was intoxicated at the time of the crash. The trial was marked by a number of unusual occurrences:

- the jury of six persons included one member of the Crow Nation who was related to the decedents, another whose uncle had died in a prior BNSF accident, and a third who previously had discussed the case with the plaintiffs' expert.

- during voir dire, one of the judges on the Crow Court of Appeals addressed the venire panel in the Crow tongue, stating: "A train runs through the middle of our land. Crows, you know. I don't have to tell you. Bodies in the past, bodies are scattered along the railway. Now this is the day. . . This is the Crow's proceedings. This is your means of survival."

- the jury was permitted to hear evidence regarding BNSF's alleged negligence in failing to provide additional warnings, even though federal law bars the Tribe from requiring such measures (see CSX Transportation, Inc. v. Easterwood, 113 S. Ct. 1732 (1993) & 49 U.S.C. § 20106).

- no evidence at all was presented regarding the appropriate level of compensatory damages (such as the potential earning capacity of the decedents).

BNSF appealed the judgment to the tribal appellate court. The Crow trial court refused to grant a stay of execution of the judgment pending the appeal unless BNSF posted a bond in excess of $250 million. BNSF sought a stay without the necessity of posting a bond from the Crow Court of Appeals, which denied the motion on February 21, stating that BNSF would have to post security for the entire judgment in order to obtain a stay.

On February 26, 1996, the U.S. District Court for the District of Montana granted BNSF's motion for a preliminary injunction against the enforcement of the judgment and ordered BNSF to post a $5 million bond.

The district court injunction and the stay in tribal court were sought because, in light of the present state of the law, BNSF felt that it could not risk posting a bond for the full amount of the judgment in tribal court. If the plaintiffs could look to a bond, they would not be forced to seek enforcement of the judgment outside the boundaries of the reservation. Under those circumstances (as discussed in detail below), BNSF might not be able to raise its due process arguments in a federal court action to review the tribal court judgment. If the plaintiffs are forced to come outside the reservation to seek enforcement of the judgment, however, BNSF should have the opportunity to raise lack of due process as a defense to an enforcement action. BNSF sought an injunction from the federal court while the appeal process is going on so that plaintiffs would not be able to use their tribal court judgment to interfere with the railroad's operations on the reservation by attempting to attach or execute on operating assets such as trains, track and the like.

The litigation is still ongoing. The case is now before the tribal trial court for consideration of post-trial motions. A hearing on post-trial motions is scheduled in the tribal trial court for later this month. In federal court, the plaintiffs have appealed the district court's injunction against enforcing the judgment to the Ninth Circuit. The Ninth Circuit recently heard oral argument but has not yet decided the case.

II. Existing Federal Law Provides No Clear Way For BNSF To Seek Relief From Violations Of Its Constitutional Rights Outside Of The Tribal Forum.

The BNSF case is far from unique. Tribal courts' civil jurisdiction over non-members of a tribe has been confirmed repeatedly by the Supreme Court. See Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985). It extends to situations in which nonmembers have entered into "consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements"; or where the nonmembers' conduct "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." Montana v. United States, 450 U.S. 544 (1981). And, of course, tribal courts have much broader jurisdiction over tribe members.

The scope of tribal courts' jurisdiction is a matter of federal law. National Farmers Insurance Cos., 471 U.S. at 852-853. Although the Constitution does not directly apply to Indian tribes (see Talton v. Mayes, 163 U.S. 376 (1896)), the Indian Civil Rights Act (25 U.S.C. § 1302) requires tribal courts' procedures to comply with due process and equal

protection (the statute also protects other constitutional rights).1/ Finally, claims adjudicated by tribal courts frequently involve questions of federal law, because generally-applicable federal laws apply to conduct in Indian country. See, e.g., United States v. Funmaker, 10 F.3d 1327, 1330-1331 (7th Cir. 1993) ("[a]s a general rule, [federal] statutes written in terms applying to all persons include members of Indian tribes as well" unless the law affects statutory or treaty rights or self-governance matters).

There is, however, no statute providing for independent review of tribal courts' federal law determinations. Review is available only on a patchwork basis, with some issues potentially falling entirely between the cracks.

For example, following the exhaustion of tribal court remedies, a party may obtain federal court review of the question of tribal court jurisdiction. See National Farmers Insurance Cos., 471 U.S. at 853. But current law suggests that compliance with due process and equal protection arguably may be tested only if the prevailing party seeks to enforce the tribal court judgment in state or federal court, because a judgment typically will be recognized only if the proceeding met due process requirements. If out-of-jurisdiction enforcement is not necessary, there may be no due process review, because the Supreme Court has held that there is no private cause of action to enforce the rights guaranteed by the Indian Civil Rights Act. See Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). And there may be no clear way to obtain any review at all of tribal courts' other determinations of federal law.

1/ 25 U.S.C. § 1302 reads in pertinent part:

> No Indian tribe in exercising powers of self-government shall --
>
> ***
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person liberty or property without due process of law;
>
> ***

III. **Judgments From Federal, State, And Territorial Courts And From The Courts Of The Commonwealth Of Puerto Rico Are Subject To Statutory Direct Review In Federal Court To Ensure Protection Of Constitutional Rights And Uniform Application Of Federal Law; The Same Principle Should Apply To Tribal Court Determinations.**

This issue is not confined to one case or one company, however. The 232 tribal judicial systems2/ already face a growing civil docket "[a]t the same time, surging economic and resource development and, most recently, Indian gaming operations, have greatly increased the potential for [more] civil litigation."3/ Chief Judge J. Clifford Wallace and his Ninth Circuit colleague Judge William C. Canby cited statistics that indicate that the Navajo Nation -- as just one example -- decided about 25,000 civil and criminal cases in 1995, not including traffic offenses, juvenile matters, and alternative traditional court proceedings or appeals.4/

The problem for BNSF and other similarly-situated litigants (including both tribe members and non-members) is that once the federal court determines that a tribal court has properly exercised jurisdiction, the extent to which the federal court may review other tribal court determinations is uncertain -- even with respect to interpretations of federal law. Indeed, the transparent violations of BNSF's fundamental rights in the Crow Tribal Court proceedings are exacerbated by the uncertain ability of BNSF to seek relief from such violations in federal court.

Clearly defined avenues to federal court and/or Supreme Court review of determinations regarding federal questions and federal rights exist with respect to every judicial forum in the United States except Indian Tribal Courts. Not only state and federal courts, but also local courts in the Commonwealth of Puerto Rico and in the territories of Guam and the Virgin Islands are subject to federal court oversight. For example, final judgments rendered by the Supreme Court of Puerto Rico in which "any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or

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2/Joseph A. Meyers and Elbridge Coochise, "Development of Tribal Courts: Past, Present and Future," 79 Judicature 147, 149 (November-December 1995).

3/William C. Canby, Jr., Prepared Statement before the Senate Committee on Indian Affairs, Oversight Hearing on Indian Tribal Justice Act (August 2, 1995).

4/J. Clifford Wallace, "A New Era of Federal-Tribal Court Cooperation," 79 Judicature 150, 152 (November-December 1995); Canby, Prepared Statement.

authority exercised under, the United States" may be reviewed by the Supreme Court under a writ of certiorari. 28 U.S.C. § 1258.

The courts of Guam and the Virgin Islands are treated under federal law in a manner similar to state courts:

> The relations between the courts established by the Constitution or laws of the United States and the local courts of [Guam and the Virgin Islands] with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus, and other matters or proceedings shall be governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States in such matters and proceedings.

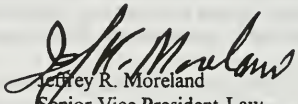
48 U.S.C. § 1424-2 (Guam) and § 1613 (Virgin Islands). The only distinction between the treatment of a territorial high court and a state's highest court is that direct review by writ of certiorari to the Supreme Court will not be available from the highest courts of Guam and the Virgin Islands for fifteen years. Id. Until such time, review by writ of certiorari exists to the U.S. Court of Appeals for the Third (Virgin Islands) and the Ninth (Guam) Circuits.

The statutes governing the relationships between state and federal courts, as well as the statutes specifying the interaction of territorial and federal courts, are designed to ensure the protection of federal rights and the uniformity of federal law. BNSF and other civil litigants in Indian Tribal Court have no such guarantee that their federal rights will be protected or that federal law will be interpreted in a manner consistent with the decisions of the Supreme Court.

Ensuring the consistent application of federal law and protecting constitutional rights will not in any way diminish tribal sovereignty. The States, the Commonwealth of Puerto Rico, and federal territories all wield significant amounts of sovereign authority, but every decision of their courts involving a federal claim is subject to statutory review in federal court. The issue here is whether the rights guaranteed under the United States Constitution may be misapplied, or ignored altogether, merely because an action may have arisen within the boundaries of an Indian reservation -- even though still within the boundaries of the United States of America.

I urge the Committee to take action to correct these problems in order to protect the constitutional rights of all litigants. BNSF stands ready to work with the Committee to reach a solution.

Sincerely,



Jeffrey R. Moreland
Senior Vice President-Law
and General Counsel

NQN/51

Dear Senator John McCain and members of the Senate Indian Affairs Committee,

I am a FEE Land porperty owner, within the boundaries of the Lummi Indian Reservation, located near Bellingham, Wa.. I have been a full time resident for 6 years. During the last two years I have seen what appears to be a serious increase in very aggressive actions taken by the Lummi Indian Business Council and its' Chairman Henry Cagey, directed at non-tribal residents, who are property owners and tax paying citizens. I beleive that this increase is caused by the fact they are not being held accountable for their actions.

Some of these actions have been:

1. The drilling of a non-permitted large capacity well on a FEE simple residential lot, in violation of county and state regulations as well as in violation of a county stop work order and within 100 feet of a long existing, community water association well that provided water to tribal and non-tribal residents as well as water to a tribal fish hatchery.

2. The threat of closing down a county public road to non-tribal users.

3. The threats and implied threats of lengthy and cost prohibitive legal action against any person, company or government body that opposes their current position. Examples of this are the change in position fo the local PUD offer to bring off reservation water in to supplement existing water supplies and the reluctance of the Corp. of Engineers to RESTORE the entrance of the only SAFE HARBOR entrance for miles.

The above are a few of the actions that cause me to urge you to remove sovereign immunity for Tribal Governments just as it has been removed for the Federal Government and the State Goverments. I belieive the removal of sovereign immunity will allow the tribal government system to grow by making them accountable for their actions and, in turn, allow them to become a better governing system.

Yours truly,

Wayne K Peterson

Wayne K. Peterson
4155 Salt Spring Drive
Ferndale, Wa. 98248
360-398-8806

NOV/51

August 19, 1996

To: Senator John McCain, Chairman and
Members of the Senate Indian Affairs Committee

Your hearing on tribal Sovereign Immunity is applauded! We trust it will be an impartial analytical appraisal of this exclusive privilege which has been afforded to only one segment of our country's citizenry, the American Indian Tribes. We have owned our fee simple property here in Whatcom County, Washington for over ten years. There have been numerous instances relating to the Lummi Indian Business Council (LIBC) which have threatened our freedoms or impacted what should be an excellent quality of life here on a spit of land within the geographic boundaries of the Lummi Reservation, known as Sandy Point.

It was not until we felt our health and safety were being seriously impaired by the LIBC's illegal well did we become actively involved. Allow us to relate, with documentation, a number of situations, starting with the illegal Lummi well.

ILLEGAL LUMMI WELLS at Sandy Point and Georgia Manor. County did not take action regarding their Stop Work Order and State didn't enforce the permit process because of jurisdictional complexities and potential of tribal litigation, as well as the lack of funds to support legal defense.

In the words of a Lummi tribal member..."Regarding that well up there (at Sandy Point)...desperate situations require desperate measures to preserve our land and stop development". An apt statement of the Lummi intent when they built and last year pumped excessively from the illegal well, 100 feet from the Sandy Point community well from the same aquifer threatening the health and safety of 550 Sandy Point fee land owners and 40 tribal homes. This well, was drawn down to dangerously low level, is still in place, is still pumping, although not as aggressively, yet remains a dangerous threat to the short and long term well being of the Sandy Point community. (Complete recap attached)

The fact remains the Lummi well is illegal, having been built against a county stop work order in a residentially zoned neighborhood and without fulfilling Washington state's permitting process for commercial production wells on fee simple land over which the County and State have jurisdiction. Initially the Lummi well was secured with armed guards and razor wire fencing.

JUDGE BARBARA ROTHSTEIN'S CONSENT DECREE has been violated. Sewer service has been denied to Commander Murray-Jones at South Cape (Summary and complete Affidavit attached) and for a 5 lot tract on Decator in Sandy Point Heights and other individual lot owners denied sewer connection without signing a tribal consent to jurisdiction agreement. (documents attached) Property owners have no recourse due to Lummi Sovereign Immunity, yet discriminatory acts like this continue to exist.

There are numerous fee simple property owners who own land at Sandy Point and elsewhere on the reservation, paying taxes and stand-by sewer fees who are being held hostage by the various tactics of discrimination for sewer and Bellingham water hook-ups by the Lummi leadership and policies.

Judge Barbara Rothstein's 1982 Consent Decree section 11c specifically refers to Federal Housing laws wherein signatories to the Decree are not to coerce or attempt to coerce, intimidate, threaten, or interfere with any persons in the enjoyment to the right to housing secured by 42 U.S.C. S3601 et seq, or applicable laws. Federal funds supported the Lummi sewer project, however discriminatory abuses of these federal statutes are being flaunted by the LIBC. (Consent Decree attached)

BELLINGHAM WATER is piped onto the Lummi reservation...We understand 1.44 million gallons per day are available and only 30-50,000 gallons per day are being used by the LIBC. It was provided by federal funding but is denied to non-tribal members on a discriminatory basis. No recourse by property owners, nor the City of Bellingham for this discrimination due to tribal Sovereign Immunity. The original non-discriminatory language was deleted after LIBC assured they would not discriminate against non-tribal applicants. (Original and final agreements herewith)

Letter signed by Henry Cagey to Albert Sperry dated 5/12/94 quotes LIBC Resolution #90-108..."NOW THEREFORE BE IT RESOLVED, that the Lummi Indian Reservation has no surplus water for additional non-Indian development and that all water present on the Lummi Indian Reservation is subject to the sole regulatory authority of the Lummi Indian Nation."

Albert Sperry couldn't take the tribe to court because of Sovereign Immunity, so rather than fight the battle he decided to sell his property. (Complete Resolution and Cagey letter, plus transcript of KGMI, Jeff Kent interview with Commander Murray-Jones and Albert Sperry 8/24/95 attached)

SEWER TAX AND PENALTIES are non-consensual and in violations of federal law. Taxation which has NOT been properly approved by neither the Commissioner of Indian Affairs nor the Secretary of Interior, as specifically directed by the Lummi Constitution. We have no true voting privilege other than voting for two of five Lummi Sewer Board members. No voice in tribal government, which amounts to taxation without representation. No recourse other than the stacked deck of the tribal court system, where intimidation and harassment of non-tribal members occurs by tribal approved judges. We are without legal recourse unless Sovereign Immunity is waived by the tribe. We have a serious flaw in our judicial system in this regard.

WATER TO RESERVATION BY PUD to fee land owners is blocked because the threats or fears of legal action by the Lummi Business Council. Letter from PUD Manager dated, June 20, 1995, (copy herewith) stipulates they will provide water supplied from its Nooksack River water right but "jurisdictional and legal matters must be cleared up" first. Another instance of not having access to our rightful legal process due to Sovereign Immunity by the Lummi tribe.

HENRY CAGEY INTERVIEW ON KVOS-TV on June 29, 1995 the LIBC tribal chairman said referring to the water supply problem at Sandy Point..."We're not here to take away any water from domestic people up there, that are actually living there. "Where we have concerns is any future development. "Until we move toward adjudication, until we move toward understanding, then that's where we see some problems." A clear attempt to control growth, not allowing property owners, who pay taxes on their undeveloped land to build. Again, no recourse with the American judicial system because of Sovereign Immunity. (Complete transcript of KVOS-TV report and Henry Cagey interview with Jeff Kent on KGMI Radio, 8/11/95 enclosed.)

ROAD BLOCKADE THREAT...Henry Cagey's threat to blockade the roads to our homes is another illustration threatened control over fee property owners within the geographical boundaries of the Lummi Reservation. A threat with direct impact on our constitutional freedom and rights. (Bellingham Herald article enclosed)

TIDELANDS...When the land on which Sandy Point is located was purchased by William and Justine Wood (1953) and James Bolster (1957) from Frank and Celena Finkbonner and subsequent sales to various owners/developers, the land came with all appurtenances and the riparian rights to use the tidelands, just as the Finkbonners had used them during their ownership. Yet Sandy Point Improvement Company on behalf of property owners paid LIBC a huge $534,000 lease payment and the beaches have been posted with no trespass signs in the past. Plus non-tribal members have been ordered by Lummi law enforcement to stay off "their tidelands". Again, no recourse available to property owners due to tribal Sovereign Immunity. (Chain of ownership attached)

The time is right to remove tribal Sovereign Immunity. The time is overdue for tribal accountability and for non-tribal members to have due process and true justice within our otherwise excellent legal system.

Respectfully submitted:

Earle Baker Gertrude Baker

Earle Baker and Gertrude Baker
4175 Sucia Drive
Ferndale, WA 98248

Phone/Fax 360 380-2343

cc: Senator Patty Murray

104 Scott Drive
Sheridan, Wyoming 82801
September 19, 1996

Senator John McCain, Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D C 20510-8450

RE: Senate Committee on Indian Affairs
September 24, 1996

Dear Senator McCain:

These are my comments which I would appreciate your entering in the record for the above hearing.

It is essential to the freedom and due process of Non-Indians to have tribal sovereign immunity eliminated from Non-Indians and their property. I am requesting that Non-Indians have the right to direct access to State or Federal courts in Indian related matters.

I emphasize that I am not wishing to take away the powers of Tribal Government over their **own people and lands**, but Non-Indians should **not be subject to the Jurisdiction of the Tribes.**

The American public when traveling through Indian Reservations are now subject to Tribal Jurisdiction and Tribal Court if they break a law or have an accident. This will put a burden on the American Public to get proper insurance to protect autos and machinery.

On the Crow Indian Reservation, people living on their own deeded lands are unable to get the State, Federal or Tribal officers and officials to prosecute Indians for theft, assault, etc. because of the confusion of Jurisdiction. As a result Non-Indians and Indians, alike, do not have proper protection.

Our **Constitutional Rights** are being stripped from us that do business on the reservations and we definitely need **legislation** that will establish that **Non-Indians and their property are not subject to Tribal Jurisdiction.**

Very Sincerely yours,

Brad Spear

cc. Senator Craig Thomas
Senator Slade Gorton
Senator Al Simpson
Senator Conrad Burns

104 Scott Drive
Sheridan, Wyoming 82801
September 19, 1996

Senator John McCain, Chairman
Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D C 20510-8450

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Very Sincerely yours,

Brad Spear

cc. Senator Craig Thomas
Senator Slade Gorton
Senator Al Simpson
Senator Conrad Burns

FULLER RANCH
P.O. Box 158
Wvola, Montana 59089

September 19, 1996

Senator John McCain
Chairman of Senate Affairs
838 Hart Senate Office Building
Washington, D.C. 20510-6450

Dear Senator McCain:

We are writing this letter in regard to the hearings requested by Senator Slade Gorton to be held on September 24.

We are residents of Big Horn County, Montana, and citizens of the United States of America. Our home and ranch are located near Wyola, Montana, and are within the boundaries of the Crow Indian Reservation. We are non-Indians, and therefore are not members of the Crow tribe, but are being required to settle our legal disputes by going through the Tribal Courts. Our disputes should be presented in the Federal Courts, and tried by a jury of our peers. We are also being threatened with taxes on our property by a governing body over which we have no control, through either election or appointment.

The Fourteenth Amendment to the Constitution states, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

No State could infringe on our rights. Surely Congress does not mean to abandon all its non-Indian citizens that live on reservations. What kind of country is this when there are "nations" within a nation that can set up courts and tax at will? We believe our Constitutional rights are being violated, and request that Congress take appropriate action to rectify our situation, and enforce the provisions of the Fourteenth Amendment.

Sincerely,

Charles F. Fuller
Marilyn B. Fuller

xc: Senator Conrad Burns
Senator Max Baucus

Semator John McCain
Chrmn., Senate Committee on Indian Affairs on Civil Jurisdiction in Indian Country

Dear Sir:
In June of this year, 1996, we had three pickups stolen out of our yard, another pickup and trailer tampered with, our private residences entered and various items stolen including two older rifles. Attempts to get any help from the County Attorney the County Sheriff, the BIA investigative Officer, the Crow Police or anyone that could possibly help us has led to nothing but frustrat ion and futility.

Because of juriadictional problems nothing can be done at all by anybody. These culprits are known yet they are free and roaming around. There is no one to help us and we are increasingingly subject to lawlessness and nowhere to turn.

Reservation courts are ajoke. Judges with no education, hand picked juries, no right to your own legal system. The Indians are claiming Sovereignity but still rely on the United States to support them from the "cradle to the grave" This is racist to the extreme, unconstitutional, and illegal.

We would like to be treated as everyone else is with regard to law and order wherever we are. Lives are at stake here. Those of us on this Crow Reservation have been here going on four generations and we have about had enough.

Let the Indians govern themselves if they must but let us be governed by the U.S. Constitution free and equal.

Sandra J. Smith
HC 42 Box 570
Busby, My. 59016
c c : Senator Slade Gorton
Senator Conrad Burns
Senator Max Baucus

September 20, 1996

Senator John McCain
Chairman-Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510-6450

Dear Senator McCain:

Request this letter be made part of hearing record of hearing by Senate Committee on September 24, 1996, Indian Affairs on Civil Jurisdiction in Indian Country.

The controversy surrounding the rights of the Native American people has been a concern for generations, but there must come a time when this issue is put to rest.

Don't we believe in the Pledge of Allegiance anymore? Whatever happened to the deep feeling that rises up inside of us when the words, "I pledge allegiance to the flag of the United States of America and to the Republic, for which it stands, one nation under God....." This has been a cornerstone of what our country, sadly enough, use to believe in. It does not say sovereign nations, or nations, but one nation. The sovereign nation concept should never have been recognized, it only succeeds in dividing different ethnic groups further apart.

We only have one court system that we as citizens should honor and abide by and that is the American court system. Tribal court serves the Indian people and their reservations, but anyone that has to live within or near the bounds of the reservation know that it is ridiculous to expect these tribal courts to be remotely fair or objectionable. Believe it when it is said to you that there is prejudice against the white people and it is being allowed to thrive here in our area.

Think about the rights of the non-Indian people, we are the ones that are having them blatantly violated. We are such a small number and have limited cash to expend on fighting for our rights that are suppose to be protected by the constitution. Equal justice is something we also have a right to.

We are honest people who work hard to make a living for our families. The same values that built this country decades ago are practiced by us. The land is our home, and it may consist of 500 acres or 50,000 acres, but it is ours and we are the caretakers of it. If you were to find someone violating your personal property or home and nothing could be done about it due to some of the similiar issues we are facing now, wouldn't that alarm you to the point of doubting the justice of it all? The justice you would receive as a white person in tribal court makes a mockery of the judical system. Sadly enough, the person who did the injustice would never be held accountable for their actions. It is the truth, because we live this day after day.

Thank you for your time.

Sincerely,

David & Kathy Helvey

David and Kathy Helvey
HC 42 Box 630, Busby, MT 59016

The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

REPRESENTATIVE LILA V. TAYLOR
HOUSE DISTRICT 5

HELENA ADDRESS:
CAPITOL BUILDING
HELENA, MONTANA 59620-0400
PHONE: (406) 444-4800

HOME ADDRESS:
BOX 595, KIRBY ROUTE
BUSBY, MONTANA 59016-0595
PHONE: (406) 757-2236

COMMITTEES:
NATURAL RESOURCES
AGRICULTURE
STATE ADMINISTRATION

September 21, 1996

Senator John McCain
Chairman Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D. C. 20510-6450

Dear Senator McCain:

Thank you for recognizing and addressing through this hearing the problem of jurisdiction of non-Indians and non-Indian lands within the exterior boundaries of the reservations. In our case the reservation is the Crow Reservation in Montana.

We are non-Indians residing on deeded land within the Crow Reservation. We are United States citizens and Montana residents and are subject to county, local, state and federal taxes . We are governed by the laws of the United States and the state of Montana. However, we are also supposedly under the jurisdiction of the Crow Tribe and their laws and tax codes and their court system.

As you well know somewhere close to half of the Crow Reservation , if not more, is owned by non-Indians. The issue of jurisdiction is becoming one of the most divisive issues separating people on this reservation.

The issue of taxation without representation was settled years ago in this country by a Revolution. Don't keep ignoring this issue hoping that it will go away. It will not. Through our Constitution we as United States citizens are guaranteed due process of the law. Let the process be through the state and federal courts where laws passed through the democratic process are judged.

I represent this district where we live as a Representative for the State of Montana. My district has both Indians and non-Indians both on and off the Crow and Northern Cheyenne Reservations. I work very hard to represent all of these people equally. Our legislature works to fund education for all schools equally. We work for a strong economy that employs all people equally. We struggle with tax issues, employment, roads, health care, etc for everyone within our state equally. Yet this jurisdiction issue treats people unequally and only causes division. The issue of tribal jurisdiction on non-Indians within the exterior boundary of the reservation creates disincentives for businesses to locate on the reservations and instability and uncertainty for those already here.

Our family was one of the few families that Congress moved onto the reservation by the settlement of the 107th. That move, among other things, meant that our residences are now on the reservation and under tribal jurisdiction. We still are responsible for all our same tax bills as before, however, now we are subject to tribal taxing laws and tribal courts with no vote or say.

As we try to work through these issues, the insurance companies are beginning to question their ability to insure where there are continual questions of court remedy. The banks are beginning to look at loans made to businesses on the reservations where they may have no recourse to recover property. Please try to realize this problem for the severity that exists.

Sincerely,

Lila V. Taylor

To the Honorable Senator John McCain,
Chairman of the Senate Committee on Indian Affairs,
Concerning the issues of tribal immunity and their effects on non-Indians.

Before the Crow Boundary Settlement Act of 1994 96% of my deeded property lay outside the Crow Reservation Boundary., today 96% lies within the Reservation. Due to this act of congress certain intrinsic rights as a United States citizen have been stripped from me and all the other landowners involved .

The Declaration of Independence states, as one of its major grievances against Great Britain, "for imposing taxes on us without our consent".We are now taxed without representation one of the issues guaranteed us in the Constitution.

In property disputes we are required to "exhaust civil remedies in the tribal courts before filing in the state or federal courts". Article VI of the Bill of Rights guaranteed citizens the right of access to an impartial jury. When a jury consists of men and women drawn from any one common denominator ,no matter what it is, how impartial can it be?

I beseech the committee to be cognizant of the concerns and fears of non-indians with property within reservations. I did not choose to have property on the reservation, I as well as all the others involved feel that not to be governed and ruled by the Constitution of United States is a perpetration of our rights as United States citizens.

Sincerely,

Jessie E. Huffman

Jessie E. Huffman
HC 42, Box 640
Busby, MT 59016

Walter J. Taylor Jr.

HC42 Box 595

Kirby, MT. 59016

September 21, 1996

Senator John McCain
Chairman Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D. C. 20510-6450

Dear Senator McCain:

I am a non-Indian that owns land within the exterior boundary of the Crow Reservation in southeastern Montana. My family's ranch headquarters was put on the Crow Reservation with the enactment of Public Law 103-444 Nov. 2, 1994 "Crow Boundary Settlement Act of 1994". Our biggest problem since that time has been being put under Crow Tribal jurisdiction. I will not go into the inequities this "Crow Boundary Settlement Act of 1994" did to the people like my family who own land within the disputed land lying between the 1891 Survey line and the 107 Meridian.

More importantly for this hearing on the effect of tribal jurisdiction on non-Indians within the exterior boundaries of an Indian Reservation, one must first recognize the difference between an open reservation and a closed reservation. The Crow Reservation is an open reservation which means a large amount of land is owned by non-Indians approximately fifty percent. The landowners who have fee patents on this land , can be Indian or non-Indian. They pay County and State property taxes. I am eligible to vote and elect the government which levies these taxes. The Indians are also eligible to do the same. The problem comes when the Crow Tribe levies taxes on non-Indians within the exterior boundary of the reservation, as we have no vote in the election of their government. The court system which we appeal to also falls under Tribal jurisdiction.

Our local law enforcement and game warden have no jurisdiction on violations on fee patent land involving tribal members. I have never had the Bureau of Indian Affairs respond when called for help on violations,

and we have some cases documented. They always try to turn the violations over to the deputy sheriff who has no jurisdiction.

I feel it is time the U.S. Congress stops perpetuating discrimination between Indians and non-Indians within exterior boundaries of Indian Reservation. Only the U.S. Congress has the power to do this, and it is in the best interest of both parties.

Thank you for the opportunity to explain our situation. I hope you will work to correct this disparity.

Sincerely yours;

Walter J. Taylor Jr.

P
Z RANCH
HC-42, Box 610
BUSBY, MONTANA 59016

September 21, 1996

Senator John McCain
Chairman Senate Committee on Indian Affairs
838 Hart Senate Office Building
Washington, D.C. 20510-4701

Dear Sir,

I request this letter be made part of hearing record of hearing by Senate Committee on September 24, 1996, "Indian Affairs on Civil Jurisdiction in Indian Country".

I am writing this letter to request you vote, *YES*, granting non-Indians and non-Indian property within the boundaries of Indian reservations to be under the jurisdiction of Federal, State, and local courts and governments, not tribal jurisdiction. As non-Indians we have NO vote in Indian law or taxation issues. We belong under local, State, and Federal jurisdiction.

As a footnote, we had property placed within an Indian reservation boundary in the 107th Meridian settlement with the Crow Tribe, this was accomplished with *NO consultation* with the land owners.

Any help you can give to us will be greatly appreciated.

Sincerely,

Dwight S. Ferguson

cc:
Senator Slate Gorton
Senator Conrad Burns
Senator Max Baucus

Transcription of G.I. James/and Marlene Dawson
Portage Island Picnic Sat. 8/17/96

MY NAME IS **G.I. JAMES**, IM NOT SPEAKING FOR THE TRIBE BUT AS A TRIBAL MEMBER "- **(NOT HEAR)"** THINGS FOKES DON'T LIKE TO HEAR IT WASN'T ME WHO DID THAT SO DON'T BRING THAT CRAP TO ME AND LAY IT ON MY DOOR STEP. THAT I HAVE TO BE RESPONSIBLE FOR SOMEBODY ELSES ACTIONS. I WANT TO BRING FORTH HOW PEOPLE GET INTO POSITION THAT THEY WERE IN OVER HERE TO SELL THEIR PROPERTY. I WAS BORN HERE. I WAS BORN ON MC NEAL ISLAND IN THE MIDDLE OF THE NOOKSACK

I. RIVER. MY FATHER WAS A FISHERMAN AND HE WAS ARRESTED SO MANY TIMES FOR TRYING TO EXITCUITE A LIVING AS A FISHERMAN AND TRY TO FEED HIS FAMILY THAT HE WAS FORCED TO SELL EVERTHING HE HAD. BECAUSE THE STATE AND THEIR POLICYS WERE FORCING THEM NOT TO BE ABLE TO MAKE A LIVING. NOW YOU SAY GEE! BUT THESE PEOPLE SOLD THEIR PROPERTY. IT DOSEN'T MAKE IT RIGHT. IT ANGERS ME WHEN SOMEBODY POINTS OUT HERES A CONTRACT SOMEBODY SOLD THAT LAND AND WE NOW HAVE A RIGHT TO IT AND YOU ARE PREVENTING US FROM GETTING TO IT. IGNORING THE FACT THAT IT SHOULDEN'T HAVE HAPPENED IN THE FIRST PLACE. SOME FOKES MAY CALL IT RACISM I CALL IT LOOK BACK. NO BODY WANTS TO LOOK BACK AND SEE WHAT HAS ACCRUED TO ALLOW THAT TO HAPPEN IN THE FIRST PLACE. YOU MENTION SOME OF THE COUNCIL PEOPLE THEY WERE ALL FOR IT. I WAS ON THE COUNCIL FOR 7 YEARS, I DID SOMETHING THAT THE PEOPLE DIDN'T WANT ME TO DO. THEY TOOK ME OUT AND MAYBE RIGHFULLY SO. THEY HAVE THE ABILITY TO DO THAT. YOU LOOK BACK AT SOME OF THE OLD DOCUMENTS THAT WERE PUT TOGETHER BY THE SECRETARY OF STATE BACK IN THE 40'S AND 50'S EDUCATING PEOPLE IN THE STATE ABOUT INDIANS. IT WAS A PRETTY GOOD DOCUMENT. BUT YOU DON'T SEE IT ANYWHERE IN THE SCHOOLS NOW DAYS. THERE IS ON PARAGRAPH IN THERE ABOUT GOVERNMENT AND IT MENTIONED HOW FRUSTRATING IT WAS DEALING WITH INDIAN PEOPLE AND INDIAN GOVERNMENTS. BECAUSE SOMETIMES THE PEOPLE AGREE WITH THEIR LEADERS AND SOMETIME THEY DON'T. SOMETIME THEY WERE ABLE TO AFFILATE DEALS AND SOMETIME THE WERN'T. BECAUSE THE PEOPLE ARE THE ONE'S THAT DICTATE TO GOVERNMENT. NOT THE OTHER WAY AROUND. SO I MAY OF LEARNED SOME OF THOES LESSONS MYSELF, HOPEFULLY I AM LEARNING THEM. THAT THE PEOPLE HAVE TO BE INVOLVED IN WHAT IS GOING ON. I DON'T SEE A WHOLE LOT OF OUR PEOPLE HERE TODAY BUT THERE SOME OF THE ONE HERE TODAY (2) VERY UP-SET ABOUT THE TRIBAL COUNCIL SAYING YES! GO AHEAD ALLOW THE FOKES TO GO OVER. THERES A LOT LOF ANGER HERE ITS NOT RACISM ITS ANGER. WERE SITTING HERE TALKING ALLOWING FOKES TO GO OVER TO AN ISLAND THAT WE PRESERVE AND YES IT I S A SERENE PLACE, THIS WHOLE COUNTY WAS A SERENE PLACE AT ONE POINT. IT IS NOT US WHO SCREWED IT UP. ITS NOT US WHO LOGGED IT OFF AND BEEN SUCKING OFF ALL WATER AND DIVERTING IT AND POLLUTING IT SO NOW IT COMES DOWN TO GEE! THERES VERY FEW PLACES LEFT. LETS PRESERVE THE INDIAN RESERVATION FOR ALL OF US THAT SCREWED UP EVERYTHING ELSE. THERE IS A LIMIT TO WHAT FOKES CAN SHARE. ESPECIALLY WHEN THERE IS THING GOING ON THAT ARE, LOOKS LIKE IF WE DON'T ALLOW IT AND WE ARE TRYING TO PROTECT THE PROPERTY WE HAVE IT IS RACISM. WHEN ITS THE OTHER SIDE OF THE FENCE SAY HO! HO! YOU CAN'T COME ACROSS HERE. YEA! ITS IN THE BOUNDARIES OF THE RESERVATION. YOUR NOT GOING ACROSS THERE. IF YOU DO WERE GOING TO ARREST YOU AND THAT ISN'T CALL RACISM ITS CALLED PROPERTY RIGHTS. AND PROTECTING YOUR OWN PROPERTY. SO I THINK AND I AM NOT SAY THIS TO HURT ANYBODY. JUST TRYING TO LET YOU KNOW THAT THERE ARE DIFFERENT POINTS OF VIEW ABOUT WHAT HAS ACCRUED. MR. DEITCH MENTIONED THAT THIS ISLAND WAS STOLEN FROM WHATCOM COUNTY, WHATCOM COUNTY DIDN'T EXIST. THE STATE DIDN'T EXIST UNTELL 1889, THE TREATY THAT SET THIS ALL UP WAS 1855. THERE IS A LOT OF EDUCATING THAT NEEDS TO ACCRUE. MR. KENT INVITED US OUT HERE. WE CHOOSE TO PARTICIPATE UNTELL THE LAST MOMENT. OUR COUNCIL SAID MAYBE YOU OUGHT TO BE DOWN THERE SO WERE HERE. THE RELATIONSHIP HAS NOT BEEN VERY GOOD. ITS BEEN VERY TENACIOUS. WE HAVE JUST GIVEN YOU AN EXAMPLE, A LOT OF YOU MAY HAVE SEEN WHAT IS GOING ON WITH THE WATER DISPUTE OUT HERE. WE OWN 75% OF THE LAND HERE.

EITHER TRIBAL OR TRIBAL INDIVIDUAL OWN 75% OF THE LAND. 25% IS NON-INDIAN OWNERSHIP. 3% OF THAT LAND IS SUB DIVIDED LIKE DOWN HERE AT SANDY POINT, GEORGA MANNER. USING OVER 50% OF THE WATER AND WERE BEING ASKED TO SHARE. SHARE SOME MORE. WELL LOOK AT THE RESULTS OF SHARING AND WHAT GOING ON. YOU HAVE TO LOOK AT THE IMPACT ARE TO OUR PEOPLE AND THAT THIS LAND WAS SET ASIDE FOR OUR SOLE USE. THAT NO NON-INDIAN SHALL RESIDE UPON WITHOUT OUR PERMISSION, WE NEVER GIVEN THAT PERMISSION. (MARLENE DAWSON) I HAVE A QUESTION I UNDERSTAND IN 1934 THERE WAS A FEDERAL REORGANIZATION ACT. ALL TRIBES IN THE UNITED STATES HAD AN OPPORTUNITY TO ADDRESS RATHER THEY WANTED TO CLOSE OFF THE RESERVATION AND STOP THE SALE OF THE LAND. TRIBAL PEOPLE SAID WE WANT TO LIVE THE AMERICAN DREAM AND BE ABLE TO LIVE OFF THE RESERVATION AND HAVE A CHOSE OF SELLING OUR LAND. **(G.L JAMES)** NO! NO! THIS IS NOT TRUE. THIS IS ABSOLUTELY REJECTED. **(MARLENE DAWSON)** THEN HOW DID IT GET SOLD THEN? **(G.L JAMES)** ANOTHER LARGE PARTY HERE IS THIS PICE OF PROPERTY. BOYTON PROPERTY, DR. BOYTON CONFICEATED IT. **(MARLENE DAWSON)** PROPERTY CONTINUES TO BE SOLD TODAY **(G.L JAMES)** WELL YOU SEE IN THE CONSTITUTION, OUR CONSTITUTION THAT THE TRIBE CAN'T SELL IT. THE BUREAU TAKES THE POSITION THAT YES WE CAN. BUT IF YOU GO BACK INTO THIS RESERVATION UNDER THE GENERAL ALLOTMENT ACT, WHICH YOU MAYBE REFERRING TO, WHICH WAS 1889 PEOPLE CAN SELL THERE PROPERTY, THIS TRIBE, THIS RESERVATION WAS NOT SET UP UNDER THE GENERAL ALLOTMENT ACT, IT WAS ASSIGNED NOT ALLOTTED. AND THERE IS A DIFFERENCE BETWEEN ASSIGNMENT AND ALLOTMENT. ASSIGNMENT YOU GET TO USE IT AND IF YOU DON'T USE IT. IT GET ASSIGNED TO SOMEONE ELSE. SO THERE IS DIFFERENCES HERE. DO WE AGREE WHAT HAS HAPPENED NO. LIKE I WAS SAYING DR. BOYTON OVER HERE GOT THAT WHEN AFTER SOMEONE DIED THAT HE WAS TAKING CARE OF, PROPERTY HAS BEEN INHERITED OUTSIDE OF TRIBAL OWNERSHIP BY BEING INHERITED BY CANADAN INDIANS. WHICH THE UNITED STATES CONCEDERS NOT AN INDIAN. LOT OF THAT HAS ACCRUED. PEOPLE HAVE OPTED TO TRY AND SELL THERE PROPERTY AND THE BIA AGREED WITH THEM AND HAS ALLOWED THEM TO DO IT.

104 Scott Drive
Sheridan, Wyoming 82801

September 3, 1996

Joseph P. Mazurek
Attorney General
State of Montana
Post Office Box 201401
Helena, Montana 59620-1401

Dear Mr. Mazurek:

I am forwarding you herewith - a copy of information on the theft of 3 pickups from the Spear O Ranch of Busby, Montana and a copy of a incident that occurred with James Hamilton of Decker, Montana. Both of these incidences happened on or adjacent to the Crow Indian Reservation.

The Spear O Ranch theft of 3 pickups is in limbo - nothing has been done yet, I guess. On August 21, 1996 I visited with Wesley Stops, BIA Criminal Investigator. He advised me that the people involved with the theft had been arraigned, charged and sentenced. I asked for a written disposition of the case and he advised me to get it from the Tribal Prosecutor - Marjorie Iron Maker. Ms. Iron Maker did not know anything about the case and said she would look for it and to call her back in a few days.

On Monday, August 26, 1996, I called Marjorie Iron Maker and she advised that she has not had time to look for the file. I called Wesley Stops and he advised that he will check with her to see what the disposition was.

On this date, September 3, 1996, I again called for Wesley Stops at 8:10 AM and again at 2:PM - the police secretary said he wasn't in both times. I also called for Marjorie Iron Maker at the same time and she was not in the first time I called and the second time I was told by the fellow answering that perhaps she was not back from her vacation.

Also, on this date, I called the Big Horn County Attorney, Christine Cooke and she advised that she has not heard from the Federal Attorney - Shirley Briney and will call her this afternoon as to her opinion.

Your advice would be appreciated as to any other steps that we can take in this situation.

Sincerely yours,

Brad Spear

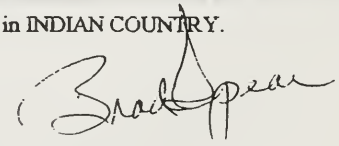
Brad Spear
Chairmank, MSGA Reservaton Relations

A SHORT REPORT ON SOME VISITATIONS
3 Pickups stolen at SPEAR O RANCH

July 9, 1996: Sandra and George Smith and my self (Brad Spear) met with Larson Medicine Horse, Sr., Sheriff of Big Horn County, Montana. He advises that things are d one a different way than many years past, now. Deputy Price, if not certain of his position, will turn in a report to the County Attorney - who in turn will advise what is needed and then he will act on that information.

July 24, 1996: Sandra Smith and I met with Wesley Stops, Sr. at Crow Agency, Montana. Mr Stops is the BIA Investigative Officer. When Sandra showed him the information and after some brief discussion, he remarked that he should have been informed by the other officers so that he could have made a complete investigation. He advised that they know this, but he was not aware of the incident until several days later when Gros Ventre said he was sending him a report, which he had not received yet. Now, he says he cant take pictures or finger prints, etc. because the evidence has been moved. He advised Sandra that he wanted to interview her husband, the Bahm's, and the people at the Kirby Saloon, etc., in the next few days.

Wednesday, July 31, 1996: Sandra and I met with Christine Cooke, Big Horn County Atty.. She advised that she has sent information to the Federal Attorney and that Shelley Briney has been assigned to the case. Ms. Cooke will contact her and see if her office can prosecute for auto theft. They would have to prove that Victor Kennedy knew that the 1990 GMC was stolen - otherwise it would be using without permission. When asked about the others being on deeded lands on Corral Creek, she replied that the STATE has no jurisdiction on lands in INDIAN COUNTRY.



3 STOLEN PICKUPS – SPEAR O RANCH
BUSBY, MONTANA 59016

Sometime, between 5:30 AM and 8:30 AM, June 6, 1996, five Indian people entered Private Deeded Lands of the Spear O Ranch Company, of Busby, Montana. This ranch is located on the Crow Indian Reservation adjacent to the Northern Cheyenne Indian Reservation.

These people entered the home of George and Sandra Smith. They took tapes out of the stereo upstairs, a motorcycle helmet off the bench, and went downstairs to a bedroom and took a motorcycle light lens out of the room and took them outside into the yard.

These people arrived at the Spear O Ranch driving a red car which evidently ran out of gas.

These people tried to take a red 1995 Ford pickup that was in the same yard hitched to a gooseneck trailer, which they damaged by trying to jack up the pickup up off the ground. They left the lights and radio on and threw stuff out of the pickup onto the ground, including the keys.

They took a yellow 1975 Ford Flatbed pickup (4x4) and a brown/tan 1979 4x4 pickup and drove them up Corral Creek about 6 miles. The 1979 pickup was driven off the road into the brush on the Fee property of Torrey Johnson. The 1975 pickup was driven off the cattle-guard going from the Johnson fee lands to the Emil Bahm fee land. The 1979 was badly scratched up in the brush and the 1979 pickup had the frame bent and torn up in the cattleguard.

Later in the morning, Paula and Emil Bahm noticed the pickup off the road on their side of the cattleguard. They found an Indian - passed out and badley beaten - in the pickup. They called the Sheriff's office.

Deputy George Rogers of the County Sheriff's office and Albert Gros Ventre of the Crow Police came over about noon. They identified the fellow in the pickup as Hugh John Stops. They were told by Stops that the others involved were: Victor Kennedy, Curtis Iron, and Garret Door, Jr.

They located the 1979 Ford in the brush not very far from the 1975 flatbed. By following the tracks Rogers, Gros Ventre, and the Bahm's went down to the Torrey Johnson ranch - about 1 - 1/2 miles down the creek. They found evidence indicating that the Indian boys entered the garage, went upstairs and found the keys to the GMC 1990 Extended Pickup in a jewelry box. Mr. Bahm noticed that two rifles were missing from the gun rack - a 30.06 with a scope and a compass built into the stock; and a .22 bolt action rifle with

a 5 bullet clip. The Johnson Ranch is deeded property also.

The Indians took the 1990 GMC, which had tools and chain saw in the box, and left the premises. It is believed that Gros Ventre took Hugh Stops back to Crow Agency Police Department. Deputy Rogers and Gros Ventre drove to the Spear O Ranch and talked with George and Sandra Smith, who had just returned from helping some neighbors brand at about 5:30 this morning.

On July 7, 1996, at about 3:30 PM, George Smith saw the 1990 GMC coming from the Sheridan direction on the Rosebud Road near the old X4 Ranch on Indian Creek. He followed them to the Kirby Saloon. The Sheriff's office was called. It was reported that Dexter Falls Down refused to go to the Kirby Saloon because it was off the Reservation. Deputy Larry Price was sent over. Dick Roebling had the bartender make the call to the Sheriff.

Larry Price arrived about an hour later It was determined that Julia Roundstone was the driver of the pickup (1990 GMC) and Victor Kennedy were minors (19 years of age). The other two were adults: Melvina Roundstone and Waldo Roundstone Wounded Eye. Deputy Price called the dispatcher and reported his findings. He was instructed to bring in the two minors on a "possession of alcohol" charge, and turn the others loose. George Smith was informed that since the crime of theft was committed on the reservation that Deputy Price could not arrest them for stealing the vehicle - he had no jurisdiction. None of the tools were in the back of the pickup.

Tools missing: 3/4 " drive sockets and handles; speed ratchet; hydraulic jack; small set of 1/2" sockets and drive handle; and a new Homelite Chain Saw; in addition to the rifles.

On Monday, the 10th of July, Leota Stops and a fellow who did not wish to state his name, came to the Spear O Ranch to get the red car. They could not get it started. Sandra called Terry Tolou and then the Crow Police - who asked that they not klet the red car get away. They came in about an hour and took possession of the red car. Leota Stops and friend were gone by this time.

SCR No. 9606-0160 | Rec'd 1105 | Disp. 1129 | Arr'd. | Cl'rd | Type/Incident/Offense THF/F | Amended AAA | Patrol 6 | Sector

OCA #

Incident Location: SPEAR O RANCH

Last Name, First, Middle

Complainant: EMIL ~~BANES~~ BAHM

Address: SPEAR O- 757-2400 OR 757-3401

Res. Phone: 757-2777 | Bus. Phone:

Officer Disp. 5 BIA | Domestic Abuse Case Yes ___ | Weapons Involved Firearm ___ Knife ___ Other Dang. Weap. ___ | Assigned to: SO ___ BIA ___ JUV ___ MHP ___ WEL ___ FG ___ AMB ___ K-9 ___ Other ___

No. Units ___ | Suspect Charged Yes ___ No ___

Sheriff Disp ___ | Coroner Disp ___ | Fire Dept. Disp ___ | Wrecker Disp ___ | Ambulance Disp ___ | HWY Patrol Disp ___ | Child Wel. Disp ___ | C.I. Disp ___

CODE: S-Suspect R-Vehicle Owner O-Other A-Arrested W-Witness

10-15 Time

Last Name, First, Middle

STOPS, HUGH JOHN — Address: — Phone:

SEX	RAC	HGT	WGT	EYE	HAI	SOC	DOB	Smt/Clothing/Etc.

KENNEDY, VICTOR — Address: — Phone:

SEX	RAC	HGT	WGT	EYE	HAI	SOC	DOB	Smt/Clothing/Etc.

DOOR, GARRETT JR — Address: — Phone:

RAC	HGT	WGT	EYE	HAI	SOC	DOB	Smt/Clothing/Etc.

IRON CURTIS — Address: — Phone:

SEX	RAC	HGT	WGT	EYE	HAI	SOC	DOB	Smt/Clothing/Etc.

	Lic.	VYR	VMA	VMO	VST	VCO	Characteristics/Vin No.
#1	22T-422A	FORD	74			YELLOW	3/4 TON FLAT BED
#2	22T-344C	FORD	79			BRO/CRM	4X4

Disp. DB

Narrative: I'M CALLING FOR GEORGE AND SANDRA SMITH AT THE SPEAR O RANCH, THEIR TEENAGE SON IS HOME ALONE, THEY ARE AT A BRANDING, THEY HAD TWO VEHICLES STOLEN LAST NIGHT, SUSPECTS LEFT A RED DATSUN CAR 80'S NO PLATES IN THE DRIVE WAY, WE LOCATED ONE OF THE PICKUPS ON THE OLD JACK OWENS RANCH WITH A ~~VICNUR~~ TRIABLE MEMBER IN THE PICKUP PASSED XXXXX OUT, THE OTHER PICKUP IS STILL MISSING

2205 WE HAVE LOCATED THE OTHER PICKUP ABOUT 300 YARDS FROM THE OTHER ONE BUT WE HAVE ANOTHER STOLEN PICKUP 22T-828C 90 GMC EX-CAB GRY IN COLOR CROW AND LAME DEER ADVISED

1346- I'M CLEAR FROM HERE, I'LL BE GOING OVER SOIUX PASS TO LODGE GRASS

Off. | Off. Report Yes X No ___ | Cit. Issued | 844

Officer Assigned: CE Ramm 10/7/91.

On or about November 4, 1994 at approximately 11 AM I heard several rifle shots which I judged to be on my property. I went to the area in my pickup. There I discovered three young Indian males with a dead doe mule deer which they had shot and field dressed. I questioned them and wrote down their names and a complete description of their 4 wheel drive pickup. I sensed that there was another dead deer in the area but they would not admit it. They stated that they believed they were on the Crow Reservation, in the Youngs Creek area. In reality, they were in the Spring Creek area and approximately 2 1/2 miles east of the eastern boundary of the Reservation.

I requested them to leave the dead deer on the ground where it lay and to get in their pickup and leave, returning the same way that they had come. I informed them that I would notify the game warden and deputy sheriff. They got in their pickup and did as I had said.

Unknown to me, our game warden, Chris Anderson of Colstrip, MT was about 3 miles away, talking to a neighbor of mine, John Young. They saw the pickup heading west across Youngs land. Anderson gave chase and apprehended them after 4 or 5 miles of chase. During the chase, they crossed into the Reservation. Anderson crossed the boundary knowingly under the rule of hot pursuit. The chase started about a mile east of the Eastern Boundary and ended approximately 3 miles west of the Boundary.

The three young men had blood on their hands and clothes and blood was evident in the back of the pickup. They admitted that they had shot a deer, but stated that a rancher has taken it from them. Anderson and Young guessed that it must have been me and with the use of Andersons radio and dispatcher in Hardin, MT contact was made with me. I had by this time returned to our house.

Anderson brought the three individuals to our house where he questioned them and got their right names. The names they had given me were false. He confiscated their rifles, charged them with trespassing and hunting without a license and let them go. After obtaining a statement from me, Anderson and I returned to the killing site and picked up the dead deer plus another dead deer which we found after a short search.

Their trial was to be in Justice of the Peace Court in Hardin the following Wednesday. On Monday a Crow Game Warden told the J.P. that he had been to the spot where the deer were killed and that it was within the boundaries of the Reservation. He also stated that Anderson has no authority to arrest a Crow Indian on the Reservation. After this, the J.P. postponed the trail indefinitley.

Andserson learned of this development and came to see me. Using a tape recorder, he took a statement from me. I stated the exact legal description of the land where the incident occurred and described the event as I remembered it. He took a statement from John Young also.

When this evidence was presented to the J.P. court, the case was again scheduled for trail. For various reasons, it kept being postponed. Finally in June, 1995 I was served a subpoena to appear at the trail. The day before the trail I was notified that the charges had been dropped because too much time has passed for the defendants to receive a "fair and speedy trail".

I talked to the Big Horn County Attorney and her deputy. They both informed me that they were sorry but that was the way that it was. I believe it is worth noting that the County Attorney, Christine Cooke is an enrolled member of the Crow Tribe.

Chris Anderson told me that this was the most open and shut case he had ever seen and would have been easily provable in court.

This statement is true and accurate to the best of my recollections. I will provide more information at any time. Further proof and exact dates may be obtained from Mr. Anderson, Mr. Young and the records of the court and Big Horn County Attorneys office.

Jim Hamilton

HC 57 Box 13
Decker MT. 59025

RE: September 24, 1996 - Senate Committee on Indian Affairs

TO: Senator Conrad Burns

FROM: Jim Brown, P.O. Box 259, Lodge Grass, Montana 59050

Dear Conrad,

Could you please direct your staff to have this letter entered into the record for the upcoming hearing September 24 sponsored by Senator Slade Gorton - a member of the Senate Committee on Indian Affairs.

Thank you for your continuing representation!

No. pages 3

Am re-faxing! Had a malfunction on this end and am not sure if it went through.

Mary Brown

P.O. Box 259
Lodge Grass, Montana
September 21, 1996

Senator John McCain
Chairman of Senate Indian Affairs
838 Hart Senate Office Building
Washington, D.C.

Dear Senator McCain:

I am a lifetime resident within the exterior boundries of the Crow Indian Reservation in Montana. This is, as I understand it, one of the few if not the only reservation that is open. That is, almost one half the land is not held in trust for tribal msmbers, but is held in fee patent status by non-Indian owners either from homesteads or sales by tribal members. From this perspective two recent extensions of Tribal sovereignty are very troublesome.

The first is recent unrestrained exercise of jurisdiction by Tribal Courts over Non-Indians illustrated by the case of Red Wolf vs. Burlington Northern Railroad Company Inc.(BN) tried by a jury consisting solely of enrolled members of the Crow Tribe. It was determined that BN was liable for the deaths of two tribal members when a car in which they were occupants was hit by a train at a railroad crossing within the Crow Indian Reservation. The jury rendered a verdict against BN with each of five heirs given $50,000,000.00. The damages awarded were entirely compensatory and no evidence of economic loss was presented. I fear that having to defend liability litigation in tribal courts could quickly ruin me financially and make insurance impossibly costly. I don't believe I should be denied the protection of the due process and equal protection clauses of the U.S. Constitution merely because my ancestors were invited to homestead land on an Indian Reservation or bought such land legally or drove on a public road across such a reservation. Tribal courts should not be granted original and appelate jurisdiction in such cases. State and Federal courts afford all, including residents of Foreign countries, equal rights and protections.

The other main issue is taxation of Non-tribal propertries or business on Non-tribal lands by Tribal governments where Non-tribal members have no status or representation and therefore no recourse against any tax made unfair or unjustly burdensome. Judgements could force me to lose my property and livelihood and force other business to leave the reservation or not come to it causing severe economic loss to tribal and non-tribal members alike.

I feel that these are major concerns that should be addressed by in depth study and finally passage of legislation that facilitates orderly fair commerce and production while at the same time protects the rights of all involved individuals and entities.

Sincerely,

M. James Brown Jr.

M. James Brown, Jr.

cc: Senator Conrad Burns
Senator Max Baucus
Senator Slade Gorton

Montana Stockgrowers Association

Serving Montana's Cattle Industry Since 1884

420 N. California
Post Office Box 1679
Helena, MT 59624
Phone: 406/442-3420
Fax: 406/449-5105

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George Hammond
Hardin

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Randy Smith
Glen

John Swanz
Judith Gap

September 23, 1996

U.S. Senate Committee on Indian Affairs
836 Hart Senate Office Building
Washington, D.C. 20510-8450

Honorable Senators and Guests:

As president of the Montana Stockgrowers Association and a rancher that owns property and resides on the Crow Indian Reservation in Montana, tribal sovereign immunity is a very unfair policy. It must be eliminated.

As non-tribal members, ranchers on Indian reservations do not have equal protection under the law. Non-tribal members have no standing in tribal matters. We have no say and no right to vote on matters of taxation. We are subject to taxation without representation.

For non-tribal members to have the freedom and due process guaranteed to all citizens in the United States, tribal sovereign immunity must be eliminated. Additionally, we are also requesting the right to direct access for non tribal members to state or federal court in tribal related matters.

On behalf of the 4,000 members of the Montana Stockgrowers Association, your consideration to this very serious issue is appreciated very much.

Sincerely,

George Hammond
President

cc:
Senator Conrad Burns
Senator Max Baucus
Senator Slade Gorton

R=97%

September 24, 1996

STATEMENT OF MONTANA GOVERNOR MARC RACICOT BEFORE THE SENATE INDIAN AFFAIRS COMMITTEE

I. INTRODUCTION

I wish to thank the Committee for the opportunity to submit a statement on a matter that has great importance to states with Indian reservations. There is, in my view, no more controversial or deeply-felt issue in Indian country than the question of tribal jurisdiction over nonmembers. From the tribes' perspective, the ability to regulate conduct of all persons on their reservations goes to the very core of their sovereignty; from the nonmembers' perspective, being subjected to the authority of a government in which they have no voice violates what Justice Kennedy rightly called in Duro v. Reina, 495 U.S. 676, 694 (1990), "a fundamental basis for power within our constitutional system"--the "consent of the governed."

At the outset I want to emphatically urge Congress to address and reconcile the tribes' and nonmembers' competing visions concerning the reach of inherent tribal and state authority. My belief, after years of experience, is that Congress, in all likelihood, will not have the will to do so, but I cannot overestimate how important definition and resolution of jurisdictional issues are to the long-term and mutual best interests of both tribes and states.

It is important to understand that everyday there is a significant amount of cooperation that results between tribes and states. In Montana, for instance, there are literally hundreds of cooperative agreements between the State of Montana and the Indian Nations within our borders that allow for the effective transaction of business on a government-to-government basis. Whenever and wherever there is irreconcilable difficulty, it is inevitably because of questions concerning jurisdiction.

Neither the states nor the tribes created these jurisdiction problems. The constant failure of Congress to assume its responsibility to resolve these issues over the last century and longer, along with the plodding, inconsistent, and largely impotent attempts of various courts, mostly federal, to fill the void left by Congress, has relegated both tribal members and nonmembers to constant uncertainty and acrimony. It is a preposterous situation that strains the fabric of our mutual existence sometimes to near breaking point. At best, allowing this situation to develop and persist has been the product of benign neglect. At worst it is an unacceptable denial of responsibility that works substantial injustice to Indians and non-Indians alike.

My hope is that Congress will find the courage to address the transcendent issue of jurisdiction in the most definitive terms possible.

Those jurisdictional principles that apply to **criminal** cases, although complex, are not for the most part, the subject of daily controversy. Parenthetically, however, I would point out that appropriate enforcement resources for federal and tribal authorities on some reservations are completely inadequate.

The most significant difficulty is with tangled, imprecise, inconsistent and, in many instances, as yet unknown civil regulatory and adjudicatory jurisdictional principles. In Montana whenever a noncriminal jurisdictional problem arises because the parties don't know where they stand, the State's position is that the individual tribe has jurisdiction over tribal and trust lands, while the State has jurisdiction over nontribal lands. Although such a position may, in the wisdom of Congress, need further definition, I believe such a jurisdictional rule vindicates and respects the sovereign interests of both states and tribes, and places both parties in co-equal positions.

As mentioned earlier, I have grave doubts that Congress will go as far as it should, and that in fact the focus of this hearing will be confined to property transactions. If that is indeed the case, I would urge Congress to consider legislation to

resolve definitively the previously-described inconsistent visions of jurisdictional authority in an expeditious, hopefully cost-effective manner, by reopening the doors of federal courts to claims by nonmembers that tribes have exceeded the scope of their regulatory authority. These doors have been closed by unfortunate, and quite misguided, decisions in those Circuit Courts of Appeals -- the Eighth, Ninth and Tenth -- where most Indian country is located. In this regard I ask only that nonmembers be accorded the same access to federal courts that tribes have when seeking to have the scope of their inherent authority determined and that persons challenging the exercise of state authority have.

II. LEGAL BACKGROUND -- NATIONAL FARMERS UNION

Some legal background is necessary to understand the nature of the problem. In 1985 the United States Supreme Court decided a case from Montana, National Farmers Union Insurance Cos. v. Crow Tribe, 471 U.S. 845 (1985). The dispute there involved an accident that occurred in a public elementary school's parking lot, in which a Crow member was injured. The school is located within the Crow Reservation. The injured member's guardian sued the school district in tribal court, but the district failed to respond to the summons and complaint. A default judgment then issued, and the injured member's guardian began the process of attempting to execute under tribal law on school property. The school district's insurer filed an action in federal district court seeking to enjoin the execution, arguing that the tribal courts lacked jurisdiction over the district. A decision favorable to the school district by the federal district court was reversed on appeal by the Ninth Circuit, which dismissed the case for lack of federal question jurisdiction under 28 U.S.C. § 1331. After granting certiorari, the Supreme Court reversed the Court of Appeals. It held that the federal courts had subject matter jurisdiction over the dispute, since the scope of tribal authority is determined by federal common law. The Supreme Court, however, held further that the school district was

obligated to present its jurisdictional challenge to the tribal court's authority before proceeding to federal court except in very narrow circumstances. The latter holding is now known as the National Farmers Union exhaustion rule.

The exhaustion rule established in National Farmers Union is an exception to the "virtually unflagging obligation" of federal courts (Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 817 (1976)) to exercise their jurisdiction when that jurisdiction has been invoked properly. The exception is grounded in the Supreme Court's conclusion that promotion of tribal self-government is furthered by "a rule that will provide the **forum** whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." National Farmers Union, 471 U.S. at 856 (emphasis added). I emphasize the word "forum" because its use indicates that the Supreme Court was concerned with the effect of exercising federal court jurisdiction on the orderly completion of tribal court proceedings--a concern analogous to that the Supreme Court previously expressed in a series of state-court abstention cases beginning with Younger v. Harris, 401 U.S. 37 (1971).

III. EXPANSION OF NATIONAL FARMERS UNION

In National Farmers Union, the Supreme Court viewed the requirement that a tribal court defendant present its jurisdiction defense to a tribal court as not unduly burdensome and consistent with the deference one judicial system owes another where a collateral jurisdictional attack is mounted. Assuming the decision is correct and fair, the radical expansion of the National Farmers Union exhaustion rule overseen by lower federal courts is neither equitable nor constructive.

Most important, many lower federal courts require **all** challenges to tribal **regulatory** authority by nonmembers to be presented first to a tribal administrative agency or court, regardless of whether administrative or judicial proceedings are ongoing. So, for example, in Burlington Northern Railroad Co. v. Crow Tribal Council,

940 F.2d 1239 (9th Cir. 1991), the Ninth Circuit held a railroad could not commence a suit to challenge the authority of a tribe to regulate its on-reservation activities, which took place on right-of-way granted by the federal government, even though there were no tribal administrative or judicial proceedings yet initiated. Subsequently, in Middlemist v. Babbitt, 19 F.3d 1318 (9th Cir.), cert. denied, 115 S. Ct. 429 (1994), the same circuit held two landowners could not challenge a tribal ordinance regulating modifications potentially affecting non-navigable streambeds until they had initiated tribal administrative or judicial proceedings for the purpose of arguing that the tribe lacked regulatory jurisdiction. The Eighth Circuit in Duncan Energy Co. v. Three Affiliated Tribes, 27 F.3d 1294 (8th Cir. 1994), cert. denied, 115 S. Ct. 779 (1995), similarly conditioned access to federal courts upon a nonmember corporation's commencing tribal adjudicatory proceedings for the purpose of contesting the tribes' authority to tax the corporation's activities and to regulate its employment practices. The Tenth Circuit reached the same result in Pittsburg & Mining Coal Co. v. Watchman, 52 F.3d 1531 (10th Cir. 1995), with respect to a Navajo tribal tax on a nonmember corporation's activities on fee lands. None of the cases involved interference with ongoing tribal court proceedings.

These decisions are questionable for several reasons. First, they mean greater deference is accorded tribal processes than state processes---an anomalous result in view of the federalism principles inhering in the Constitution. Under the Younger v. Harris doctrine, federal courts may refuse to exercise their jurisdiction to consider a federal law-based challenge to state authority only when state court proceedings are ongoing. Thus, had the challenges in Burlington Northern, Middlemist, Duncan Energy or Pittsburg been to state law, the involved federal court would have been required to exercise its jurisdiction and resolve the controversy. Indeed, the Ninth Circuit has been willing to address preemption claims by tribes against application of state law

notwithstanding the existence of ongoing state court proceedings and even to enjoin such proceedings. Fort Belknap Comm'y Council v. Mazurek, 43 F.3d 428 (9th Cir. 1994), cert. denied, 116 S. Ct. 49 (1995); White Mountain Apache Tribe v. Smith Plumbing Co., 856 F.2d 1301 (9th Cir. 1988).

Second, nonmembers are forced to **initiate** tribal court proceedings for the purpose of arguing that tribe lacks jurisdiction over them. It is a strange rule of law that requires litigants to invoke the jurisdiction of a tribunal solely to contend that the tribunal's sovereign has no jurisdiction over them. This situation differs markedly from the one in National Farmers Union, where the school board had been sued in tribal court and thus was **defending** on the basis of lack of tribal jurisdiction.

Finally, the issue whether a tribe has inherent authority to regulate nonmember conduct in a particular context is a question of federal law. While it may be assumed a tribe's courts have special expertise with respect to the proper interpretation and application of tribal law, the same assumption cannot be made with respect to the interpretation and application of federal law. Requiring nonmembers to initiate proceedings in tribal court thus furthers no interest in securing a definitive determination of federal law -- the very purpose of the nonmembers' challenge to tribal authority.

IV. PRACTICAL EFFECT OF NATIONAL FARMERS UNION

The practical effect of the lower courts' application of the National Farmers Union exhaustion doctrine can be quite significant to individual nonmembers. Two examples from Montana reflect this effect.

One of the cases mentioned above -- Middlemist v. Confederated Salish and Kootenai Tribes -- began in 1991 when a rancher on the Flathead Reservation sought funding from the Agricultural Soil Conservation Service (ASCS) to replace or refurbish a stockwater tank on his fee lands. To receive this funding, the rancher was told that he would be required to obtain not only federal and state permits but also a permit from the

Confederated Salish and Kootenai Tribes under its Aquatic Lands Conservation Ordinance. About the same time, a second rancher, who has a perennial stream-fed impoundment reservoir on his property, requested a permit from the Corps of Engineers to make improvements to the dam associated with the reservoir. The Corps, as had the ASCS, required him to obtain both state and tribal approval of the proposed improvement. Neither rancher believed his activities were subject to tribal regulation, and in late 1991 they filed suit in federal court seeking a declaratory judgment to that effect. The district court dismissed the suit in February 1993 after concluding National Farmers Union exhaustion was necessary -- i.e., that the ranchers first would have to present their jurisdictional challenge to the Confederated Tribes for resolution. The Ninth Circuit affirmed in April 1994, and the Supreme Court denied certiorari in October 1994. The ranchers then brought an action in tribal court seeking a determination that the Confederated Tribes lacked jurisdiction over the proposed fee-land activities. The tribal district court, however, dismissed the action on the ground that the ranchers were required to exhaust administrative remedies before the involved tribal agency. The tribal district court's decision was affirmed by the tribal court of appeals in June 1996. The tribal court of appeals, like the lower court, did not address the merits of the jurisdictional issue.

These ranchers may be right or wrong on the merits of their jurisdictional challenges. That is an issue, again, which I do not address today. Nevertheless, to require them to invoke the jurisdiction of the tribal courts or a tribal administrative agency as a condition to ultimately securing a federal court determination of the jurisdictional question effectively closes the doors of the federal courts with respect to an issue over which those courts admittedly have jurisdiction. It is not a sufficient answer to state that the doors are closely only temporarily since, as the Middlemist case indicates, "temporarily" means years. Exhaustion for most landowners is too

time-consuming and expensive to be a feasible alternative -- especially when they face the almost certain prospect of protracted federal litigation after exhaustion. The exhaustion requirement in the context of challenges to regulatory jurisdiction thus has the practical effect of inducing nonmembers to comply with tribal regulation simply because the alternative is so burdensome and futile.

The second example comes from the Crow Reservation. The Crow Tribe enacted a "resort tax" in 1995, requiring all reservation tourist businesses to impose a four percent tax on gross receipts. All such businesses are owned by nonmembers, and the vast majority of the affected sales are to nonmembers. Recognizing the obligation to exhaust tribal remedies under existing Ninth Circuit law, all but two of the businesses initiated proceedings before the tribal administrative agency to challenge the Tribe's authority to impose the tax. Under the tribal tax code, they were required to pay the challenged tax amounts under protest, but there is no provision in the code for return of the protested amounts should the challengers prevail. The tribal tax agency rejected their protest, and the business owners appealed to the tribal courts. In June 1995, the tribal trial court denied the owners' motion for summary judgment, concluding that questions of fact remained to be decided with respect to the jurisdictional issue.

In the meantime, the Tribe has filed liens with the Big Horn County Clerk and Recorder as to allegedly delinquent resort taxes. Whether these liens are authorized under state law is uncertain, but it is clear that they constitute a cloud on the property titles of the business owners. It is also clear what is really needed is an expeditious resolution by a federal court of the core question: whether the Tribe can impose the resort tax at all. This kind of dispute, needless to say, does little to encourage entrepreneurs to invest in reservation businesses since, aside from the jurisdictional questions themselves, there is no forum viewed by nonmembers as impartial immediately available to answer those questions.

V. SUGGESTED STATUTORY CHANGE

The scope of tribal jurisdiction over nonmembers is a vexing legal issue that can be resolved conclusively only by federal courts unless Congress acts to define such authority. Although it would be entirely appropriate to define that authority legislatively, I do not foresee Congress doing so in the near term. But what Congress can do, at least, is to remove a judge-made obstacle to nonmembers' gaining access to federal courts to determine jurisdictional issues. Providing access merely would make the playing field level, since tribes can freely sue states or individuals in federal courts to have jurisdictional issues resolved. Beyond notions of basic fairness, providing access would have the practical effect of allowing far more expeditious determination of these issues; reducing the extraordinary cost attendant to requiring exhaustion and then, in almost all cases, a federal court action; and developing a more complete body of federal decisional law to guide tribes, states, local governments, businesses and ordinary citizens in understanding the reach of tribal authority. The National Farmers Union exhaustion doctrine as applied by the lower federal courts has greatly impeded the development of law in this area.

It is perhaps beyond the scope of this statement to propose the text of the statutory change I think is necessary. Nonetheless, I urge consideration be given to amending the Indian Civil Rights Act, 25 U.S.C. §§ 1301 to 1303, to provide that access to federal courts shall not be denied by failure to present claims or issues challenging applicability of the powers of self-government to the federal court plaintiff for resolution by a tribe, a tribal agency or officer, or an Indian court, unless the federal court plaintiff is a defendant in a tribal court proceeding initiated prior to the federal court action and has a full and fair opportunity to raise the claims or issues in such proceeding.

Thank you for the opportunity to present my views on this very important issue.

É@

BIG HORN COUNTY ELECTRIC
Cooperative, Inc.
P.O. Box 410
Hardin, Montana 59034-0410
Quality Service Since 1941

September 13, 1996

The Honorable Slade Gorton
United States Senate
Room 703 Hart Senate Office Building
Washington, D.C. 20510-8450

Dear Senator Gorton:

This letter is offered for presentation at the September 24, 1996 Senate Committee on Indian Affairs hearing on tribal sovereign immunity. Please relay the frustration Big Horn County Electric Cooperative has experienced in dealing with the **Crow tribe** and their **Tribal Utility Tax.**

Big Horn provides electric service to two sovereign Indian tribes in south central Montana. We serve the vast majority of the **Crow Indian Reservation** and a portion of the **Northern Cheyenne Indian Reservation.** Big Horn has a long tradition of providing quality electric service to our valued Native American consumers and our Trustees have maintained a clear focus on keeping rates affordable, and protecting the interest of **all** our consumers.

The issue of Tribal taxation has driven a "wedge" into our member/tribal relations. As an attribute of sovereignty tribal governments have the authority to tax on Indian trust land. The extent of this authority, however, must be legislatively placed within parameters that protect non-tribal members from taxes enacted for the purpose of generating revenue for the provision of services to which non-tribal members are denied access.

I realize that the issues of tribal taxation, and jurisdiction over non-tribal members on fee lands, are very "thorny" from a political perspective. However, if left unresolved families and businesses will be severely damaged - harmed by a situation that if it were anywhere else in the world the federal government would condemn the affair as a violation of human rights.

Big Horn County Electric Cooperative is dedicated to reaching a higher level of understanding between the cooperative and the Crow tribe on all issues. Unfortunately, that will only happen if Congress establishes clearly defined principles under which the tribes exercise their right of self governance.

Sincerely,

T R. Gregori

Tim R. Gregori
Manager

cc Senator John McCain
Senator Conrad Burns

Phone: (406) 665-2830
FAX: (406) 665-2644

Senator Slade Gorton
United States Senate
Room 703 Hart Senate Office Building
Washington, D.C. 20510-8450

September 18, 1996

Dear Senator Gorton:

This letter is for presentation at the Sept. 24th , Senate Committee on Indian Affairs hearing, on tribal sovereign immunity.

As president of the Big Horn Livestock Association, I would support legislation granting immunity to non-Indian citizens on the reservations.

These issues of jurisdiction, taxation, tribal sovereignty and tribal courts on "Open Reservations" are critically different than on "Closed Reservations". The U. S. Senate Committee on Indian Affairs needs to educate themselves on the differences between "Open and Closed" reservations, before recommending remedies for both.

The non-Indians residing within the "open" reservations, some homesteading, were granted that right by the U.S.A. They homesteaded, with the belief they were under the U.S. flag, under the jurisdiction of the United States. If legislation granted tribes on "open" reservations sole sovereignty, this action will put these non-Indian citizens under tribal jurisdiction. This would in essence, "abandon" these U.S. citizens. The way things are now, there is little or no law in these tribal lands. Nobody knows who has jurisdiction over who. Examining past tribal court rulings over non-Indian litigation in this county, the non-Indians were treated quite severely.

I do not support "denying" tribal sovereignty, over themselves. But please give the non-Indian residents the protection state jurisdiction would give them. This is what their tax dollar provides for.

Sincerely,

Miles Torske
Big Horn Livestock Assoc.
Hardin, MT

cc Senator John McCain
Senator Conrad Burns

REQUEST THIS WRITTEN TESTIMONY BE ENTERED IN THE RECORD.

MONTANA HOUSE OF REPRESENTATIVES

REPRESENTATIVE JUDY RICE MURDOCK
HOUSE DISTRICT 6

HELENA ADDRESS:
CAPITOL BUILDING
HELENA, MONTANA 59620-0400
PHONE: (406) 444-4800

HOME ADDRESS:
PO BOX Q
LODGE GRASS, MONTANA 59050
PHONE: (406) 639-2508

COMMITTEES:
TAXATION
AGRICULTURE
STATE-FEDERAL RELATIONS

SEPTEMBER 24, 1996. SENATE COMMITTEE ON INDIAN AFFAIRS HEARING ON CLIVIL JURISDICTION SOVERIEGN IMMUNITY OF INDIAN TRIBES AND ITS EFFECT ON NON INDIANS ON AND OFF RESERVATIONS.

Senator Slate Gorton
U.S. Senate Committee on Indian Affairs
Room 730 Senate Hart Building
Washington D.C. 20510-4701

Honorable Slate Gorton;

States are bound by the roll laid our for them by federal policy that causes them to be responsible and accountable for all it's citizens, which includes tribal members, but in the same respect the states hands are tied in relation to tribal members because of the semi-sovereign nation status. Like wise Banks and other businesses are encouraged, in fact mandated to make loans to tribal members, but as soon as tribal members return to reservations where sovereign immunity status is in effect. the banks and others , have no way to claim property in default, except through tribal courts.

. Sovereign immunity has made no separation of powers, between judicial and executive branches of tribal government. There are no specific guide line for procedure. Tribal courts are not tied to any code of ethics. People who work there or are a part of the tribal legal system are there at the pleasure of whoever is in control of tribal politics. Again I have no intention of making judgment of the tribal or non-tribal persons who become involved in the tribal courts.

If you are non tribal, you are simply at the mercy of the mood of day. There is no way of being guaranteed your civil rights as a United States citizen, you have no say in any way shape or form.

If you are a tribal member, you have even less recourse, because your options are limited. If you have complaint concerning election or tribal hiring procedure, or firing, you are referred to tribal court and if you don't happen to be in accordance with whatever administration, the court are serving at the leisure of the tribal administration.

In trying to find solutions to deal with all types of crime on the Crow Reservation, the consensus of law enforcement officers is always, we can pick up the offenders but if the court can't or won't deal with them, what else can we do? The curious thing about the

REQUEST THIS WRITTEN TESTIMONY BE ENTERED IN THE RECORD.

whole soverngty issue is that people like law enforcement officers can not state what the problem is, for fear of losing their jobs. Banks can't say the problems they encounter, they are simply expected to make loans. The jurisdiction issues are a bit like the story of the king's new clothes, everyone knows but can't say, because someone might be offended.

Limits of sovereign immunity and jurisdiction, leave room for a lot of mischief, on taxes, the court systems, law and order, the state financed public schools. The federal government is shifting it's trust responsibility to the states and the local tax payers, but at the same time sovereign immunity status for the tribes is encouraged. You are asking the states and counties to provide education and deal with social issues, and economic development, but tying their hands, in the relationship to tribes. This is a lawyers paradise, everyone is having to deal with a court that is ill equipped to deal with simple issues let alone something as unclear and ambiguous as taxes, drugs and civil disobedience, with the jurisdictional gray area.

Respectfully,
Judy Murdock

Lyle Neal
RT. B Box 922
Lodge Grass, MT 59050

September 20, 1996

Dear Senator Slade Gorton,

My family and I live on the Crow Indian Reservation in Montana; and we are absolutely against non-Indians going before the Crow Tribal Court. The Crow Indian Court System is biased in their decisions and tribal Judges serve at the pleasure of the Tribal Council or the Chairman.

The United States Constitution does not apply for non-Indians going to tribal court living on the reservation; and therefore our personal rights mean nothing.

If by chance a non-Indian wins in a tribal court, very seldom is any action taken in the non-Indian's favor.

The best course of action for everyone is to have their cases presented in the County, State or Federal Courts.

Sincerely,

Lyle Neal

Lyle Neal

CC
Senator Conrad Burns
Senator Max Baucus

Roy Neal
RT. B Box 922
Lodge Grass, MT 59050

September 20, 1996

Dear Senator Slade Gorton,

I am in favor of legislation to separate non-tribal members and tribal members for jurisdictional purposes.

To preserve the civil rights of all non-tribal members it is necessary and prudent for Congress to clarify jurisdictional boundaries. ***All*** American citizens who are not tribal members should not be subject to Tribal jurisdiction. The County, State and Federal courts have protection to safe guard ***all*** citizens civil rights. Another level of courts only leads to further deterioration of individual freedom and is an additional financial burden in an area that is already heavily burdened.

Sincerely,

Roy Neal

Roy Neal

CC
Senator Conrad Burns
Senator Max Baucas

United States District Court
Western District of Washington
United States Courthouse
Seattle, Washington 98104-1187

Barbara J. Rothstein
Chief Judge

November 7, 1990

Richard T. Bremer, President
Lummi Property Owners Association
177 Telegraph Road, Suite 647
Bellingham, WA 98226

Dear Mr. Bremer:

The court has received your letter of October 11, 1990, expressing concern about discriminatory actions taken against non-Indians by the Lummi Indian Business Council. You contend that applications for sewer extensions by non-Indians are being reviewed and denied by the Lummi Tribe in a discriminatory manner, in violation of this court's Consent Decree issued December 8, 1982.

Upon review of the documentation attached to your letter, the court is indeed concerned about possible violations of the non-discrimination mandate in the Consent Decree. You should be aware that the Consent Decree does set forth specific grievance procedures to be followed by anyone contesting decisions related to sewer service (see paragraph 19). However, given the serious nature of your allegations, the court strongly urges you to seek the assistance of an attorney.

Enclosed you will find a copy of the Consent Decree. The court is forwarding a copy of your letter to the attorneys of record in the underlying lawsuit, and it hopes that a resolution to this particular problem is quickly forthcoming. Please keep the court informed of any developments in this matter.

Sincerely,

Barbara J. Rothstein

Barbara J. Rothstein

BJR:lgj

cc: G.I. James Sealth, Lummi Indian Business Council
Harry L. Johnson, Office of the Reservation Attorney
Daniel A. Raas, Office of the Reservation Attorney
Abigail Elias, United States Department of Justice
Carl A. Johnson
Charles B. Roe, Jr., Assistant Attorney General

LUMMI PROPERTY OWNERS ASSOCIATION

177 Telegraph Road, Suite 647

Bellingham, WA 98226

October 11, 1990

Judge Barbara Rothstein
1010 Fifth Avenue
U. S. Court House
Seattle, WA 98104

Re: Racial Discrimination by Lummi Tribe toward persons requesting sewer extensions

Dear Judge Rothstein:

We believe that the Lummi Tribe is discriminating against non-Indians by denying requested sewer extensions to non-Indians in the Sandy Point Heights development area, in direct conflict to your consent decree in Civil Action no. C79-682R, Lummi Indian Tribe and United States of America vs. Wilbur Hallauer.

Since November of 1989, persons requesting sewer extensions have been told that they must sign a consent to tribal jurisdiction statement (copy enclosed) before being allowed to hook up to the sewer. To our knowledge, no non-Indian, after reading the statement, has been willing to sign the statement, and no non-Indian sewer extensions have been built in over a year.

Unfortunately, sewer collector lines were not extended to all lots within platted developments at the time of original construction. Lines were run to existing houses only, and significant areas of lots within predominantly non-Indian owned platted developments were left unsewered.

Recent proposed sewer extensions by non-Indians in the Sandy Point Heights area, which were approved by the Lummi Tribal Sewer and Water District board, have been turned down by the Lummi Indian Business Council. The reason given for the denial of sewer extension is the claim by the council that the water purveyor servicing the area doesn't have a valid water right (copy of letter enclosed). Additionally, the LIBC has sent a letter (copy enclosed) to the sewer board that the LIBC policy is to have the Lummi Tribal water system, which is administered by the Lummi Tribal Sewer and Water District board, deny water service by the district to any new non-Indian homes. Aren't these actions by the LIBC in direct conflict with the non-discrimination mandated by you in the consent decree?

We believe that the result of these actions by the Lummi Indian Business Council is to deny non-Indians their constitutional right to enjoyment of their property and access to a sewer system which their tax dollars have already paid for. We ask that you look into what we believe to be racially discriminatory policies by the LIBC, especially as to the conditions of the consent decree regarding sewer service, and to see that the Lummi Tribe is made to be accountable to the conditions of the consent decree.

We would appreciate hearing from you as soon as possible.

Sincerely,

Richard T. Brewer

Richard T. Brewer, President
Lummi Property Owners Association

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD. • BELLINGHAM, WASHINGTON 98226-9298 • (206) 734-8180
DEPARTMENT _____ EXT _____

[redacted]

_____ and _____ (hereinafter referred to as "the Owner") are the owners of a certain tract of land located on the Lummi Indian reservation and more particularly described below ("the land"). The Owner desires certain municipal services from the Lummi Indian Tribe ("the Tribe"), for the land and activities on the land. The Tribe is willing to provide the land with the requested services on the express condition that the Owner pay all fees and charges for the service and consent to the full civil adjudicatory and regulatory of the Tribe over the land and all persons and activities on the land.

The Owner hereby consents to the full civil adjudicatory and regulatory jurisdiction of the Tribe over the following described real property and over all persons and activities thereon. The Tribe agrees to provide sanitary sewer service to the property under the terms and conditions of its Sewer and Water Ordinance as presently in effect or hereafter amended, and any agreements executed in accordance with the Ordinance. The agreement shall run with the land and be binding on the Owner's heirs, successors and assigns, and shall be irrevocable without the written consent of the Tribe.

Legal description:

Dated: _____

Owner

_____

Owner

_____

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD • BELLINGHAM, WASHINGTON 98226-9298 • (206) 734-8180
DEPARTMENT _____ EXT _____

RECEIVED
AUG 2 3 1990
Lummi Tribal Sewer District

August 28, 1990

Lummi Tribal Sewer and Water District
2156 Lummi View Drive
Bellingham, WA 98226

Re: Proposed Sewer Extensions

Dear Board Members:

The Council considered the July 3, 1990 memorandum from Mary Lou Julius regarding the District's conceptual approval of three specific sewer extensions in the Sandy Point heights area, at the request of the owners of Lot 17, Division 11, and Lot 14, Division 3. The Sewer Board had approved the concept of building these three extensions with the financing details to be resolved at a later date.

The memorandum from the Sewer Board does not indicate the source of water supply for these properties, but it is our understanding that the property owners are relying upon the Sandy Point Improvement Company to supply water. Since the Sandy Point Improvement Company does not have a valid water right for its wells located on the Reservation, there is no adequate water supply system for these properties, and we cannot approve an extension of the sewer system which would have the effect of increasing the demand for water from this source. When this issue has been resolved, we will again consider the approval of these extensions. Please notify the applicants of our decision.

Very truly yours,

LUMMI INDIAN BUSINESS COUNCIL

G.J. James Sealth

G.J. James Sealth
Manager

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD. • BELLINGHAM, WASHINGTON 98226-9298 • (206) 734-8180
DEPARTMENT _____ EXT _____

August 27, 1990

Lummi Tribal Sewer and Water Board
2156 Lummi View Drive
Bellingham, WA 98226

Re: Water Service From Tribal Water System

Dear Board Members:

In answer to your request for clarification regarding the connection of new, non-Indian customers to the tribal water system, it is necessary to restrict new connections to tribal members at this time. Existing non-tribal member customers will, of course, continue to receive service.

Sincerely,

LUMMI INDIAN BUSINESS COUNCIL

Gerald J. James Sealth

G.I. James Sealth
Manager

1110 Courtright Road
Mohave Valley, Ariz. 86440
August 22, 1996

C.E.R.A.
James L. Mitchell,
3319 Highway 485
Jemez Pueblo, N.M. 87024

Dear Jim:

Milo Nelson has already apprised you of the fourteen year struggle that he has been in with the Bureau of Land Management and the Mojave Indian tribe. My case is also part of the same struggle. I purchased over 48 acres of land in back of Dike road whose main value at the time was the contingent finger of almost 55 feet of river frontage that allowed all of this property access to the river. My property was advertised for sale just before this situation happened. One of the offers on my property, which at that time included the finger of river access, came to just under a half million dollars. The prospects of this sale were ended when clear title could not be guaranteed due to the "litigated land-grab" of the B.L.M. for the Mojave Tribal benefit. Even though subsequent actions have cleared the majority of my property for sale, those actions have stripped me of all river access which made that property valuable, and have lowered the value as a whole to less than half of its previous value.

I also wrote to Senators John McCain and Dennis DeConcini and Representative Bob Stump, asking for relief in this matter, and was assured in return that the B.L.M. survey was correct, but found that no one had mentioned to them, or to the O.H.A. court that the shoreline used by the B.L.M. survey was not the one they were directed to use by the O.H.A. As a result, the survey had a 77 degree angle instead of the 90 degree angle to the shoreline that it should have had. This matter could have been culminated and ended long before this by the simple expedient of a court order to show cause on the survey. However, due to Tribal Sovereignty of the Mojave Tribe, in whose interest the B.L.M. was supposedly acting, no such court order can be served nor sought. Thus, until the tribe decides to act upon the bogus survey, my once valuable property has been reduced to an almost valueless state. Another drawback to this matter is that Mohave County tax board finds the original value to be the one upon which they base taxation and ignore the valueless state that has been imposed upon it in this struggle.

Please include my case along with that of Milo Nelson's as one and the same struggle that shows no sign of being resolved due to the Tribal Sovereignty that protects this issue from being resolved in a federal court of law.

Sincerely,

Leon Abrams

November 03, 1991

Mr. William Covey
% C.E.R.A.
P.O. Box 215
Big Arm, Montana 59910

This letter is being written concerning a problem which has been prevalent for seventeen(17) years. Surely, it's time for the problem to be resolved. Letters have been written and sent to the President of the United States, Secretary of the Interior, Bureau of Indian Affairs in Washington D.C., Phoenix, and Parker, Arizona. Also, letters were written and sent to the Governor of California and all of the elected officials in our state government. Many are sympathetic to our problem, but either say they can't or won't do anything to help. Why? To whom do we turn for help? We believe as citizens, taxpayers, and voters of this wonderful country, our elected officials should respect us enough to investigate and resolve this problem, or at least address it.

There is a strip of land along Havasu Lake, California known as " the colony There are seventy-seven (77) homes on this land. The Bureau of Land Management was in control of this land from 1941-1974. Leases were given to these people during the 1940's and 1950's, to build these homes. The " Chemehuevi Indian Reservation " is located here at Havasu Lake, Ca.. When the Parker Dam was constructed and Havasu Lake formed, the Tribe was paid (FMV) by the Secretary of the Interior for any of their land used in forming the lake No Chemehuevi Indians could be found, so the money was held in trust. Then, in 1970, a Chemehuevi Tribe was formed and the money turned over to them. In 1974, the acting Secretary of the Interior, Mr. Whitaker, committed an act of unconstitutional disposition of public land by returning this strip o land known as " the colony " to the Chemehuevi Indian Tribe. Public land can not be given to a Tribe.

The Tribe gave the homeowners a fourteen (14) year lease. This lease expired on July 3, 1990. The homeowner's group, called The Betterment Society, made twenty-seven (27) appointments with the Chairperson and the Tribal Council between January 1990 and July 3, 1990, to negotiate a new lease. Every one of these appointments was cancelled by the Chairperson and Tribal Council. Leases were sent out to these homeowners on November 26, 1991, and rejected. I am sending you a copy of the lease. No sane person would sign this type of lease.

My sister owns her home on this property. Her income is $687.00 per month. After paying $300.00 lease rent per month for the land, plus her utility bil how is she to live? Some of the homeowners are being charged $500.00 per month lease rents for the land. The lease rents for the land range from $2100.00-$6000.00 per year. All the homes are owned by the homeowners, they are only leasing the land.. There are widows and others living on fixed incomes. All of them thought they could live out their lives here in peace on their pensions. Instead, since 1974, it's been nothing but hassel. No one blames the Chemehuevi Indians. It's our government officials telling us we have no rights and they refuse to investigate or correct these problems. We demand, as citizens, voters, and taxpayers that these problems be investigat and corrected.

Sincerely,

Shirley Smith

Shirley Smith
P.O. Box 1693
Havasu Lake, Ca. 92363

Lewiston, Idaho
Dec. 1, 1991

Mr. William H. Covey
President, C.E.R.A., Inc.
P.O. Box 215
Big Arm,Mont. 59910

Dear Mr. Covey,

The following is a summary requested by you of our boundary dispute in Kamiah, Idaho.

Due to a 1989-1991 Re-survey by the Bureau of Land Management; the Bureau of Indian Affairs has informed us that we are trespassing on Indian Land and upon final decision of the BLM we will be given 30 days official notice to vacate.

Fee Patent was issued on the land in question in 1953 without benefit of an official survey by the government as required by law.(See: R.S. 2115) In 1957, the non-Indian purchasers, requested a surveyof these lands from the BLM and were instructed by the BLM to employ a private surveyor which they did. It was not until some thirty years later, after the lands had been improved with a house and other valuable additions that the BIA attempted to change the historical boundaries and claim Indian Sovereignty over lands on the reservation so the U.S. Courts cannot interfere and adjudicate the issues involved. ((See: TREATIES with the NEZ PERCE INDIANS 1855, 1863 and 1868 ; Indian Severalty Act of Feb. 8, 1887, sec. 6 ; and the Act of June 2, 1924 (43 Stat. 253) declaring U.S. Citizenship for all Indians

The BLM, under the direction of the BIA, caused their Chief of Field Operations and Survey Party Chief to bring the Indian Trust Heirs onto our property and show them the corners of "Their" property as determined by the BLM survey without regard to existing Bona Fide rights of adjoining owners.

As adjoining property owners, we have feared for our personal safety and have moved from our improved lands which were warranteed by the former Indian owner. We have been forced to acquire other living accommodations entirely at our own expense and have expended over $ 20,000 in defense of our property covered Govt. Fee Patent, Warranty Deed and insured title. We have been informed unilaterally by the BLM that we do not own these lands; this following documented proof on my part that their survey is in Gross Error.

As a Surveyor with over thirty years experience in land survey,I have taken issue with many of the BLM survey errors and shown them documented proof to contradict their position.

All of our written Protests and Appeals have been routinely denied by the BLM until intervention by Senator Craig in August 1991.

(2)

Due to Senator Craig's efforts, BLM's official decision of May 31, 1991, will be reviewed by the Interior Board of Land Appeals.

This entire issue has been an emotional and financial nightmare, perpetuated by denial of our consitutional rights as United States Citizens and a total disregard for "our" Civil Rights.

Sincerely,

Lorna L. Boykin
1102 Richardson Ave.
Lewiston, Idaho 83501

Reynold L. Allgood
1102 Richardson Ave.
Lewiston, Idaho 83501

ROBERT C. WENDT
8596 Hamilton Ave.
Huntington Beach, Ca. 92646
(714) 960-2700

WILLIAM H. COVEY
P.O. Box 215
Big Arm, Montana 59910

December 5, 1991

Dear Mr. Covey,

I am addressing you as a fellow tax paying American citizen with concerns that my civil rights are being threatened. I am seeking your respected advise and assistance in the following situation.

I am the leaseholder of a lot in the area known as the "Colony" on the shore of Lake Havasu in California. The "Colony"is a community of seventy homes with the land held in trust by the Government for the Chemehuevi Indians. On July 3, 1990, our leases expired, at which time we continued our previous attempts to negotiate a new lease with the Chemehuevis.

Recently the residents of our community and I received a lease proposal from the Chemehuevi Indian Tribe directing us to sign and pay up or vacate the premises, meaning our homes, within fifteen days of the November 26 date stamped on the cover letter. Any personal property left in the area after that period shall revert to the landowner, meaning the Tribe.

Please clarify for me; who is the "landowner" of this property? After much research I have yet to find evidence that the Chemehuevis are a patented Indian Tribe by treaty or Congressional order. As for land ownership, it is my understanding that the Government is holding this property in trust for the Chemehuevis with the right to benefit from the rents that we pay while being relieved of the property tax burden that is also our responsibility to pay.

As a leaseholder I was shocked to see the Chemehuevis issued a lease that increased our one year lease amount by more than one thousand (1,000%) percent with yearly increases according to forthcoming appraisals at the option of the Lessor for the duration of the lease. I would like to see the initial appraisal that substantiates such an increase.

The term of the lease is for five years retroactive to July 4, 1990, with an additional five year option at the discretion of the Lessor. A relatively short period considering the Lessee is committed to pay an undetermined porportionate share of the cost to construct a water/sewer main sufficient in size to service the Colony area. As stated in the lease, the Lessee is to accept the expense to connect to utility services such as gas, sewer, water, cable television, etc., as they become available within 300 feet of the property line.

Included in the lease is an insurance clause requiring joint coverage in the names of the Lessee, Lessor and the United States of America. In the event of damage to the extent of seventy-five (75%) percent or more of the property improvements, reconstruction shall commence at the option of the Lessor. If the Lessor elects not to reconstruct, the premises are to be cleared at the Lessee's expense with all insurance proceeds paid to the Lessor. In discussing this matter with my insurance agent, it was his opinion that it would be practically impossible to get an insurance company in this country to provide such terms of coverage.

One of the stipulations of the lease requires all who enter the property on the Lessee's behalf to abide by the laws of the Chemehuevi Indian Tribe. These laws have never been made available for the knowledge of the "white" community, yet the Tribe reserves the jursidiction rights to impose and enforce laws unknown to us.

It is not my intent to exhaust you with each onerous provision contained in this lease but as you can see, there are many objectional clauses. I would like the opportunity to negotiate some of the terms with the Lessor. Unfortunately the only communications the Lessor will accept are in writing mailed to their address. Given only fifteen days to complete and enter into a new lease agreement or vacate the premises leaves no feasible time to initiate a negotiation process. For more than five years many of the leaseholders have attempted open, individual negotiations with the Lessors. Each has been greeted by a closed door.

I fear the impossible deadline will have passed even before you receive this letter. Nevertheless, I would appreciate any assistance you may have to offer in this matter.

Thank you.

Sincerely,

Jeri Wendt

Jeri Wendt

GORDON & NAOMI GILBERTSON
3111 SILVER SADDLE DRIVE
LAKE HAVASU, ARIZONA 86403
(602) 855-6513

December 5, 1991

Office of Intergovernmental Affairs
Washington, D.C.

Dear Sirs:

In 1975 my wife and I purchased approximately 279' of Colorado River Frontage located in Mohave County, Arizona.

We planned to fulfil the American Dream and build condominiums on the property as soon as we could pay for it in full. Then when we could retire we would have income from the project to see us through the remainder of our years.

In 1982, seven (7) years later, Mr. Leon Abrams, who also purchased property in the same location, sold his land and improvements. He went to the County seat to inquire about a zoning change and was told that he did not own the property. He called me and told me that he had found out that the Bureau of Land Management had completed a resurvey of the land and had taken our property away from us and it was now part of the Fort Mojave Indian Tribe Reservation.

We immediately informed First American Title Insurance Company, who insured the property, and told them what had happened. They in turn filed an appeal with the United States Department of the Interior.

Now almost ten (10) additional years have passed and we are back to square one with the Administrative Procedure process and we still do not have a final decision on the corrective survey performed by the BLM. I UNDERSTAND THAT EVEN IF AND WHEN WE OBTAIN A FINAL DECISION FROM THE DEPARTMENT OF INTERIOR, THE TITLE WILL STILL BE CLOUDED, UNTIL THE MATTER IS SETTLED IN FEDERAL COURT. This is a real hardship due to the status of the Ft. Mojave Tribe as Sovereign, and the fact that we cannot file action with them in our court system.

During all of this time, the Government specifically, the Bureau of Land Management, has not been the least sympathetic to our circumstance. We bought the property in good faith, and have had to fight the government, and the tribe as intervenor, in an apparently endless battle of Procedures. The whole situation has created an untold financial hardship on us, and we still continue to appeal to the Secretary of Interior.

When will it all stop? Will it settle in our lifetime and what do we do if we do get a final decision from the Secretary? We still can't fulfill our goals, due to the clouded title, and so all this time spent from our lifetime and we still have not regained the right of actual ownership, because of the tribe's sovereignty.

The most recent reapportionment is still not equitable and there is no end in sight. I really did not think a thing like this could happen in

the United States, NOT BY OUR GOVERNMENT!

Our property has effect been taken away from us, property that we bought in good faith and according to the law. We have both worked hard all our lives and now approaching retirement and all our efforts are in ruin.

By the action of the resurvey the BLM has allotted approximately a 35% increase in the amount of river frontage allocated to Section 10, belonging to the Fort Mojave Indian Tribe, while simultaneously increasing the amount of frontage allocated to Section 15, belonging to myself, my wife and other private citizens, by only 1%. If that reflects the most equitable apportionment possible, then the Department of Interior and the Bureau of Land Management have a gross misunderstanding of the concept of "equity" or they both have patent disregard for the citizens of this country, or perhaps they just do not understand the circumstances involved!!

I would appreciate your attention to the above and any action your office could recommend. Also, if you could make the President aware of our circumstances, he may be able to suggest other appropriate action to be taken.

Thank you.

Sincerely,

/s/ Gordon D. Gilbertson
Mr. Gordon D. Gilbertson

/s/ Naomi S. Gilbertson
Mrs. Naomi S. Gilbertson

GDG/ms
cc: Citizens for Equal Rights Alliance
File
Map Enclosed

(This letter has been retyped from a difficult to read fax copy which Mr. & Mrs. Gilbertson sent to me. The fax copy is on file in the Citizens Equal Rights office and available upon request. The copy of the map is difficult to read, but am sure the Gilbertson's would be happy to furnish you a better one, if you need it.)

T. 17 N., R. 22 W., Gila and Salt River Mer., Az.
ACCRETIONS FRONTING ON SECS. 10 & 15

PATTY MURRAY
WASHINGTON

COMMITTEES:
APPROPRIATIONS
BANKING, HOUSING, AND URBAN AFFAIRS
BUDGET
SELECT COMMITTEE ON ETHICS
VETERANS

United States Senate
WASHINGTON, DC 20510–4704

July 23, 1996

Mr. William Bonnar
4448 Moresley Way
Ferndale, Washington 98248

Dear Mr. Bonnar:

Thank you for contacting me with your support for Section 329 of H.R. 3662, the fiscal year 1997 Interior appropriations bill. It was good to hear your views on this important issue.

As you know, Section 329 would have subjected all governmental decisions of Indian tribes to the civil jurisdiction of state courts and waived the sovereign immunity of Indian tribal governments. Non-Indian property owners on Indian reservations have expressed legitimate concerns to me on various issues, and I understand the dynamic problems involved. However, I joined with several concerned colleagues, both Democrats and Republicans, to remove Section 329 from the appropriations bill for a number of reasons.

First, I oppose creating controversial and far-reaching shifts in public policy by attaching legislative riders to appropriations bills. Policy decisions should remain with the authorizing committee, in this case the Senate Indian Affairs Committee, in order that hearings may be held on the relevant issues surrounding a decision. Second, due to the breadth of Section 329, nearly all tribal government actions would be subject to the jurisdiction of state courts. I do not believe we should solve the problems of non-Indian property owners by stripping the rights of tribal governments.

While we disagree on this issue, it is always important for me to understand the concerns of my constituents. If you have further concerns on this or any other issue, please do not hesitate to let me know.

Sincerely,

Patty Murray

Patty Murray
United States Senator

PM/bk

PRINTED ON RECYCLED PAPER
Internet: senator_murray@murray.senate.gov
World Wide Web: http://www.senate.gov/~murray/

PATTY MURRAY
WASHINGTON

COMMITTEES:
APPROPRIATIONS
BANKING, HOUSING, AND URBAN AFFAIRS
BUDGET

United States Senate
WASHINGTON, DC 20510-4704

September 28, 1995

Ms. Audrey Bonnar
4448 Moresley Way
Ferndale, Washington 98248

Dear Ms. Bonnar:

I appreciate you letting me know of your concern about the appropriations bill for the Department of the Interior (H.R. 1977). It was good to hear from you.

As you are aware, there has been cutbacks proposed in many areas during the FY 96 interior appropriations process. Although it has always been my priority to see the Bureau of Indian Affair's programs fairly and adequately funded, the most drastic cuts are currently aimed at the B.I.A. I want you to know I am opposed to these cuts and supported Sen. Domenici's (R-NM) attempts to restore funding to the Bureau. If this bill is passed as written, many of the tribes and programs on the reservations of Washington State will suffer greatly.

Section 115 of this bill directly effects Tribal Priority Allocations which represent an important shift in federal Indian Policy. In addition to recognizing the reduction in Bureaucracy and red tape that self-governance allows and the shifting of decision-making from the federal to the local level, the TPA funds also represent a fundamental recognition of tribal sovereignty. Section 115 of H.R. 1977 will force undo strain on the tenuous self-governance agreement between the tribes of Washington State and the United States federal government.

Be assured, I take the U.S. Government's trust responsibility to Native Americans very seriously. I recognize the government-to-government relationship between the federal government and sovereign tribes and trust responsibilities that emanate from our treaties with the Indian Nations. As a member of the Senate Appropriations Interior Subcommittee, I will fight hard in support of full funding for Indian programs, especially health, education, and protection of natural resources.

Again, thank you for keeping in touch with me.

Sincerely,

Patty Murray

Patty Murray
United States Senator

PM/mos

PRINTED ON RECYCLED PAPER

September 6, 1996

Diane Feinstein
United States Senate
331 Hart Senate Office Building
Washington D.C. 20510

Dear Mrs. Feinstein,

I am writing in regards to tribal sovereign immunity that has been granted on Indian reservations within our nation. I understand the issue was raised before the Senate early this summer in debate over the Interior Department Appropriations Bill. The clause introduced by Senator Gorton of Washington proposed the repeal of tribal sovereign immunity to tribes as it inadvertently affects the rights of non-tribal members. The clause was removed from the bill providing the issue will be addressed at a hearing of the Senate Indian Affairs Committee scheduled in late September.

I'd like to share with you my experience dealing with the matter of tribal sovereign immunity and the negative impact it has had on myself and virtually all those who reside in my community. A brief history of our situation goes back to the early 1940's when the U.S. Fish and Wildlife Department offered leases under the provisions of the Public Lands Act, now known as the Small Tracts Act to individuals consenting to build homes on the remote and barely accessible shore of the newly inundated Lake Havasu. Through a mutual, neighborly effort a seventeen mile road was graded by the residents from the main highway and utility service to the homes was installed providing a foundation for our community, Havasu Lake, California.

Our troubles began in 1974 when the acting Secretary Of Interior illegally gave our community to the Chemehuevi Indian Tribe thus creating a reservation. The Government promptly constructed housing adjacent to our town and the Tribe moved in with the intent to exercise their newly acquired control over the area. Due to local protests and the threat of legal action the Government engaged in a behind-closed-doors settlement extending the property rights on the condition that the homeowners relinquish their right to challenge the validity of the land transfer.

The extension expired in 1990 and our new landlords (the Indians) immediately increased our rent over one thousand percent in a "Month-To-Month Revokable Permit". Sadly, many of our senior citizens were unable to bear this financial and emotional burden forcing them to abandon their homes. Others are facing virtual homelessness at the news we are soon to be ejected (with the blessing of the Federal Government) so they can rent out our homes as a part of a casino resort. Both the Government and the Tribe have refused to compensate us for our dwellings and interest in the property.

After getting the deaf-ear in several negotiation attempts with the Tribe and the Department of Interior, in 1992, we filed suit against the Secretary of Interior to correct the jurisdictional switch from Public Lands to Reservation. Our case is supported by research covering over 100 years of history proving the transfer and subsequent arrangements are illegal and unconstitutional.

Without a hearing or consideration to factual merits of the case, Judge Terry Hatter in the Ninth Circuit Federal Court, dismissed it in favor of tribal sovereign immunity. The dismissal was upheld on appeal. In utter dismay and frustration we even petitioned the court for a re-hearing because the dismissal contradicts decisions in similar actions nationwide. The petition was denied.

Since then, the Tribe with the cooperation of the San Bernardino County Sheriff's Office have served a 24 hour Notice of Trespass, independent of a court order, to one of the occupant groups in the shoreline area forcing them to remove their property from the premises. A locked chain was installed across their access road and a tractor trench was dug to make re-entry impossible. The Tribe has vowed to follow up with the same type of action against all the remaining residents of the area. Consider, please, whether justice has been served or am I describing a situation of blatant tyranny?

Our entire community is in jeopardy of being lost due to the insistence of the Federal Government to uphold sovereign immunity, which was designed as a convenience to avoid litigation in instances where they would prefer there be no challenge. The end result in our case will be the repeal of our private property lease interest constituting a "taking" without just compensation.

It's preposterous to me that the Federal Government empowers a group of special interest to confiscate our property through the denial of due process especially when there were relatively simple solutions available such as, excluding the non-Indian occupied Riparian Zone from reservation status or reasonable compensation for our interest in the land and our improvements.

As we sit in the eleventh hour ticking toward eviction, I urge you to exercise your leadership appropriately and vote for the reinstatement of the paragraph waiving sovereign immunity to tribes violating the property rights of non-tribal members. I trust you will support, as I do, Senator Gorton's valiant proposal to defend justice for all.

Sincerely,

Jeri Wendt

Mrs. Jeri Wendt

Mailing address: 21181 Breton Ln.,
Huntington Beach, Ca. 92646
Telephone: (714) 960-7065
FAX: (714) 969-6871

cc: Citizens Equal Rights Alliance
Lana Marcussen, Attorney
Fellow homeowners

1000 Dike Road
Mohave Valley, Az. 86440
August 9,1996

C.E.R.A
James L. Mitchell
3319 Highway 485
Jemez Pueblo, N.M. 87024

Dear Jim:

I submit for your consideration, a fourteen year ordeal that has, due to the sovereign immunity of the Mohave Indian tribe and the shrewd connivance of the Bureau of Land Management, reduced a formerly valuable piece of property to a non-resolved, and dead-end limbo. This is a case where the sovereign immunity issue has been utilized not by the Indians, but in their behalf by the B.L.M. for reasons known only to the bureau. The litigation during the first ten years of this travesty upheld my claims in every hearing . Further challenges to my title would have to be heard in a Federal court where the matter could be resolved. Faced with a certain end to this "litigated land-grab," the B.L.M. used "creative surveying" that ignored the directions of the Office of Hearing Appeals and allowed them to freeze the matter indefinitely. In support of the above statements I have enclosed a copy of the map displaying the Bureau of Reclamation mapped 1947 shoreline, previous to, and after dredging, and that of 1962, 1982, and 1991. When the O.H.A. directed a proper survey to be done that included a line of 90 degrees to the river shoreline before it was channeled, the B.L.M. delivered one that included a line of 77 degrees to the pre-channeled river shoreline.

I have also enclosed copies of my letters to Senators John McCain and Dennis DeConcini and Representative Bob Stump, asking for relief in this matter, and their letters of response. In each instance, they referred my complaints to the B.L.M. and were assured in return that the survey was correct but omitted to mention that the shoreline used for B.L.M. survey was not the one directed to be used by the O.H.A.

The impasse unfortunately, is that a tribal claim to the property, originating from the B.L.M. survey, would necessitate a court order to enforce the O.H.A. decision and take possession. However the last three years or more have seen no such action from either the B.L.M. or the Indians even though they have been approached by the title company to do so. All parties realize that such action would bring the matter to the jurisdiction of a Federal court where it would be resolved and previous litigation examined. If this were a civil based case, I or my Title company would be able to sue for relief in the courts. Though neither the Mojave Tribe nor the B.L.M. can take possession of clear title, utilizing the tribal sovereign immunity has been a clever way to keep me from clearing the title either.

Sincerely,

Milo W. Nelson

Milo W. Nelson

Mr. and Mrs Milo W. Nelson
1000 Dyke Road
Mohave Valley, Arizona 86440
August 25, 1994

The Honorable John McCain
U.S. House of Representatives
Washington, D.C., 20515

Mr. Congressman:

My wife and I need your help in resolving a problem that has plagued our retirement years with worry and stress. In 1975, my spouse and I purchased a piece of property in Arizona, with the intention of building a home for our impending retirement. The parcel we purchased had 150 feet of river frontage located on the Colorado River. At the time we purchased the property there was a brass cap 50 feet from our property line. The brass cap was stamped as a B.L.M. Cadastral survey marker, dated 1962 and indicated that this was the boundary between section 10 and section 15, with our property being in section 15. Assured by the presence of the marker, and by the title insurance policy rendered to the title by the 1st American Title Insurance Company, we believed ourselves the owners of this parcel of land. We began to develop our land, using savings and our earnings to build without mortgage, until we moved into our riverfront home and made it our residence in 1978. The nearby growth in Laughlin, Nevada, Lake Havasu City, Arizona and Bullhead City, Arizona contributed to the rapid growth in the value of this property, although we had and have no intention of speculating. Wishing simply to live out our retirement in peace in our hard-earned and mortgage free retirement riverfront home, we were soon the object of "Hindsight Litigation."

In 1982, the B.L.M. re-surveyed and moved their original cadastral boundary marker about 1500 feet into what had been section 15. We found out about the boundary movement quite by accident, and hired a law firm to push 1st American Title Insurance into a defending action of the title we held. 1st American Title Insurance appealed, and the case went before the Interior Board of Land Appeals, (I.B.L.A.). In brief, after deciding that the Mojave Indian tribe should also be involved, the I.B.L.A. sent the case to an Administrative Law Judge, and the decision was that we had "Bona-Fide

Rights" and the boundary should be moved back to its original 1962 location. The case was appealed by the B.L.M. and by the Mojave Indian tribe three subsequent times to the I.B.L.A. and three times the B.L.M. was instructed to return the marker to its original 1962 location or to use a surveying method that was not beneficial to the B.L.M's position. Finally, the B.L.M. appealed to the Secretary of the Interior to intervene. The intervention referred the case to the Office of Hearing Appeals with the result that although the surveying method decreed was acceptable to B.L.M. goals, the court decreed starting point, called zero accretion point would not result in a decision favorable to the B.L.M. Ignoring the court decreed starting point, and using the survey method that was now allowed to them, the B.L.M. once again found a satisfactory solution, although totally wrong by the decrees of the court. If this case were to be further litigated, it could only be so litigated in the Judicial system, in that a fair and impartial survey can only be done by parties not involved in the acquisition of land for the government or involved as a protectorate of the Indian Nations. Notified by 1st American Title that we and the other property owners who would be affected by this case would not accept the flagrant misinterpretation of the court ruling, the B.L.M., has refused to take further action, since any action would open the litigation in the Judicial system. The following paragraphs more fully illustrate the salient points of argued survey methods and points of survey.

- ***1st Hearing*** **B.L.M. argued that the wrong method of survey had been used in 1962, and wished to use a 90 degree method of survey The I.B.L.A. (The Interior Board of Land Appeals) court decreed that the original proportionate method of survey that all accretion titles had been settled upon was to be used and not the 90 degree method, ordered that the boundary be moved back to its original 1962 position and that the Mojave Indians must be involved in the survey and remanded the case to an Administrative Law Judge to referee.**

- ***2nd Hearing*** **The Administrative Law Judge, in the second hearing on this matter, ordered the boundary marker returned to its original 1962 position, affirmed that the original proportionate method of survey be used, and affirmed further that we had "Bona-Fide Rights."**

- ***3rd Hearing*** **The B.L.M. appealed this decision to the I.B.L.A, joined as per court ruling by the Mojave Indian Tribe. I.B.L.A. made the decision to use the original method of survey but stated**

that "Bona-Fide Rights" did not exist for our property even though large sections of existing titles would be in jeopardy from this action. The B.L.M. re-surveyed, interpreting the decreed method in a manner open to criticism, and moved the line from where it was in 1962 by 14 feet into what should be Section 15. The B.L.M. felt that even the incorrect survey point used did not provide satisfaction and soon appealed the ruling to the Secretary of the Interior to intervene.

- ***4th Hearing*** **By the request of the Secretary of Interior for intervention, the case was taken over by the O.H.A. The decision of O.H.A. was that the previously ruled proportionate method could not be used because there was no zero accretion point. Therefore they now ruled that the 90 degree method requested by the B.L.M. must be used, with the exception that the 90 degree surveyed point should be taken from the pre-channeled river. Stating that the present river channel must not be used in conjunction with the 90 degree method of survey, the O.H.A. failed to provide for a review of the re-survey it mandated and ordered the re-survey .**

- ***Results of 4th Hearing and Present status*** **The B.L.M. re-surveyed, using the survey method they had finally gained legal ruling on, but ignoring completely the stipulation that such survey method be used in conjunction with a pre-channel river survey such as the one made by the Bureau of Reclamation prior to channeling and presented to the court and the B.L.M. by 1st American Title Insurance in the 4th hearing. Without a pre-arranged court review of the mandated resurvey, the B.L.M. used the present channel, which suited its aims, and placed the marker approximately 460 feet inside the old section 15 boundaries, thereby placing two other land owners adjacent to my property within the boundaries of Indian land. Claiming vindication of its claims, the B.L.M. has made no attempt at acquisition since the resurvey knowing that such an attempt would be a valid opening for the case to be heard in the Judicial instead of the Executive legal branches and that the case would be settled by impartial surveyors and mediators not involved in land acquisition.**

We are senior citizens. I am now 73, and my wife is 70 years of age, and we have been retired for several years. Since the beginning of the above litigation, beginning with the movement of the boundary marker by the B.L.M. in 1982, our lives have been in a constant state of panic and fright. We feel that in our senior years that the government we both have served in two wars, supported in peace and loved all our lives has become an uncaring and callous juggernaut that threatens almost daily to strip us of most of our very hard earned retirement. Although the title policy by 1st American Title Insurance insures the original amount of $33,000.00 that we paid for the land in 1978, the rest of the property and structures were not insured against title litigation, only disasters of nature and accident as normal. Wishing our retirement home to be lien free we have invested an additional $59,000.00 in the home, and $17,000.00 in a well and other appurtenances. The additional $76,000.00 came from retirement savings and wages before we retired and as it is lien free, it has no Bank or Financial Institution to guarantee its loss. If there were any foundation, verity or legal basis in the arguments of the B.L.M., we believe that the hearings in those courts familiar with the B.L.M. as a primary litigant would have ruled in either their favor or that of the Mojave Indian tribe. We have sunk an amount of almost $76,000.00 from savings that we could ill have afforded from our retirement except for the development of this property and home, besides the original amount for the property. A very basis for title litigation in this area can be found in the current property values. Averages from current sales in this area quote a price of almost $3000.00 per front foot for river frontage. This means that the land value is nearly $450,000.00; the 2800 square foot home at a bargain $70.00 per foot has a value of $196,000.00; and the well, retaining wall, landscaping and other structures valued at a replacement expense of $25,000.00 bring the marketable value to $671,000.00. We had no wish when we decided to build for retirement in speculating on property and had no clue that property values would reach their present amounts, but we can certainly understand how such appreciation in value could tempt any number of "Hindsight Litigators." If we had been speculators we would not have attempted to become lien free, but would have provided ourselves the assurance of mortgage and the mutual interest of a large Bank or Institution. Such would have protected us against an action such as that brought by the B.L.M. If the savings of other retired people of senior age in the recent Savings and Loan Scandal were important enough for Congress to investigate and guarantee, we feel that this situation is no less a scandal and requires investigation and swift settlement.

Please investigate this matter and do whatever you can to bring this litigation to a swift and just ending that would preclude future attempts at litigation, so that my wife and I can enjoy the few remaining years of our retirement in peace.

Respectfully yours,

Milo W. Nelson

Milo W. Nelson

c/o The Honorable Dennis DeConcini

cc: The Honorable John McCain
Washington, D.C.
The Honorable Bob Stump
Washington, D.C.
Citizens for Equal Rights Alliance
Santa Fe, N.M.
Mr. John Atkins
Farmington, N.M.

S 49° 43' W (Skinner's 1962 Partition Line)
ABRAMS
12.2 ACRES
55 FEET FRONTAGE
S 43° 29' W
1993 BLM PAR
ABRAMS
22.1 ACRES
S 21° W (Myer's 1962 Partition Line)
BERMUDA PLANTATIONS
INDIAN RESERVATION LAND PER BLM's REVISED 1991 PARTITION LINE 15.7 ACRES
PORTION OF THE "TRIANGLE" EXCLUDED FROM THE INDIAN RESERVATION IN 1991 11.1 ACRES
1947 SHORELINE BEFORE DREDGING
1947 SHORELINE AFTER DREDGING
1962, 1981 & 1991 SHORELINE

JOHN McCAIN
ARIZONA

COMMITTEE ON ARMED SERVICES
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
COMMITTEE ON GOVERNMENTAL AFFAIRS
COMMITTEE ON INDIAN AFFAIRS
SPECIAL COMMITTEE ON AGING

United States Senate

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WASHINGTON, DC 20510-0303
(202) 224-2235

1638 SOUTH ALMA SCHOOL ROAD
SUITE 375
MESA, AZ 85210
(602) 491-4300

2400 EAST ARIZONA
BILTMORE CIRCLE
SUITE 1150
PHOENIX, AZ 85016
(602) 952-2410

450 WEST PASEO REDONDO
SUITE 200
TUCSON, AZ 85701
(602) 670-6334

TELEPHONE FOR HEARING IMPAIRED
(202) 224-7133
(602) 952-0170

September 12, 1994

Milo W. Nelson
1000 Dyke Road
Mohave Valley, Arizona 86440

Dear Milo:

Thank you for contacting my Phoenix office. I understand you have encountered a problem with the impact of a BLM resurvey on your property.

In an effort to be of assistance, I have contacted the Bureau of Land Management. As soon as I receive an answer to my inquiry, I will recontact you.

Again, Milo, I wish to thank you for presenting me with this opportunity to be of service to you. I will make every effort to help you with this situation.

Sincerely,

John McCain
United States Senator

JM/xka

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JOHN McCAIN
ARIZONA
COMMITTEE ON ARMED SERVICES
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
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111 RUSSELL SENATE OFFICE BUILDING
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(202) 224-2235

1839 SOUTH ALMA SCHOOL ROAD
SUITE 376
MESA, AZ 85210
(602) 461-4300

2400 EAST ARIZONA
BILTMORE CIRCLE
SUITE 1160
PHOENIX, AZ 85016
(602) 952-2410

450 WEST PASEO REDONDO
SUITE 200
TUCSON, AZ 85701
(602) 670-6334

TELEPHONE FOR HEARING IMPAIRED
(202) 224-7132
(602) 952-0170

October 31, 1994

Milo W. Nelson
1000 Dyke Road
Mohave Valley, Arizona 86440

Dear Milo:

In response to my latest inquiry on your behalf, enclosed you will find the letter that I have received from the Bureau of Land Management.

After reading the letter over, I think that you will find it to be self-explanatory. Should you have any further questions regarding this situation, please do not hesitate to contact my office.

Thank you for giving me the opportunity to be of assistance to you.

Sincerely,

John McCain
United States Senator

JM/xka
Enclosure

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DENNIS DeCONCINI
ARIZONA

CHAIRMAN
SELECT COMMITTEE ON INTELLIGENCE

COMMISSION ON SECURITY AND COOPERATION IN EUROPE

COMMITTEES
APPROPRIATIONS
JUDICIARY
VETERANS' AFFAIRS
INDIAN AFFAIRS
RULES AND ADMINISTRATION

United States Senate

WASHINGTON, DC 20510-0302

PLEASE DIRECT YOUR RESPONSE TO:
☐ WASHINGTON OFFICE
☐ PHOENIX OFFICE
☐ TUCSON OFFICE
☐ MESA OFFICE

September 6, 1994

Mr. and Mrs. Milo W. Nelson
1000 Dyke Road
Mohave Valley, Arizona 86440

Dear Mr. and Mrs. Nelson:

Thank you for contacting Senator DeConcini regarding your problems with the Bureau of Land Management. The Senator has requested that I respond to your letter.

I have forwarded the information that you sent to the Senator to BLM. I expect to here from them in approximately 4 weeks.

Again, thank you for contacting Senator DeConcini. If you have any questions or more information, please do not hesitate to contact me at the address below.

Sincerely,

CRAIG S. MILLER
Special Assistant
Office of Dennis DeConcini
323 West Roosevelt, C-100
Phoenix, Arizona 85003

CM

WASHINGTON OFFICE
328 HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510-0303
(202) 224-4521

PHOENIX OFFICE
323 WEST ROOSEVELT, #C-100
PHOENIX, AZ 85003
(602) 379-6756

SOUTHERN ARIZONA OFFICE
3730 EAST BROADWAY, SUITE 106
TUCSON, AZ 85716-5340
(602) 670-6831

EAST VALLEY OFFICE
40 NORTH CENTER STREET, #110
MESA, AZ 85201
(602) 379-4556

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BOB STUMP
3D DISTRICT, ARIZONA

211 CANNON BUILDING
WASHINGTON, DC 20515-0303
(202) 225-4576

DISTRICT OFFICE
230 N. FIRST AVENUE
2001 FEDERAL BUILDING
PHOENIX, AZ 85025
(602) 379-8923

Congress of the United States
House of Representatives
Washington, DC 20515-0303

ARMED SERVICES COMMITTEE
SUBCOMMITTEE ON RESEARCH AND TECHNOLOGY
RANKING MINORITY MEMBER
SUBCOMMITTEE ON MILITARY INSTALLATIONS AND FACILITIES

VETERANS' AFFAIRS COMMITTEE
RANKING MINORITY MEMBER
SUBCOMMITTEE ON HOSPITALS AND HEALTH CARE
SUBCOMMITTEE ON EDUCATION, TRAINING AND EMPLOYMENT

November 15, 1994

Mr. and Mrs. Milo W. Nelson
1000 Dyke Road
Mohave Valley, Arizona 86440

Dear Mr. and Mrs. Nelson:

Thank you for your letter regarding the troubles you are having with your land on the Colorado River. Please accept my apologies for not acknowledging your letter sooner.

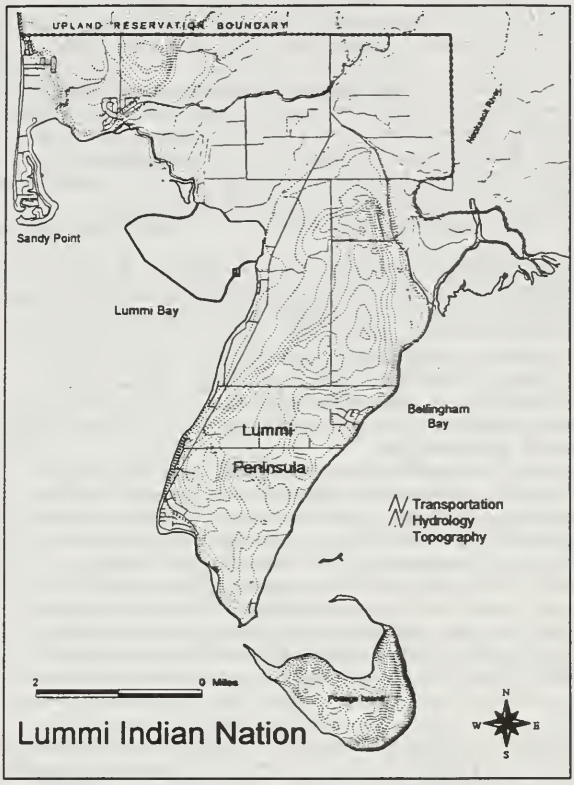
While I have received documents for the Bureau of Land Management to review, there is additional information that I am attempting to secure. Please be assured that I will keep you informed of further developments.

If you have any additional concerns, please do not hesitate to contact me. Again, my apologies for the delay in contacting you.

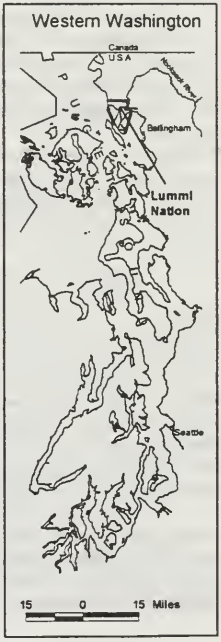
Sincerely,

BOB STUMP
Member of Congress

BS:mw



Lummi Nation Response to Testimony of Marlene Dawson before the U.S. Senate Committee on Indian Affairs, September 24, 1996.



Lummi Indian Business Council
2616 Kwina Road
Bellingham, WA 98226

November 8, 1996.

A. WATER RIGHTS

Background

* The Lummi Nation has been in active federal negotiations with the State of Washington over reservation groundwater since July, 1995. We had been requesting negotiations from the Dept. of the Interior since 1993. Because the state requested that we quantify our reserved right we have demonstrated a commitment to negotiate rather than to litigate this issue. During this time, Marlene Dawson and her associates in reservation water associations filed petitions for a general stream adjudication and drilled new wells on the reservation in an attempt to provoke confrontations. We firmly believe that a negotiated solution is preferable to a lengthy and costly litigation.

* A 23-year moratorium on approval of tribal water codes by the Department of the Interior has prevented the tribe from protecting groundwater trust resources from damage resulting from excessive withdrawals by non-Indian water associations operating under state permits. In addition, individual small-group domestic wells using less than 5000 gallons per day are allowed by the state to operate under an exemption from permitting and groundwater evaluation, and have proliferated along reservation shorelines. Over several decades, reservation groundwater in one aquifer has experienced salt water intrusion, and mining of the water table to below sea level in the other aquifer under state permitted withdrawals. Reservation non-Indians living on less than 4% of the land account for 75% of domestic groundwater use.

* In 1990, the tribe offered to provide sufficient water to meet the contractual obligations of all of the water associations in order to resolve conflicts with water associations and to protect the aquifer. (A copy of the contract signed with one of these associations is included as attachment #1 so that the committee may judge for itself whether it is fair to all concerned.) Unfortunately, these offers were refused by all but two of the associations. The non-Indian users within the associations who do have contracts with the tribe have had no complaints. The Lummi Nation's attempts to negotiate with the other seven associations, to provide them with water and manage the groundwater protectively as a unitary resource, were rejected, even though some are without permits to cover their need. After the other associations refused, the state declared its intent to continue to allow increased withdrawals until the tribe quantified its senior right. In response to the state's demand, the Lummi government began its efforts to initiate federal negotiations over reserved water rights.

* The City of Bellingham line was built in 1990 by the Indian Health Service for a tribal water supply after state users polluted the groundwater with salt water intrusion in one aquifer. In the other aquifer, the Sandy Point association drew the water table down by more than 40 feet. It was concluded that a future supply for tribal members would have to come from off-reservation sources because there was minimal potable water left. This conclusion has been confirmed by state, federal, and tribal experts in the water negotiations. The purchased Bellingham water is used only to supplement tribal supply wells, as the water source is the Nooksack River where salmon are affected and the cost is extremely high. Reservation non-Indians utilize the groundwater at no cost with little or no protection by the state while the tribal system customers are forced to absorb the cost of imported water at the cost of other federally reserved rights.

* Since at least 1988 Sandy Point has been refusing water service to Indian landowners who live along Sandy Point's service lines and who have no other source. Sandy Point claims they need the water for their members, although other non-Indians outside the Sandy Point plats have been served. The IHS has refused to fund a water line for tribal members in the area since it will duplicate an existing system, despite Sandy Point's refusal to serve Indian people.

* Attempts to limit our sovereignty and sovereign immunity in particular would force us to litigation to protect our senior reserved water right, which would be far more costly to all parties, including the federal government, the state, the tribe, the non-Indian landowners, and the entire County, which would be affected by our claims on the Nooksack River. We prefer a negotiated settlement that can benefit all parties.

1. "....sabotaging non-Indian water aquifers...." and "....depleting our water to dangerous levels...."

These allegations are fabrications created by those who created the "crisis" as an excuse to attack the tribe politically. The "crisis" was the result of improper pumping by the Sandy Point Improvement Company. When the "crisis" happened, we met with Sandy Point in Congressman Jack Metcalf's office. A BIA hydrologist report of that meeting (attachment #2) documents that Sandy Point had been pumping at very high rates for only part of the day, in effect "shocking the aquifer." When they agreed to our suggestion that they pump for longer periods at lower rates, the well recovered.

High volumes were withdrawn from the Sandy Point well during the unseasonably hot and dry weeks before Memorial day, and the high demand for a holiday weekend was clearly a factor. The Lummi Nation had warned the state during the 1993 permit review that establishing an annual allocation without regard to seasonal extremes and peak demand periods would lead to aquifer damage. Our comments were ignored.

Lummi professional staff monitors the well closely, and the monitoring records which we have provided to the State and Sandy Point show that these accusations are false. While Sandy Point has state-and-county-permitted new home construction underway, we have been forced to cut back our hatchery program to protect the aquifer, which is on the Lummi Reservation and therefore is not a "non-Indian aquifer." We have worked with Sandy Point to prevent adverse health and safety impacts, and there have been none.

The second well drilled under a Lummi Nation permit on tribally-owned land near a non-tribal well is on a main thoroughfare of the reservation, near an existing well and well-house. Close monitoring by Lummi staff is used to adjust the pumping rate at the earliest sign of a water table decline. No water table declines or impacts to the nearby non-tribal well have occurred.

2. "..drilling commercial wells 100' from the association's wells....drilling of a well which included installation of a large storage tank and pump house surrounded with a chain link fence and razor wire....."

This well is one of the two wells referred to in statement 1 above, as the statements refer to the same event. The wells are not "commercial;" one is a public supply well and one is a salmon hatchery well with several domestic connections. They were permitted on tribally-owned land by the Lummi Water Resources Department under senior reserved rights to water. This tribal hatchery well at Sandy Point was drilled before the Sandy Point Improvement Co. received a state permit for their well. Indian owned lands on a reservation are not subject to county or state civil regulatory jurisdiction regardless of whether they are in fee or trust status. Moe v. Confederated Salish & Kootenai Tribe, 426 U.S. 463. They are still part of the reservation and subject to exclusive tribal jurisdiction.

The Lummi salmon hatchery well at Sandy Point was drilled in the only productive aquifer available, an area that is very limited in geographic extent. No other source was available. The Lummi and Sandy Point wells are 1 mile from the majority of Sandy Point homes, but less than 100 feet from large acreages of Lummi trust property that has not yet been developed. Drilling the

well on adjacent tracts of trust land was impossible because the undivided parcel has over 250 owners and was tied up in probate. This realty problem is a common one for Indian-owned land, and not only prevents Indian development, but in this case the tribe itself could not purchase the land to drill a well for its hatchery needs.

Sandy Point Improvement Company built an 1100-lot subdivision (773 now developed) and irrigated a golf course with reservation groundwater for 22 years before receiving a state water right permit. The Lummi well was a permitted well under a senior water right. Sandy Point has two wells that are closer to each other than to the Lummi hatchery well. For years they pumped both wells illegally at high volumes, and have applied to the State to permit withdrawals from their second well far greater than those the Lummis are taking from a well farther away. The wells are in keeping with existing land use at the nearby Sandy Point well: which includes a utility shed, two pump houses, a chain link fence with barbed wire, and two nearby storage tanks, one of which is twice the size of the Lummi storage tank.

The Lummi Nation issued public notices when drilling commenced stating that existing domestic water uses of non-members would be protected. Accordingly, we have worked with Sandy Point to avoid problems in water supply for their customers.

3. "....bad faith negotiations with the City of Bellingham...in purchasing off reservation water."

The Tribe made it very clear to the City that it was seeking water for a portion of its own needs. The City made no attempt to require the tribe to serve non-members. The City's only concern was that if the tribe decided to serve non-members, they would be charged the same rate as members. The tribal code and the tribal constitution already guaranteed equal treatment and non-members have been charged the same rates as tribal members. The tribe does have a subsidy program for its low income elders, but funds for that do not come from the water system revenues. In addition, both the Water and Sewer Districts are subsidized by the tribe. Verbatim transcripts of the City Council negotiation sessions are available if there is any question about what was promised.

4. "....non-Indians are now being denied access to this off-Reservation water" and "...denying public waters..." (from oral testimony).

The Lummi Water District has a number of non-Indian customers and provides new service to non-Indians under contracts with the two water associations that the tribe took over in 1990. They receive equal service and treatment and their rates are the same as tribal members. The majority of water in our public supply system comes from reservation groundwater sources. Because of the high cost and fish habitat issues, Bellingham water is used sparingly as needed to protect the aquifer. There is no way to separate on-reservation from off-reservation water, and increases in use of Bellingham water result in additional cost for all our customers.

This water is not "public water" but is purchased by the tribe under a contract. Until the tribe has resolved its reserved water right, we can't obligate it to non-Treaty users other than those with whom we have contracts. It is not prudent water management to allocate water to new development without assurance that it will be there in the future.

5. "...threaten well drillers with confiscation of their equipment...."

The federally approved Lummi code of laws does have provisions for impoundment of objects used in violation of the code. There are full due process protections, including a speedy hearing in court. The lack of a Water Code approval by the BIA since 1974 has prevented the tribe from protecting the groundwater, and most of the damage has occurred since 1974.

No well drilling equipment has been confiscated. In the absence of federal support to regulate and protect the groundwater, the tribe has tried to discourage well drilling in order to protect the aquifer from further damage, but has never made an attempt to physically stop a well from being drilled.

The State has allowed wells to be drilled indiscriminately and without regard to the groundwater damage. For example, one non-Indian drilled a well in a known area of naturally-occurring saltwater. Because we were concerned about the potential for adversely affecting nearby uncontaminated groundwater, the Lummi law officers accompanied our staff groundwater geologist on-site to warn the landowner the water was saline, to no avail. We commenced legal action, but voluntarily dismissed the action after it became clear that the well would not be usable. After spending $10,000 on the saline well, the man was forced to abandon it.

Another well was drilled by non-Indians after county law officers created a confrontational situation at the well site. The county officers refused to honor a tribal court order and threatened to arrest tribal officers if they entered the property to serve the papers. Eventually the tribe elected to drop the lawsuit in favor of addressing the problem in water negotiations. The well resulted in elevated salinity in a nearby Lummi public supply well 3 weeks after it was put into operation.

6. "Residents feel it unjust they are required to pay stand by fees for an available sewer connection, but can't receive it's *(sic)* compliment *(sic)* the water."

As stated above, we have offered to take over the contractual obligations of the water associations and to provide water service. Those offers have been refused, with two exceptions. The availability of sewer service does not guarantee water service, on the reservation or anywhere else.

Two appeals have been filed in tribal court based on nonprovision of water service. Ms. Dawson acted as an advisor to the appellants and she had a full opportunity to prove all of the allegations she is now making regarding water service. She failed to do so. In one of the cases the lot involved is in a water association that refused the tribal takeover offer. The association was allowed by the state and the county to continue to add connections even after a 1974 U.S. Geological Survey report documented incipient salt water intrusion in its wells. By the mid-1980s the wells recorded salt intrusion that exceeded the Safe Drinking Water Act standard by three times, and in 1990 the state finally required the association to stop all new hookups. For this reason the water association cannot provide water service to the property. The appellant wanted the tribe to extend a tribal line to her property. The second lot is not within any water association area but is in an area now affected by salt water intrusion from excessive withdrawals by state-permitted non-tribal water associations.

7. "...a tribal member recently told me members will also be denied water unless they sign a contract stating they will never sell their land to non-Indians."

The Tribe has no such policy.

8."Residents have even been threaten *(sic)* with litigation should we try to bring off-reservation water in from the city of Ferndale."

The water from the City of Ferndale is withdrawn from the Nooksack River, the flows of which do not meet state-mandated minimum flows for two-thirds of the year. The Lummi Nation has senior reserved water rights for instream flows in the Nooksack River for purposes of the reservation, for fish habitat, and for other inherent and reserved rights. In addition, more than 500 farmers in Whatcom County are withdrawing surface and groundwater without state permits. We

oppose further depletion of this vital resource, but have been leaders in trying to resolve these issues through negotiation, not litigation. The Nooksack Indian tribe and the State of Washington joined the Lummi Nation in 1993 to request federal water rights negotiations from the Department of Interior. In 1995 a federal negotiating team was appointed to address the groundwater issues on the Lummi Reservation, and it is anticipated that these talks will be followed by negotiations over the waters of the Nooksack Basin.

The issues are very complex, and all parties have agreed that they wish to resolve the problem through negotiation rather than litigation. The delay in basin negotiations has resulted in uncertainty over water rights in the county. Also, the water the Sandy Point Improvement Company wishes to import for future growth is covered by a water right junior to those of the tribes and a number of state users. The Lummi Nation has said that importation of what may be part of our reserved water right in advance of the resolution of water rights and jurisdiction conflicts could precipitate litigation that we would like to avoid. To commit limited water supplies to future growth, while unpermitted farmers and other existing users live with uncertainty, may preclude negotiated solutions necessary to avoid disruption of the local economy.

Contrary to her assertion here, Ms. Dawson has been the one advocating litigation. She has been a leader in the groups urging the state to sue the tribes and every water user in the Nooksack Basin in a time-and-money-consuming general adjudication of rights. Her position on this issue is clearly in the interest of the Sandy Point board on which she sits, and not in the interest of the citizens that she represents on the County Council. The County Council has passed a resolution in favor of negotiation over litigation. The Public Utility District that serves the City of Ferndale has voted not to serve Sandy Point until the water rights issues have been resolved. If Ms. Dawson's statement on this issue were true, then the "tribal threat" would provide her with the access she desires to a state or federal court for a water rights adjudication. It is fortunate for reservation and county residents and for the governments involved that her group has not prevailed in their attempts to force litigation.

9. 1981 report on "...whether the tribe really should get into the water perveyorship *(sic)*....to be used in ways which inhibit non-Indians from utilizing their land...."

The infrastructure in 1981 allowed for importation of a very small quantity of water for the isolated reservation. Because the supply was limited, the report discussed limiting development for both Indians and non-Indians. In fact, from 1976 to 1985 the tribe operated under a housing moratorium for its members because the construction of the sewer system was delayed by litigation with the state, the county, and non-Indian residents. Tribal shellfish beds had been decertified due to pollution by shoreline septic fields, which were largely non-Indian. After the tribe and the civil rights divisions of the Justice Department successfully sued in federal court to allow completion of the tribal sewer system, the system was constructed and operated under tribal control.

In 1981 the Lummi Nation water system, as developed by the Indian Health Service, and financed by the B.I.A. and H.U.D., was in operation to serve tribal homes. The tribe, aware of the limitations of the Lummi Peninsula aquifer, was attempting as a responsible government to plan for development of the reservation by assessing the availability of water. State permitted users along the reservation shoreline were developing rapidly and without restriction by the state, and refused to serve nearby Indian lands. It was clear that the water supply was limited and that damage to the aquifer was occurring. The comments cited by Ms. Dawson are taken out of context from a discussion of the seniority of tribal water rights, and the options for protecting the existing water supply and the future reserved tribal water supply from continued damage and depletion by junior non-treaty users.

Non-members received huge benefits from the sewer system without any charge for

construction of it. Their property values skyrocketed, but the moratorium on tribal housing was continued due to the water shortage until 1990 when the supplementary water supply from the City of Bellingham became available. During this 14-year moratorium on tribal home construction, non-Indian development continued at a rapid rate. As separate portions of the tribal water system were connected during the 1980s, a number of non-Indian homes along the line were provided service. It is clear from these facts, and from the fact that in 1990 the tribe offered to integrate non-tribal water associations with the tribal system and meet their obligations for future growth, that the policy implied in Ms. Dawson's statement was not implemented by the Lummi Nation.

The Lummi Nation recognizes that increased numbers of non-members on the reservation have led to jurisdictional conflicts over water and land use. In addition, like most Indian governments, we make no secret of our intent to purchase reservation fee lands taken or sold in violation of our treaty, in order to fulfill the treaty intent of a tribal homeland. The tribe has purchased hundreds of acres of reservation land in the past twenty years, and in every case we have paid fair market value or above. Our land acquisition program is openly discussed as a long-term solution to the need for reservation land for homes for our people.

B. SEWER SERVICE AND UTILITY TAXES

Background

* As discussed above (section A.9), the Lummi Sewer System was constructed in 1983-85 with federal funding. The sewer was needed to protect reservation waters and shellfish beds, which had been decertified by septic pollution from primarily non-Indian shoreline development. The construction of the sewer was delayed from 1975-83 by a lawsuit with the State of Washington, Whatcom County, and non-Indian landowners over purveyorship by the tribe. When it became clear that the U.S. would prevail, the state allowed funding to proceed, and a settlement was reached with the county and non-Indian landowners.

* The Consent Decree filed in Federal Court under the sewer decision provided for the Lummi Nation to be the sole purveyor of water and sewer on the reservation. A Lummi Water and Sewer Board was established which provides for two of five positions to be elected by all State-registered voters of the reservation. In 1992, after the non-tribal associations refused the Lummi offer to integrate their water systems with the Lummi system, actions by non-Indian members of the board made day-to-day administration of the water system difficult. The Lummi Nation therefore separated the Sewer Board and all its functions from the Lummi Water Board. The Sewer Board, now an entirely separate entity, continues to function with the two non-tribal members participating fully in all decisions, including addressing complaints and hearings before the Board.

1. **"...tribes are also pushing to collect taxes in violation of Supreme Court cases like Montana, which states taxing of non-Indians must be consentual *(sic)*."**

Once again, Ms. Dawson is wrong, both on the facts and on the law. Here is what the Supreme Court held in Montana v. United States:

> Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through *taxation*, licensing, or other means, the activities of nonmembers who enter *consensual relationships* with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Williams v. Lee, supra, at 223, 79 S.Ct., at 272; Morris v. Hitchcock, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030; Buster v. Wright, 135 F. 947, 950 (CA8); see Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 152-154, 100 S.Ct. 2069, 2080-2082, 65 L.Ed.2d 10. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct *threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.* See Fisher v. District Court, 424 U.S. 382, 386, 96 S.Ct. 943, 946, 47 L.Ed.2d 106; Williams v. Lee, supra, at 220, 79 S.Ct., at 270; Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-129, 26 S.Ct. 197, 200-201, 50 L.Ed. 398; Thomas v. Gay, 169 U.S. 264, 273, 18 S.Ct. 340, 343, 42 L.Ed. 740.

United States v. Montana, 450 U.S. at 565-66. (emphasis added) Ms. Dawson incorrectly implies that the taxpayer must consent to the tax itself. She is wrong. It is the consensual relationship with the tribe or its members which gives rise to the inherent power to tax. The tax she is complaining about is imposed on the tribally subsidized and tribally provided sewer service which her property receives.

2. "...must pay illegal utility taxes to the tribe" and "using threats and intimidation" to collect the utility tax (from oral testimony).

The sewer utility tax is recognized by the Washington State Public Utilities Commission and approved by the Department of the Interior. The Lummi Sewer Board, including the non-Indian members, made the decision to include the tax in the sewer rates and to show the tax amount on the bills. Public hearings were held for the tax ordinance. The $1.15 monthly impact of the tax is the same for all customers, Indian and non-Indian, since the sewer rates are the same for all customers.

With regard to "threats and intimidation", we cannot tell what incidents she is complaining about. Every government issues overdue notices and collects its taxes through lawsuits if they are not paid in accordance with the law. There is ample opportunity to challenge the legality of the taxes in this process. To the extent she implies that the tribe is guilty of strong-arm tactics or illegal activities, we demand an explanation and an apology.

3. Taxing utilities whose lines pass through the reservation...."litigation is now required to reverse the action of the Utility and Transportation Commission rolling the tax to the ratepayers." (from oral testimony).

Lummi does not levy any tax on any utility whose lines merely pass through the reservation, although federal law allows such a tax. Burlington Northern R. Co. v. Blackfeet Tribe of Blackfeet Indian Reservation, 924 F.2d 899 (9th Cir. 1991). We do have a federally approved tax on utility sales which take place on reservation, which is recognized by the Washington State Utilities and Transportation Commission. The UTC determined that the tax appeared valid and could be passed on to ratepayers. There is no litigation underway or, to our knowledge, threatened over the UTC decision.

A detailed Interior Solicitor's opinion supports the legality of the utility tax, which is comparable to city and state utility taxes paid by all customers off the Reservation. Ms. Dawson requests removing sovereign immunity to address this, yet when tribal sovereign immunity was waived in Tribal Court on the appeal of her Sewer Board hearing she did not pursue a further appeal to an outside arbitrator, as she could have under the Tribal Court procedures.

4. Sewer Board attorney conflict of interest

The Washington State Bar Association has investigated this complaint and found it to be groundless.

5. Denying sewer service to non-Indian landowners (from oral testimony).

Again, no specifics are provided. We are aware of one case where an applicant was turned down for a sewer extension for a new subdivision in an environmentally hazardous area . The decision was not based on the race or tribal membership of the applicant but on the merits of the project. The project was a 26-home subdivision at the end of an eroding sandspit, in a flood zone, where several years ago a swimming pool foundered and cracked. An active seismic fault has been identified offshore in a recent geophysical study. As a repair and maintenance hazard in an unstable area, costs would be borne by all the sewer customers. The proponent failed to appeal the decision or take advantage of other available tribal remedies. This development generated substantial non-tribal opposition when first proposed in 1988. In fact, a tribal proposal to extend the sewer to other non-Indian properties nearby (including land owned by Ms. Dawson) was voted down at that time by non-Indian property owners. Other than this development, all requests for service have been connected.

C. TRIBAL TIDELANDS

Background

* In the early 1960's the LIBC agreed to lease tribal tidelands to a real estate developer so he could dredge out a channel for a boat basin at Sandy Point. He eventually enlarged the dredging to create a lengthy artificial canal system on which he developed more than one hundred lucrative waterfront lots which now sell for around $100,000 each. Very expensive homes have been built on many of these lots, priced far beyond the capacity of our members to afford.

* In 1985 a federal court review of the BIA appraisal of the value of the leases increased the beach rights lease payment from $8,000/year to $186,000/year based on state tideland lease valuation formulas. This amounts to an increase from about $7.20 to $169 per lot per year for the use of beaches for protective bulkheads, recreation and shellfish harvest which add significant property value to Sandy Point property. The channel lease for 25 years at $500/year, has not been re-appraised, and allows homeside moorage of residents' boats and access to the marina for hundreds of Sandy Point residents.

* When the lease on the channel expired in 1988 the Sandy Point Improvement Company refused to renew it, arguing that residents could use tribal property without compensation since it was "owned by the United States". They even claim that a "navigational servitude" prevents us from collecting rent on our own channel property, in spite of a U.S. Supreme Court decisions which hold that this doctrine does not apply to artificial channels such as this one. Kaiser Aetna v. United States, 444 U.S. 164 (1979); Vaughn v. Vermilion Corp., 444 U.S. 206 (1979). The same people who complain that their property rights are being taken when treaty Indians exercise fishing rights reserved under the treaties are the first to claim the right to use tribal property without compensation to the tribe.

1. **"The Lummi Law and Order have assaulted law abiding non-Indians on their beach front property....chased small children from the beaches stating they were trespassing on tribal tidelands...."**

Non-Indians trespassing on tribal tidelands are requested to leave tribal property by Lummi law officers. Generally, county sheriff personnel have also been present when these situations have arisen, and they have not reported any unprofessional or inappropriate actions by the tribal police.

Tribal members have been harassed by non-Indians who claim to own tribal beaches. Recently, criminal trespass complaints against tribal members were thrown out of state court because it was impossible to tell where the boundary lines are located between tribal and non-tribal property on the beaches.

2. **"....a Lummi tribal member pulled out a resident's survey stakes which marked the mean high tide and boundary of his property. This followed harassment by Lummi Law and Order with a survey crew which had been called out after a Whatcom County Judge ordered the survey to establish the jurisdiction boundary...."**

We don't know whether a tribal member did this or not. No tribal official or employee did it. More importantly, the statement that a Whatcom County judge ordered the survey is absolutely false.

3. **"....have allowed private non-Indian property to be used and abused by their members stating their treaty allows them use of private property."**

Apparently this is a reference to tribal members crossing undeveloped uplands on the

reservation in order to access tribal tidelands for fishing purposes. The treaties reserve this right of access, and it is not abused. As the Supreme Court explained over ninety years ago the treaty fishing right includes more than simply the opportunity to fish in common with non-Indians:

> [T]he Indians were secured in its enjoyment by a special provision of means for its exercise. They were given 'the right of taking fish at all usual and accustomed places,' and the right 'of erecting temporary buildings for curing them.' *The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,--the right of crossing it to the river,--the right to occupy it to the extent and for the purpose mentioned.* No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.
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> * * *
>
> [S]urely it was within the competency of the Nation to secure to the Indians such a remnant of the great rights they possessed as 'taking fish at all usual and accustomed places.' Nor does it restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enable the right to be exercised.

United States v. Winans, 198 U.S. at 381-2 (1905) (emphasis added).

D. LAW ENFORCEMENT AND TRIBAL COURT

Background

* The Lummi Tribal Court provides full due process protections to litigants, and the Court has the authority to invalidate Tribal Council actions and ordinances on the basis of conflict with tribal law or overriding federal law. The Court has done so on several occasions. The Court is completely independent from the Tribal Council. The provisions of the Indian Civil Rights Act are explicitly included in the Lummi Constitution, meaning that these rights exist as a matter of tribal constitutional law as well as federal law. The Tribal Court judges are appointed for six year terms and can be removed only for cause. The judges are licensed attorneys. One of our associate judges frequently sits as a judge or court commissioner in the Whatcom County court system as well. Appeals are heard by a three judge panel made up of judges from other reservations and local attorneys. Although it is not required by federal or tribal law, Lummi also employs a tribal prosecutor and a public defender to represent indigent criminal defendants.

* The Lummi Water and Sewer Ordinance contains a comprehensive dispute resolution mechanism for all disputes over water or sewer service-related matters. The principle features are: initial decision by the manager or Board; formal hearing on the record before the Board with full representation by counsel, cross examination of witnesses and introduction of evidence under a relaxed evidentiary standard; formal findings of fact and conclusions of law and a written decision, appeal to the Lummi Indian Business Council on the limited issue of whether the Board provided a fair hearing; appeal to the tribal court on the record with the standard review being whether the Board's decision is supported by substantial evidence; further appeal to an arbitrator; and a waiver of sovereign immunity to enforce any final decision. The losing party must pay the costs of transcription of the hearing record, but attorney fees are not awarded.

1. **"Lummi Law and Order have...made false accusations against property owners....stopped non-Indian residents to search car trunks...."**

Again, we have no specifics and we are not aware of what Ms. Dawson is referring to. Tribal officers do have the right and responsibility to detain non-Indians who have broken the law and hold them for state or county authorities. State v. Schmuck, 121 Wn.2d 373, 850 P.2d 1332 (1993). There is no knowledge in our Law and Order Department of any such incidents.

2. **"...threatened confiscation of road equipment used by a subcontractor of the county unless the county and the contractor paid an employment tax to the tribe."**

This incident relates to the Tribal Employment Rights Ordinance (T.E.R.O.), a federal policy requiring compliance with Indian employment requirements for projects on the reservation. A 1% tax is required which supports the tribal T.E.R.O. program administration. The contractor ignored the requirements and, according to procedures provided in advance to the contractor and after two letters of warning, a cease-and-desist order was issued by the Tribal Court. When presented with the court order and a copy of the law, the contractor immediately initiated compliance with the law. As a result of this incident, the county now includes in its bidding requirements a section regarding T.E.R.O. requirements for construction projects on the reservation. This is a matter of enforcing federal policy that was carried out according to procedures and resulted in a more cooperative relationship between all parties.

3. "While the Lummi Law and Order prevent non-Indians access to the 1,000 acre park land of Portage Island, purchased with state and federal tax dollars, they allow their own members free rein."

Portage Island is an undeveloped island on the Lummi Reservation connected to the mainland by a sand bar that is only passable at low tide. The agreement under which portions of the Island were purchased requires that it will be held for park purposes, but it does not require that the park be opened before the tribe has sufficient revenue to properly operate and maintain it. The county was required to use the funds which the tribe paid it for Portage Island to purchase replacement park property. The park on the land purchased by the county as a replacement was recently closed by the county due to lack of funds to operate it. The County Council, of which Marlene Dawson is a member, has placed park funding in the lowest priority for county spending in the coming year, and large cuts in the county parks operating budget are likely. All governments are having problems with parks funding.

The state-approved tribal park plan for Portage Island is for a wilderness park with limited access. This island is sacred land to the Lummi Nation, and is zoned by the tribe as a protected area. The island contains so many significant cultural and archaeological sites that it is nearly impossible to protect them from the public. Our tribe has suffered from vandalizing and plundering of sites elsewhere in the nearby area, including burial grounds. Protection of these areas is a legal right and responsibility of the highest importance to the Lummi people. We have issued permits when requested for supervised non-Indian events on the island, but we do not have the resources to supervise a public access park at this time.

4. "The former Humane Society director told me it was impossible to get closure from the tribe on a service contract as it concerns tribal dogs so neighbors are faced with marauding and nuisance dogs."

The Lummi Reservation is in transition from a very rural area to having areas of denser development. This problem is now being addressed under self-governance. An Animal Control Ordinance has been drafted by our Law and Justice Commission. Funding for implementation of the ordinance has been budgeted by our Health Commission. While we did work with the county Humane Society on this issue in 1995-96, there was never any problem in our working relationship and it laid the foundation for our present ordinance process. The ordinance now under development will be implemented in the near future. It has been mentioned by our members that many dogs owned by non-Indian residents also need to be controlled.

5. "I recently attempted to address the legality of the Lummi Utility Tax Ordinance and it's *(sic)* lack of proper Dept. of Interior authorization in tribal court."

Full verbatim transcripts of the hearing before the sewer board and the subsequent appeal to tribal court are available. Copies of the detailed findings of fact and conclusions of law and the judicial review are attached (attachments #3 and #4). The transcripts conclusively establish that Ms. Dawson was repeatedly given accommodations by both the court and by legal counsel and that she repeatedly failed to follow even the simplest procedures. She even failed to sign her notice of appeal or pay the filing fee, defects which by themselves would deprive virtually any court of jurisdiction to proceed. A copy of a letter to Ms. Dawson from the Sewer District's attorney which outlines these defects and the District's accommodations is attached (attachment #5). How she could complain that she has been denied due process in this situation is incomprehensible.

Her account of the proceedings in court is misleading. The appeal was based on the written record developed before the Sewer Board. The court had thoroughly reviewed the record and legal arguments before the time for oral argument. To imply that the court had inappropriately pre-

judged the case is nonsense. So is her account of the pre-hearing conference. One of the major points of her appeal was that the utility tax ordinance had been approved by the wrong official within the BIA. (It was approved by the Area Director following an extensive analysis by the Solicitor's office. She contends it could only be approved by the Commissioner of Indian Affairs and that approval authority could not be delegated, despite the explicit provisions of 25 USC §1a.) Ms. Dawson states that the "tribal attorney, stated he would try to get Dept. of Interior approval", implying that he admitted that approval had not been obtained. What was actually offered was resubmission to the BIA if that would satisfy her concerns. Her response was that she was not interested in getting the matter resolved on that basis. She felt she had a strong technical argument on the approval question, and she appeared to recognize the BIA would certainly re-approve the ordinance. She stated she wanted to go to federal court and tribal court was just a hurdle she had to clear in order to make that possible. At this point, the judge reminded her that courts exist to resolve disputes, and that if she was "just going through the motions" she should re-evaluate her position.

Nor is Ms. Dawson's account of the tribal court judge's action accurate. A statement from Judge Doucet is included (attachment #6). However, Ms. Dawson's position on tribal court jurisdiction deserves further comment. The tribal court appeal was filed by Ms. Dawson after she unsuccessfully challenged the Sewer Board's decision to pay the utility tax. She initiated both the challenge to the Board's action and the appeal to the tribal court. After extensive briefing of the issues, she appeared for oral argument and contended, for the first time, that the court did not have jurisdiction to hear the appeal she herself had filed. She contends she was "berated by the judge for taking up the court's time and was also asked to be fined by the tribal attorney." The transcript of the hearing shows that the court did ask why she had not raised the jurisdictional question earlier since if it was well founded it would have saved both the court and the parties considerable time and expense. She was not "berated" and she was not threatened with a fine. The Sewer District attorney (not the tribal attorney) did ask for sanctions to be imposed on Ms. Dawson in the amount of the District's attorney fees if Ms. Dawson were allowed to essentially withdraw her appeal on the day of the appellate hearing. The District's fees would otherwise fall on the District's ratepayers. In the end, the court proceeded with the hearing, rejected Ms. Dawson's jurisdictional argument and ruled against her on the merits. Ms. Dawson did not appeal further.

6. "The same tribal court story can be retold as it concerns two non-Indian property owners who tried to hold the tribe accountable for their bad faith negotiations with the City of Bellingham."

Full verbatim transcripts of the hearing before the Water Board and the subsequent appeal to tribal court are available. Copies of the detailed findings of fact and conclusions of law and the judicial review are attached (attachments # 7 and #8). In addition, verbatim transcripts of the relevant City Council committee meetings are available and were considered by the court. They conclusively establish that there was no bad faith negotiation on the part of the tribe. The tribe made it clear to the city that it was not interested in purchasing water from the city if it would have to open up its system to non-members, since that would defeat the purpose in acquiring the water in the first place, which was to ensure a tribal water supply. The tribe did promise to charge all customers equal rates, regardless of tribal membership. It has kept that promise.

Incredibly, the appellants in the water case made many of the same fundamental procedural errors as Ms. Dawson had in her tax appeal, even including a similar failure to sign the notice of appeal, despite the fact that Ms. Dawson was acting as an advisor to the appellants. Similar accommodations were made to these appellants. (See Letter to Susan Bailey, attachment #9.)

7. "....where there is no separation of power, the tail wags the dog as it concerns tribal court."

Ms. Dawson had ample opportunity to prove this false allegation in her utility tax appeal and she failed to do so. Her comments on tribal court refer to her 1996 appeal and her assistance in the above water board appeal in the same time period; she has not availed herself of our court system on any other occasion; all of these comment refer to those two hearings. The tribal sewer code provides for a special appeal to an American Arbitration Association arbitrator in the event that a litigant is dissatisfied with the result in tribal court. Ms. Dawson could have appealed the tribal court decision if she felt that the decision was the result of lack of separation of powers. She did not appeal because she has no case on the merits. We invite the Committee to review the record in her case and in the water appeals. No court or arbitrator would rule in her favor. How could she then complain to Congress that the tribal system was unjust? She has misused the tribal court and wasted tribal resources by going through the motions of an appeal, predictably losing her case and then heaping blame on the tribe for her own inadequacies. She seeks now to waste this Committee's time with further distortions and falsehoods.

E. LAND USE, ZONING AND PERMITTING

Background

* The Lummi Zoning Ordinance was enacted in 1976 and was subsequently approved by the Bureau of Indian Affairs. Applications for rezoning are processed according to the Zoning Ordinance, and include public hearings and comment periods. The hearings are open to all persons. Projects have a full environmental review by tribal Natural Resources and Cultural staff to protect tribal resources and must meet or exceed all tribal and federal standards. Tribal permits are issued, including shorelines, and all required federal permits such as Army Corps of Engineers permits are secured.

* Our 1996 efforts to work out a cooperative land use plan with Whatcom County were unanimously approved by the County Planning Commission but rejected by the County Council due to opposition by Council member Marlene Dawson.

* The Nation continues to update and revise our codes and ordinances, and recently has developed and is implementing a comprehensive plan to revise the land use plan and to update codes and ordinances. This has only been possible under self-governance. We recognize that we have work to do to build a better system, but we have that underway. By contrast, Whatcom County has been declared out of compliance with state land use laws for the second time in less than a year.

1. "The tribal council interferes with the buying and selling of land."

Sales of trust lands on Indian reservations have always been governmentally regulated, as required by federal law. Until recently the BIA performed realty functions. Appraisals, resolution of probate issues and the ability of our members to use their land were delayed and side-tracked. The Lummi Planning Department has now taken over realty functions under self-governance, serving our people far more efficiently. No tribal member is prevented from selling his or her land. Mrs. Dawson herself purchased nine acres in 1995 that were removed from trust two years prior without any problems, a process that would likely have been far more complicated under BIA management.

2. "....violate Whatcom County stop work orders for building and zoning violations for land in fee status."

Indian owned lands on a reservation are not subject to county or state civil regulatory jurisdiction regardless of whether they are in fee or trust status. Moe v. Confederated Salish & Kootenai Tribes, 426 U.S. 463, 478:

> If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for all jurisdictional purposes, civil and criminal, the Flathead Reservation has been substantially diminished in size. A similar claim was made by the State in Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) [and rejected by the Court].

Indian owned fee lands are still part of the reservation and still subject to exclusive tribal jurisdiction. See, also, Bryan v. Itasca County, 426 U.S. 373 (1976) and Santa Rosa Band v. Kings County, 532 F.2d 655 (9th Cir. 1975), cert. denied 429 U.S. 1038 (1977). The county can participate in the tribal processes for approval of Indian projects on the reservation, but it has generally elected not to do so.

3. **"...violated sound environmental practices by building a gas station in a wetland...."**

The gas station/minimart is not in a wetland, as documented by 1987 National Wetland Inventory maps produced by the U.S. Fish and Wildlife Service. The area was used as farmland for decades. Although it is within a floodplain, the site is elevated to 1 foot above the level of the 100-year flood, the same standard as Whatcom County uses for similar development. It is at the intersection of two 50 mph roads, far from any residences. The gas tanks meet strict up-to-date standards for underground storage so they are not damaged in a flood, and with the highest standards of double-walled construction and emergency shut-off valves. It was constructed on trust land under tribal permitting.

F. ECONOMIC DEVELOPMENT

Background

* Economic development in keeping with tribal environmental and cultural values is a priority of the Lummi Nation in order to provide jobs for tribal members and to improve the reservation community for all residents. Many of our efforts have been attacked by Ms. Dawson as "illegal" or "unethical" although they are no more than routine business transactions. Her description of the tribal government as "socialistic" may perhaps refer to tribally-owned business ventures that are not only legal, but are necessary to provide security for the capital investment required to fund them. The tribe also encourages individual tribal member enterprises through support of a Small Business Assistance Center and classes at the Northwest Indian College.

* Tribal business successes benefit not only the Lummi community, but the entire regional economy, of which Lummi is increasingly a member. The tribe is among the top five employers in the local area for numbers of employees. These employees include many non-Indians as well as Indians who live off the reservation. The income from all tribal employment is channelled directly back into the local economy, as there are only two small convenience stores and a gas station on the reservation. In addition, the Lummi government and reservation businesses purchase virtually all goods and services from off-reservation businesses. The multiplier of dollars from tribal ventures and federal funding utilized by the government adds substantially to the local economy. The multiplier of tribal dollars is 3.9 in the county and 7.0 in the state, based on a 1982-83 study by the tribe. In attacking these efforts Ms. Dawson has not considered the impact to the local economy that would result if she were successful in her campaign to reduce federal funding and prevent tribal economic development.

1. **"...derails off reservation industry by refusing to meet, discuss or demonstrate good faith negotiation on tribal environmental concerns."**

We are proud of our record of negotiating agreements which protect vital tribal interests in fisheries while allowing responsible development to proceed for the good of the larger community. While we have a legal right to object to any major development activity which displaces us from our treaty reserved usual and accustomed fishing places, see Muckleshoot v. Hall, 698 F.Supp., 1504 (W.D. Wash. 1988), we prefer to resolve these matters by negotiation. We have reached agreements with such major industrial and development concerns as Tenaska (electrical co-generation facilities), Cannery Hill (golf course and residential development), ARCO (expansion of oil tanker docks within our fishing grounds adjacent to the reservation), Pacific International Terminals (multi-modal shipping facility) and Northwest Building Corporation (preservation of a tribal burial ground in the San Juan Islands). None of these negotiations has been easy, but it is irresponsible to claim that the tribe has failed to meet and negotiate in good faith.

2. **"....A CEO could spend months negotiating a contract with a tribe... only to learn that tribal councils don't adhere to agreements made by preceding councils." "...greenmail....its a well known fact that roadblocks disappear following the payment of large sums of money....Such compromising actions are not good for the tribal people and most definitely they are not good for business."**

The Lummi Nation is asked for a waiver of sovereign immunity in virtually every major business transaction. Limited waivers are typically provided, but these are negotiated on a case by case basis. This allows the Nation to decide which of its assets it wishes to place at risk and allows business people to negotiate for the security they need in order to make their business proposal

viable. A legislated immunity waiver would put all tribal assets at risk without this type of evaluation.

Ms. Dawson is not qualified to judge whether such actions are good for the tribal people. Only the tribal people themselves can decide if these agreements are good, and elect their leaders accordingly. Several of these agreements have also directly benefitted or protected the Sandy Point development's environment and property values, a fact that Ms. Dawson chooses to ignore.

As to whether such contracts are "not good for business," it is the Lummi Nation policy to avoid confrontation and litigation and to try to reach amicable settlements where we can, if they protect resources. Ms. Dawson's criticism of this policy contradicts her earlier assertion that the Lummi Nation has "derailed off reservation industry" by refusing to negotiate. Here we are criticized for negotiating agreements that meet our environmental, cultural and social concerns yet allow projects to go forward in a timely manner, which other parties and local business leaders have assured us is good for business. What Ms. Dawson calls "greenmail" she would no doubt call fair and equitable value for property and resources were it on behalf of herself and non-Indian business people. As she has never talked to the Lummi Nation about these contracts or the negotiations involved, these are uninformed statements. It is irresponsible to formulate and articulate an opinion without investigating and listening to all sides of the issue. To imply that anything inappropriate or illegal is involved in these contracts is absolutely incorrect.

G. EDUCATION

Background

* Although it is unclear how this issue relates to tribal sovereign immunity, education is one of the highest priorities of the tribe. In the past 15 years, efforts of the Lummi tribe to improve tribal education have resulted in a model Head Start program, tribal elementary, middle and high schools, and the Northwest Indian College which serves Indian students from across the nation, as well as non-Indians. The NWIC is an accredited two-year college with a transition program to Western Washington University and other four-year programs.

* These programs have begun to fulfill the acute need in Indian education for a cultural and historical education in context with a student's background and experience, as well as the skills and knowledge required to function in contemporary life. The schools are under the authority of the Lummi Education Commission and the NWIC Board, made up of community members. The reservation tribal education programs require that Lummi parents be involved in the schools, and help to focus the community on positive family activities. Parents provide activities to promote substance-free and abuse-free behaviors through traditional measures such as talking circles and family intervention, as well as traditional activities such as drum and dance groups, canoe club, and honor societies such as the Lummi School Order of Eagles that rewards traditional values such as assisting elders and respect for tribal culture and the environment. Tribal health, social, and environmental program representatives are invited to the schools to provide education on available services and careers and to serve as role models for Lummi young people.

1. **"....prior tribal educators who have been shorted thousands of dollars in their teaching contracts....they contacted the Interior Department and were told this kind of thing occurs all the time."**

This is an unfounded allegation. Whatever salary disputes have existed have been minor and have been settled within the normal employer-employee relationship. If they had not, the tribal personnel manual has extensive provisions for grievances for any tribal employee who feels he or she has not been treated fairly in employment. This certainly would include claims for unpaid salary. The tribal court is also available to resolve employment disputes. Teachers have not been shorted any dollars.

2. **"...my son made application to the N.W. Indian College....they wanted to consider him a non-resident because of his race....Our federal policy against segregated schools and the use of preferential rates is being violated on reservations across the nation."**

The history of Indian education is one of suppression of our language and culture and of forcing our members as children to attend boarding schools, where they were beaten for speaking our language and taught that our culture was sinful and backward. Later many of us attended Ferndale schools, where our educational and cultural needs were not met, and experiences of institutional racism that translated into individual racism and abuse were the norm. Ms. Dawson, who sat on the Ferndale school board during these years, is well-known to our people for her attitudes and actions against Indian education.

In 1995 Ms. Dawson sent her son to the Northwest Indian College, supposedly to register, although he never did. Instead she filed a civil rights complaint charging racial discrimination in fees to the Civil Rights Division of the U.S. Department of Education.

The U.S. Department of Education, Office for Civil Rights, Region X investigated and replied that the college was in compliance with federal law and policy. They pointed out that

lower tuition rates for enrolled members of federally recognized tribes is a political, not a racial designation, in that individuals who are racially Indians who are not members of federally recognized tribes are also subject to the higher tuition rate.

3. Federal and state dollars are not held accountable except in public school systems.

Ms. Dawson, as a former member of the Ferndale school board, is certainly aware of the accountability of federal funds provided for Indian education. The Ferndale school system received large amounts of funding from this source before Lummi schools were established, and still does so for a number of Lummi students who choose to attend Ferndale schools. Those funds have rigorous requirements for reporting and are subject to federal audits. Lummi schools require that teachers be licensed in the State of Washington and the schools are subject to the same accountability procedures as the Ferndale schools with respect to federal funds for Indian education. In addition, Lummi schools are accountable to the Lummi community in a way that "public schools" never were, and this has made a great difference in our ability to meet our childrens' educational needs.

4."If the federal tax dollar is going to be used to encourage the education of native religion and culture, then the choice of any school should be allowed to all American parents."

The choice of any school is allowed to all American parents. Indian parents can choose to send their children to non-reservation schools, and many do. Non-Indian students attend the Northwest Indian College.

H. GOVERNMENT AND GENERAL COMMENTS

1. "Certain Lummi leaders refuse to pledge alliance *(sic)* to our nation's flag."

This allegation is just nonsense. There is no leader at Lummi who does not honor the United States Constitution, the United States flag, and those who serve and protect it, for it is so important in our culture that no individual could be a leader if he or she dishonored it. The United States flag is raised and saluted by a member of the Lummi veterans Post #33 along with the Lummi Nation flag every morning, and flies proudly over the Lummi tribal offices. It is displayed in our Council Chambers, and is honored at every major event in our community. Our veterans have lovingly carved a special flagpole decorated with an eagle to carry the United States flag. Members of our nation have served in every war since World War I and Indian communities have sacrificed proportionally greater numbers of their loved ones in war than any other ethnic group in the United States. Veterans are honored by color and honor guards at all funerals, and on Veterans and Memorial Day there are community ceremonies and dinners to honor those who have fallen and those who have served. Both the Indian and the non-Indian Lummi veterans of Post #33 are among the most honored members of our community for having served and protected the United States flag. They perform many hours of community service and are involved in numerous projects with non-reservation veterans chapters. The Lummi Veterans Coordinator, Frank Cordero U.S.M.C. is a Selective Service Board member, a board member of the Regional Minority Veterans Affairs Committee, and has been honored by letters from Senator Ben Nighthorse Campbell (R-CO), Senator Patty Murray (D-WA) and Senator Bob Kerry (D-NE) complimenting his dedication and professionalism. All national veterans association are represented in our community.

Of the many insults and untruths Ms. Dawson has perpetrated, this is by far the most cruel. To cast doubt on the honor and patriotism of the Lummi veterans and the Lummi people is unconscionable, and there are no words to convey how we feel about her statement, knowing what our veterans and every family at Lummi has sacrificed in times of war and peace.

2. "This tribal leadership even went so far as to try to eject a candidate for congress from the reservation...."

The LIBC did vote to exclude from our reservation an individual who, in 1992, was promoting a political philosophy that publicly advocates the abrogation of our treaty rights. It was a symbolic act to remind the public of the original intent and provisions of the treaty. At the time, Mr. Metcalf was not a declared candidate for the U.S. Congress; he was elected to Congress in 1994. He was speaking at a community meeting at the Sandy Point meeting hall, and after the symbolic resolution was delivered, Lummi representatives left the meeting, making no attempt to actually "eject" him from the reservation.

Several years later when Congressional attention was focused on our water rights issues, we welcomed Congressman Metcalf to our reservation for a tour of our hatchery and a discussion of the issues. We later thanked him for acting responsibly in mediating talks between the Lummi government and the Sandy Point Improvement Company. While we may not agree with him on many issues, he is accorded the respect and dignity we extend to any member of Congress or federal official who visits our reservation.

3. "....at the entrances of this reservation...we have...signs that state all entering are now subject to Lummi Laws. Lummi laws...are near impossible to access because tribes are not subject to the Freedom of Information Act or the Privacy Act."

Many of the non-Indian landowners on the reservation have said that they purchased their land without being informed that it was on an Indian reservation, or that there were Lummi

Nation laws that applied to them. This has led to conflict, confusion, and false expectations on their part. We recognize that this problem stems from a combination of irresponsible realtors, to an local educational system that has failed to address Indian history and affairs and to Whatcom County's failure to stamp deeds and erect signs at the reservation boundary, according to a 1982 Intergovernmental Agreement (attachment #10). We responded to their concerns by placing signs on our reservation borders to notify the non-Indian public that they are on a reservation where they are subject to laws they may not be familiar with, and to dispel confusion among visitors who are most likely to be aided by Lummi law officers in an emergency. The county had earlier agreed to the erection of the signs but now objects to our wording, contending that they should state that persons entering the reservation are subject only to "some" tribal laws. We have offered to change the wording, but the county has not responded.

It is simply not true that tribal laws are "near impossible to access". Copies of the tribal code are available for public review and copying at the library of the Northwest Indian College on the Lummi Reservation.

4. "The treaty forming this reservation divided the land base into allotments so the individual native could sell their land when they saw fit and pursue the American Dream off the Reservation."

* It was not the Lummi Nation's Treaty of Point Elliott (1855) that divided reservation land among individual members, but the Lummi treaty did incorporate certain provisions of the Treaty with the Omaha, under which reservation land was later assigned by the tribe rather than allotted to individual tribal members. The Lummi assignments were made in 1884, three years prior to the General Allotment Act of 1887 (also known as the Dawes Act), a law that unilaterally altered to fundamental premise of the treaty: the Reservation homeland that was to be exclusively Indian. The Lummi assignments were treated as Dawes Act allotments by the Bureau of Indian Affairs in violation of the treaty, and should never have been allowed to be sold to non-Indians. Under the treaty assignment system, land not used by tribal members should have been returned to the tribe for reassignment to those who received no land.

Lummi Reservation lands, reserved in the treaty for the exclusive use of the Indians, were assigned to qualified Indians listed on the Lummi Allotment (Reserve) Schedules. There was never a surplus of land on the Lummi Reserve. No act of Congress opened the reserve to white encroachment or settlement. Even after passage of the Dawes Act the Lummi Reserve was strictly regulated by national law. The 78-acre assignment of Davie Skootah, who died without heirs, was the only parcel of reservation land covered by the general allotment laws of the United States, as required by a specific Act of Congress (66th Congress, Sess.1, 1919, see: Indian Affairs, Laws and Treaties, by Kappler, Vol. IV, p.219). All other Lummi lands are still protected by the original treaty language.

Ms. Dawson's view of Indian and treaty history and law is limited. Her statement regarding the pursuit of the "American Dream" demonstrates a denial of the lack of opportunity that has been available to Indian people throughout our history since 1855. Although Ms. Dawson lives on the Lummi Reservation, is a public official, and despite the tribe's attempts to educate her, she continues to maintain these historically, legally and factually inaccurate views of federal law and policy.

5. The 1934 Indian Reorganization Act "provided the option to reverse the federal government's goal of assimilation....and set up a separatist and socialistic form of government. The voting members of this reservation voted to continue assimilation."

This statement is absolute nonsense. The IRA included a ban on further allotment and sale

of Indian land that applied to all tribes, not just those who chose to organize their governments under Section 16 of the Act. Under the IRA tribes were given a choice whether to continue their traditional form of government or to organize under a federally sanctioned form of government which featured many aspects of a private corporation. It is absurd to contend that a tribe which voted to retain its traditional form of government was voting in favor of assimilation and the destruction of traditional tribal government. Mrs. Dawson's use of the terms "separatist and socialist" further demonstrates her lack of comprehension of federal Indian law and policy, or her rejection of that law and policy.

6. Voting to remove requirement for Secretary of the Interior approval of ordinances from Constitution (from oral testimony).

There is no federal legal requirement that tribal ordinances be approved by the BIA. See e.g. Kerr-McGee Corp. v. Navajo Tribe, 471 U.S. 195 (1985). The 1970 tribal constitution did have a provision in it for BIA approval of certain ordinances. This is purely a self-imposed requirement and the tribe does propose to remove the approval provision if the tribal membership approves. Most tribes no longer have BIA approval provisions in their constitutions.

The process for removal of this requirement has been reviewed and approved by the Secretary of the Interior. This action is part of the transition to full self-governance. In addition, the BIA has been extremely slow to make decisions on tribal ordinances. For example, 23 years ago the Secretary of the Interior placed a "temporary" moratorium on approval of tribal water codes. It is still in effect. We cannot get a code either approved or disapproved. As a result, we have seen a progressive destruction of our groundwater due to lack of an appropriate regulatory structure.

7. "Certain council members have publicly stated they can not be held accountable to decisions made by prior councils."

Ms. Dawson does not provide any details whereby this allegation can be checked. We do not know what is meant here. The statement projects a negative image, but simply reflects democracy in action. All elected officials are bound by the prior decisions (enacted laws) of their predecessors, until such laws or policies are changed. It clearly is within the prerogative of subsequent officials, if they have the votes, to change the prior laws or policies.

Ms. Dawson to be making has been a leader in repudiating a 1982 Intergovernmental Agreement between Whatcom County and Lummi Nation (attachment #10). That agreement was part of a federal court settlement in litigation between the county and Lummi. The agreement addresses and was designed to avoid many of the conflicts on the reservation today. For example, many non-tribal reservation residents argued that they were ignorant of the fact that their land was located on a reservation and that tribal laws might apply to their activities. To address this problem the county and Lummi agreed that the county would stamp every deed and tax statement for reservation property with a notation that it is located within the Lummi reservation and that tribal laws may apply. The agreement also provides that the county will recognize the Lummi Indian Tribe as "the government of the Lummi Indian Reservation" and will recognize and give effect to tribal zoning, building permits, and shoreline management permits, etc. in addition to county permits. The agreement also provides for signs to be erected at the reservation boundaries notifying the public that they are entering the reservation. Ms. Dawson refuses to acknowledge this agreement, apparently because it was signed by the County Executive (the elected head of County government), not by the County Council (the county legislative body). The County has failed to abide by the agreement.

8. "Tribal council members state the Federal Supreme Court decisions on tribal issues don't apply to them because each reservation of the 557 total is unique, so each tribe they say must litigate the issues at hand in order for it to be relevant to their reservation."

This is another distortion. The principles announced by Supreme Court certainly apply across the country, but many Supreme Court decisions, especially those which deal with tribal jurisdiction over non-members, require a balancing of many factors which vary from one reservation to another. An example is zoning. In Brendale v. Confederated Tribes of the Yakima Indian Nation, 492 U.S. 408 (1989), the Supreme Court itself fragmented over the extent of tribal zoning jurisdiction. It is one of the most cited cases involving tribal jurisdiction, but there is no majority opinion. The result in that case was that some non-Indian land was subject to tribal zoning jurisdiction while other land was not. The difference in the outcome was the facts specific to the reservation. If the facts dictate different outcomes within one reservation, it is not surprising that they can result in differing outcomes from one reservation to the next.

9. Comments regarding "hostile, unfriendly" and "confrontational" actions by tribal government.

Ms. Dawson has expressed the opinion that "hostile, unfriendly" actions are a violation of the Treaty, a personal interpretation of the clause that was designed to prohibit and end the possibility of armed conflict between citizens of the United States and Indians. The Lummi government's attempts to respond to the attacks by her group and to violations of Lummi treaty and property rights on our reservation have been labeled "unfriendly." Articles and letters from the local newspaper (attachment 11) demonstrate that her opinion is not held by all non-Indian residents. A year ago the Lummi government held a dinner attended 125 non-Indian residents to improve communication and understanding. Ms. Dawson's group circulated leaflets in which she discouraged residents from attending, or from speaking to Lummi leaders about their concerns if they did attend.

By contrast to Ms. Dawson's allegations, tribal attempts to resolve or lessen differences have often been rejected by county government under her influence. For example, the Whatcom County Planning Commission recently unanimously voted to ask Lummi to take a lead role in developing a land use and zoning plan for the reservation in conjunction with the county. The goal, publicly supported by Lummi Chairman Henry Cagey at the County Planning Commission meeting, was to adopt a joint plan which would eliminate jurisdictional conflicts between tribal and county government. Even though the proposal closely tracks an earlier agreement between the tribe and the county (See attachment #10), when the proposal came before the County Council, however, Ms. Dawson strongly opposed any tribal role, arguing that Lummi should have no say in what happens on fee lands on its own reservation. As a result, the Commission's recommendation was defeated, and jurisdictional conflicts are likely to increase.

Ms. Dawson complains that Lummi government officials have been "confrontational" but again fails to give any specifics so that her allegations can be checked or refuted. We do know that County law enforcement authorities have confronted tribal officers attempting to serve tribal court papers and threatened to arrest them if they carry out lawful court orders, and that the county has, as a matter of policy, refused to give full faith and credit to tribal court decrees.

10. "Mr. Cagey stated to a news reporter, 'We'd like to shut it down temporarily, [roads] not forever. We'd like to shut it down, keep all the non-Indians out.'"

Our Chairman did make an emotional statement to the press for which he later made a public apology in a TV interview, but the interview was not carried in the newscast, nor in the other media. The statement made headlines while the apology and retraction were never

acknowledged or reported. He also apologized to the Lummi people, most of whom were distressed by the original comment. The statement was made under extreme frustration and pressure.

11. "Moral, cultural, and spiritual afflictions...while other minorities flourish...we must ask ourselves why life for members on reservations is sub-standard....there is no other group of American citizens who have played the role of Peter Pan like the American Indians. The first essential step to promoting maturity and personal growth is to make our Native American groups personally responsible for their actions."

The racism underlying these statements and the paternalism implicit in referring to sovereign Indian nations as "our Native American groups" accurately reflect the consistent inability of Ms. Dawson to recognize our rights as individuals and as governments. The approach she has taken is to "blame the victim." Attempts to productively communicate with Ms. Dawson on the issues are impossible given that she refuses to recognize not only our legal status and rights, but our inherent rights as human beings. The Lummi people are proud to have survived the difficulties and unjust treatment of the past 147 years, and to have begun to rebuild our government, culture and community under self-governance. Personal accountability and the keeping of promises is an issue that we would like to discuss at length in terms of the history of relations between Indian nations and the United States, but our intention in highlighting these comments is to shed light on the attitudes underlying Ms. Dawson's views. Last year the Lummi Indian Business Council initiated a joint meeting with the Whatcom County Council, where members of both Councils agreed to meet in small groups to get to know each other as people so as to lay the foundation for improved cooperation. This plan fell apart after several meetings in which Ms. Dawson spent the entire time lecturing and berating our elected leaders in the offensive tone exhibited in these statements.

12. Tribal governments are "socialistic, separatist governments" who impose "tribal tyranny" over non-Indian residents.

Non-Indians on the Lummi Reservation are treated fairly, but they must be aware that when they move to our reservation there are certain differences from non-reservation communities that they must acknowledge, respect and abide by. We have had non-members in our community become a part of our community and who are welcome. Non-members who choose to live in our community need to recognize that they are choosing to live in a positive multi-racial and multi-cultural community, in which the dominant culture is not their own but is Lummi. This has been difficult for some who came to Lummi either misinformed or motivated by greed, and they must learn to work with us to overcome this. The first non-Indian development on our reservation, the Gooseberry Point Community and Water Association, had a covenant in all the deeds for the lots when first sold in the late 1940s that prohibited anyone who was "...not a member of the white race...except for domestic servants..." from residing there. This covenant against our living on certain lands of our own reservation set the tone for relations between the groups. We can overcome these years, but only if non-Indians make an effort to learn and respect the history of the situation and the reality of the aspects of life in our community that some have called "special" rights. It is their choice to live here, but it is the homeland of the Lummi people. We will always be here where our ancestors lived, fished, worked, and raised their families, doing the same.

I. BACKGROUND ON MARLENE DAWSON

1. Sandy Point development - Ms. Dawson is the Vice-President of the Sandy Point Improvement Company, located on the Lummi Indian Reservation, not in the City of Ferndale, as she stated in her testimony. Ferndale is Ms. Dawson's postal address, but there is no incorporated city on the primarily rural reservation. The Sandy Point development of 770 homes was built using reservation groundwater without a state permit for 22 years, until 1994. Their 1994 permit does not provide for water for an additional 330 empty lots. Sandy Point developers sold all the lots with water shares guaranteeing water for which it had no permit, and the Sandy Point Improvement Company is liable to all those property owners. In addition, the development was based on a tidelands lease with the Lummi Nation for beach rights and the entrance channel to the Sandy Point marina, which expired in 1988. The development has refused to renegotiate leases because of the increase in the appraised value as approved by a federal court, yet they continue to use the tribe's property without compensation to the tribe.

2. Property - Ms. Dawson and her husband, a realtor, own four homes at Sandy Point, 1 1/2 vacant lots in another reservation development, and an 8.8 acre undeveloped parcel at Sandy Point that she purchased only last year. She continues to speculate in reservation land while complaining about the treatment she has allegedly received from the tribe. Her property is assessed on the tax rolls at a total value of over $770,000, but has a market value far higher. If court rulings regarding tribal sovereignty are legislatively overturned, the property values will jump substantially.

3. Activities - Since being elected a member of the County Council in 1994, Ms. Dawson has written over 200 letters on County Council stationery against the Lummi Nation on a variety of issues, representing her personal opinion, not that of the County Council. The majority of letters have gone to federal and state agencies and to Congress, but the Lummi Nation has not received one courtesy copy so that we can answer or correct her frequently untrue or distorted accusations. In some of those letters, she has proposed legislation to our Congressional representatives that would declare the formerly leased tribal tidelands open to public access and the Sandy Point marina channel over tribal tidelands subject to "navigational servitude." In her letters she has not disclosed that she is a resident of Sandy Point, a member of its board, and the owner of multiple shoreline properties on the reservation.

Ms. Dawson and a small group have conducted a letter-writing campaign to discredit the Lummi government. Her activities promote increased conflict and polarize the issues we have been trying to resolve amicably. While the Lummi Nation was lobbying for federal water negotiations, she and her group were filing petitions with the state to litigate the issue instead. She has sponsored resolutions in the County Council in opposition to tribal economic development projects. She has undermined water negotiations by participating in appeals over water and drilling a well on her property at the same time as she was represented in negotiations by both a County and a Sandy Point representative on the state negotiating team. Her support of Congressional legislation that would force litigation over reservation groundwater while we are negotiating the issue with two entities of which she is an elected official is part of an ongoing pattern of activities that have created and exacerbated problems rather than contributed to resolving them.

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ATTACHMENT #1

WATER SYSTEM TRANSFER AGREEMENT

RECITALS

A. HORIZON HEIGHTS HOMEOWNERS' ASSOCIATION (hereinafter "the Association") is a water association organized in whole or in part to acquire water and distribute it to its members. The Association is the owner of a well, well site, pumping system, water distribution system, and a water rights claim, permit and certificate from the State of Washington, all more completely and fully described in Exhibit A to this Agreement which is incorporated herein by this reference as if fully set out. The area served by the Association is located within the Lummi Indian Reservation.

B. The Lummi Indian Tribe (hereinafter "the Tribe") is a federally recognized Indian Tribe operating under a Constitution and By-laws adopted in its present form and approved by the Commissioner of Indian Affairs on April 10, 1970. The Tribe is located on the Lummi Indian Reservation which was set apart by treaty with the United States in 1855 and confirmed by Executive Order in 1873. The Tribe is the holder of certain rights which attach to its status as a federally recognized, reservation tribe including, but not limited to, water rights under the doctrine first stated by the United States Supreme Court in Winters v. United States, 207 U.S. 564 (1908). The Lummi Indian Business Council is the governing body of the Lummi Indian Tribe and the Lummi Tribal Sewer and Water District is a subordinate tribal body created by the Lummi Indian Business Council for administration of certain utility functions which the Tribe provides. Those services include the collection, treatment and disposal of sewage and the provision of drinking water.

C. The parties to this Agreement do not agree on the validity of the water rights or claims of the parties, but do agree that ground water should be efficiently managed throughout the Lummi Indian Reservation, and that the Lummi Indian Tribe is in the best position to provide comprehensive management for ground water on the reservation. The parties desire to avoid litigation over their respective water rights claims.

AGREEMENT

In light of the foregoing recitals and in consideration of the mutual covenants and promises of the parties set out below, the parties agree as follows:

1. The Association hereby transfers and conveys to the Tribe all of its facilities and easements included on Exhibit A to this Agreement. In making this transfer, the Association warrants that it is the owner of the facilities and easements included on Exhibit A and that it has the full right to make this conveyance. However, the Association makes no warranty as to the present condition of the facilities, their fitness for the use intended for them by the Tribe, or their future operating condition. The Tribe has inspected the facilities or had the opportunity to inspect them and agrees to accept them in their present condition.

2. The Association further agrees that it will not initiate any further ground water withdrawals within the Lummi Indian Reservation and will make no

application for such withdrawals.

3. The Tribe agrees that it will provide single-family residential water service to each of the parcels listed in Exhibit B to this Agreement, regardless of ownership of those parcels. (This involves a total of 20 lots.) Exhibit B is incorporated into this Agreement by this reference as if fully set out. In the event the Tribe is unwilling or unable to provide water service to any parcel included on Exhibit B in response to a request made following receipt by the Lummi Tribal Sewer and Water District of a petition signed by the owners of record of sixty (60%) per cent of the lots listed in Exhibit B, requesting that a local improvement district be formed to finance the improvements necessary to provide the requested service, this agreement shall be cancelled and the ownership of all facilities on Exhibit A shall be returned to the Association. This provision shall not be applicable if the cause of the Tribe's inability to provide service is the unwillingness of the Association members to pay their fair pro-rata share of the costs of improvements necessary to provide such service.

4. In addition, the Tribe agrees that it will undertake the following:

A. Operate and maintain the facilities in accordance with the Federal Safe Drinking Water Act and all other applicable laws.

B. Upon request by the affected property owners or, without such request, at the option of the Tribe, integrate the facilities into the Tribe's water distribution system for the purpose of efficient management of the system, the proportionate costs of such improvements being borne by the properties benefitting in accordance with subparagraph C, below.

C. Upgrade the facilities by repair or replacement if such improvements are necessary for the efficient management of the system, the costs of such improvements being borne by those benefitting from the improvements in accordance with the District's Local Improvement District procedures under the federally approved Lummi Sewer and Water Ordinance. The parties understand and agree that the Local Improvement District procedures provide the affected property owners with substantial control over the assessment procedure.

D. Establish and enforce fair and equitable rates for the provision of water service.

E. Administer the water system in an efficient manner, encouraging conservation of water and other policies of wise use.

F. Protect the water source which is a portion of the facilities transferred under this Agreement from pollution, contamination, or other degradation.

5. The parties specifically understand and agree that when the Tribe integrates the transferred facilities into the Tribe's water system, water provided to the parcels listed in Exhibit B may come from the Tribe's overall water system and not necessarily from the source which is a portion of the

facilities conveyed by this Agreement.

IN WITNESS WHEREOF the parties have executed this Agreement this 2ND day of July, 1991.

HENRY CAGEY, Chairman
LUMMI INDIAN BUSINESS COUNCIL

Karl Schumak President
HORIZON HEIGHTS HOMEOWNERS' ASSOCIATION

VERNE JOHNSON, JR.
Chairman of the Board
LUMMI TRIBAL SEWER AND WATER DISTRICT

STATE OF WASHINGTON)
) ss.
COUNTY OF WHATCOM)

I certify that I know or have satisfactory evidence that HENRY CAGEY signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the Chairman of the Lummi Indian Business Council, to be the free and voluntary act of such party for the uses and purposes mentioned in this instrument.

Dated July 2, 1991.

Notary Public in and for the State of Washington, residing in WHATCOM COUNTY.
My commission expires 5-15-93.

STATE OF WASHINGTON)
) ss.
COUNTY OF WHATCOM)

I certify that I know or have satisfactory evidence that Karl Schumak signed this instrument, on oath stated that he/she was authorized to execute the instrument and acknowledged it as the President of Horizon Heights Homeowners' Association, to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Dated [illegible] 1991.

Notary Public in and for the State of Washington, residing in [illegible].
My commission expires [illegible].

STATE OF WASHINGTON)
) ss.
COUNTY OF WHATCOM)

I certify that I know or have satisfactory evidence that [illegible] signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the Chairman of the Lummi Tribal Sewer and Water District, to be the free and voluntary act of such party for the uses and purposes mentioned in this instrument.

Dated May 15 1991.

[illegible]
Notary Public in and for the State of Washington, residing in [illegible].
My commission expires [illegible].

EXHIBIT A

1815 +/- lineal feet of 4" water main, two (2) fire hydrants, a well, pump, pump house, well protective easement, together with all appurtenances thereto. A groundwater withdrawal permit and certificate issued by the State of Washington under Department of Ecology No. G1*1047C.

EXHIBIT B

Lots 1 - 11, Plat of Horizon Heights, Division 1.

Lots 1 - 7, Plat of Horizon Heights, Division 2.

2 unnumbered lots, described as follows:

A TRACT OF LAND IN GOVERNMENT LOT 2, SECTION 27, TOWNSHIP 38 NORTH, RANGE 1 EAST OF W.M., IN WHATCOM COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

BEGINNING AT SECTION CORNER COMMON TO SECTIONS 26, 27, 34 AND 35, IN SAID TOWNSHIP AND RANGE; THENCE NORTH 88°59'00" WEST ALONG THE SOUTHERLY LINE OF SAID SECTION 27, A DISTANCE OF 771.44 FEET TO THE WESTERLY RIGHT-OF-WAY LINE OF HAXTON WAY; THENCE NORTH 29°22'10" EAST ALONG SAID WESTERLY RIGHT-OF-WAY, A DISTANCE OF 312.19 FEET; THENCE NORTH 88°59'00" WEST, PARALLEL TO THE SAID SOUTHERLY LINE OF SECTION 27, A DISTANCE OF 645.62 FEET TO THE TRUE POINT OF BEGINNING; THENCE CONTINUING NORTH 88°59'00" WEST 170.56 FEET; THENCE NORTH 22°29'00" EAST 93.54 FEET; THENCE SOUTH 76°07'15" EAST, 162.05 FEET; THENCE SOUTH 21°26'00" WEST 54.14 FEET TO THE TRUE POINT OF BEGINNING; TOGETHER WITH AN UNDIVIDED 1/20TH INTEREST IN AND TO THE BEACH RESERVE SHOWN ON THE RECORDED PLAT OF HORIZON HEIGHTS DIVISION NO. 1, WITH RIGHT OF ACCESS THERETO.

SITUATE IN COUNTY OF WHATCOM, STATE OF WASHINGTON

A tract of land in Government Lot 2, Section 27, Township 38 North, Range 1 East, W.M., Whatcom County, Washington, described as follows:

Beginning at Section corner common to Sections 26, 27, 34 and 35 in said Township and Range; thence North 88°59'00" West along the Southerly line of said Section 27, a distance of 771.44 feet to the Westerly right-of-way line of Haxton Way; thence North 29°22'10" East along said Westerly right-of-way, a distance of 312.19 feet; thence North 88°59'00" West parallel to the said Southerly line of Section 27, a distance of 463.49 feet to the true point of beginning; thence continuing North 88°59'00" West 113.11 feet; thence North 21°26'00" East 75.00 feet; thence South 84°18'01" East 115.00 feet; thence South 21°26'00" West 62.00 feet to the true point of beginning.

TOGETHER WITH an undivided one-twentieth (1/20) interest in and to the beach reserve shown on the recorded Plat of Horizon Heights, Division No. 1, with right of access in the common right-of-way thereto.

one located to the south of Lot 5, Division 1, and one located south of Lot 6, Division 1, Plat of Horizon Heights.

ATTACHMENT #2

UNITED STATES GOVERNMENT

memorandum

DATE: June 9, 1995

REPLY TO ATTN OF: Planning Hydrologist

SUBJECT: Trip Report

TO: Portland Area Director
Assistant Area Director, Program Services

DATE: June 2, 1995

LOCATION: Bellingham, Washington

PURPOSE: To represent the Portland Area Office at a meeting between the representatives of the Lummi Nation and the Sandy Point Improvement Company.

PERSONNEL CONTACTED:

Steve Goodrich, Engineer for Sandy Point Improvement Company
Marlene Dawson, Vice President, Sandy Point Improvement Company
Roy Pottle, President, Sandy Point Improvement Company
G. I. James, Lummi Nation Policy Director
Harry Johnsen, Lummi Nation Local Council
Harrett Beale, Water Resources Manager
Bill Black, Superintendent, Puget Sound Agency
Lewis More, District Director for Sen. Metcalf

DISCUSSION: Sandy Point Improvement Company is a supplier of domestic water to a subdivision located on the Lummi Indian Reservation in northwestern Washington. The subdivision is supplied by two domestic wells located in a single well house. It is reported that the Sandy Point well was drilled in 1971 but did not receive a State of Washington permit until 1993. In 1993 the Lummi Nation drilled a public supply well on a tract of fee land near the Sandy Point well. The Tribal well is used primarily to provide water to the ~~Tibial~~ Tribal hatchery.

The Portland Area Office was contacted by Superintendent Black who requested that I attend a meeting with representatives of the Sandy Point Improvement Company and the Lummi Nation to discuss the decrease in the static head of the Sandy Point domestic water supply well. The Sandy Point Improvement Company had contacted a number of congressmen and local officials regarding the decrease in head in the well. (See attached "Notice") The meeting was held at the office of Senator Metcalf. Senator Metcalf agreed to sponsor the ~~meting~~ meeting to explore potential solutions.

At the meeting Sandy Point reported water production figures as presented in the following table.

WATER PRODUCTION FIGURES
REPORTED BY SANDY POINT IMPROVEMENT COMPANY

Reported Production	Calculated Equivalent
200,000 gpd	139 gpm
160 gpd for 770 Services	86 gpm/123,300 gpd
160 gpd for 550 Services*	62 gpm/88,000 gpd
80 gpm average	115,200 gpd
230 gpm for 8 Hours (operator duty day)	110,400 gpd
160 gpm**	230,4000 gpd

Notes:
* When questioned by the Tribal Hydrologist the Sandy Point President reported that instead of 770 services there were only approximately 550 full time residents in the subdivision.

**The Sandy Point Engineer stated that they were in possession of a report prepared for them that stated that the sustainable yield of the aquifer was 160 gpm.

The Lummi Nation reported that they were using about 80 gpm on a continuous basis at the hatchery.

CONCLUSIONS: What the actual use by the Sandy Point Improvement Company is can not be determined at this time. However, if the actual yield of the aquifer is 160 gpm, and Sandy Point must supply 160 gpd per hookup, they could provide water for more than their 550 full time residents and still allow the Tribe to use approximately 80 gpm. The Improvement Company agreed to determine if they can go on a 24 hour pumping basis and the Nation will see if they can make savings at the hatchery.

RECOMMENDATIONS:

Continue to monitor the situation. If you have any questions contact Mr. Robert Fenton at 231-6927.

NOTED:

Portland Area Director

40

Assistant Area Director,
Program Services

ATTACHMENT #3

BEFORE THE LUMMI TRIBAL SEWER DISTRICT BOARD

In Re the Appeal of MARLENE DAWSON, et al, Appellants, vs. LUMMI TRIBAL SEWER DISTRICT, Respondent.	NO. 96-S-1 FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL DECISION

A hearing on the appeal of Marlene Dawson was held before the Lummi Tribal Sewer Board on March 18, 1996, commencing at 9:00 am. Present were Board Chairman Bill Ballew and Board members Kristine Heintz, Tim Ballew, and Jeff Mackay. Board Member Jim Wilson was unable to attend. District Legal Counsel Harry Johnsen acted as hearing officer. Appellant Marlene Dawson was present and represented herself. She also represented the Additional Appellants who are listed in Appendix A to this decision. Martin Bohl, an employee of the Lummi Nation, presented evidence and argument on behalf of the Lummi Indian Business Council on the issue of the Nation's utility tax. Sewer District Manager Eugene DeCoteau presented evidence on behalf of the District. Testimony was taken from Appellant Marlene Dawson, Martin Bohl, and Eugene DeCoteau. Written legal arguments were submitted on behalf of the Appellants on the utility tax and late payment penalty issues and

on behalf of the Lummi Nation on the utility tax issue. Oral opening statements and closing arguments were made by the Appellants and the Nation.

An opportunity for post-hearing briefing was offered to the Nation, with an opportunity for a responding brief by the Appellants. No post hearing brief was filed by either party. However, on April 1, 1996, Appellant Dawson delivered to the Hearing Officer's office forty pages of documents, listed in the official docket sheet as numbers 10354 through 10393 for record keeping purposes. The ruling on these documents is as follows:

> At the close of the hearing, all parties were informed that briefs arguing legal issues and discussing the facts developed at the hearing could be submitted, but that no additional factual material would be considered. That ruling stands. It would be a violation of due process and fundamental fairness to allow one party to submit written statements or other factual material which is not subject to cross-examination after the close of the hearing. Only legal briefing was allowed.
>
> Docket numbers 10354 through 10368 consist of a cover letter from Appellant Marlene Dawson (10354), ten new petitions (10355-10364) on the same form as Numbers 10083-10353, and four letters (10365-10368) from individuals seeking to intervene in the appeal after the hearing. The parties were informed at the hearing that no additional interventions would be allowed after the date of the hearing. The Lummi Nation took the position at the hearing that all petitioners should be granted intervention. Notwithstanding the Hearing Officer's earlier ruling on the cutoff date for intervention, the Board finds that there is no prejudice to any party in allowing intervention and that the efficient administration of appeals favors granting intervention provided that no new factual issues are raised. All petitions for intervention (Docket Nos. 10355-10364) are granted.
>
> Intervention is granted to Richard Dawson (10366), to the extent that his letter indicates he is joining in the appeal of his wife, Marlene Dawson. To the extent

that the letter attempts to insert new factual material, it will not be considered.

The letter from Betty Wallace (10365) will not be considered as it attempts present additional factual material, fails to demonstrate the author has standing, and fails to address either the utility tax or penalty fee issue.

The remaining two letters (10367, 10368) are from individuals who had previously signed intervention petitions. To the extent that they seek to argue their case, they will be considered. To the extent that they seek to insert new factual material or address issues not connected to the tax or penalty fee, they will not.

Numbers 10369 through 10388 are a letter from Linnea Smith to Appellant Dawson dated March 21, 1996, and numerous attachments. The letter states that Ms. Smith was at the March 18 hearing and was not called to testify before she left the hearing. The letter and attachments purport to be the testimony she would have given at the hearing. They are plainly inadmissible as untimely and will not be considered.

Numbers 10389 through 10392 are an intergovernmental agreement between the Lummi Tribe and Whatcom County, and a resolution of the LIBC. Both contain marginal notes apparently inserted by Appellant Dawson which could be considered legal argument in support of her position in the appeal. Both documents appear to be authentic and are official records of the governments involved. They will be considered as legal argument.

The record on this appeal consists of the written notice of appeal, documents submitted before and during the appeal hearing, the oral testimony of the witnesses as recorded on tape, and the minutes of the Sewer Board meetings where the actions were taken. Certain documents are deemed irrelevant to the issues on appeal and they were not considered by the Board. They are, however, included in the docket.

Two decisions of the Sewer Board are appealed. First, the Board's decision to include in the sewer rates the amount of the

utility tax imposed on the District by the Lummi Nation. Second, the policy of the District of assessing a late payment penalty in the amount of $5.00 in the event that any portion of a monthly bill is not paid on time.

The Board has fully and carefully considered the records and files, the testimony at the appeal hearing, and the arguments of the parties and now makes the following:

FINDINGS OF FACT

1. The Lummi Tribal Sewer District is a subordinate entity of the Lummi Nation, created by tribal ordinance and exercising powers, duties and responsibilities delegated to it by ordinance enacted by the Lummi Indian Business Council, subject to the decisions and decrees in Lummi Indian Tribe v. Hallauer, Civil No. 79-682R, Western District, Washington.

2. The Lummi Indian Business Council is the governing body of the Lummi Nation under the Nation's Constitution and Bylaws adopted by the tribal membership in 1970 and approved by the Acting Commissioner of Indian Affairs April 10, 1970. The Lummi Nation is a federally recognized Indian Tribe.

3. In 1990 the LIBC enacted Resolution 90-89 (Docket 10054-63) which provided for a utility service tax in the amount of 5% of gross retail sales of utility services provided on the Lummi Indian Reservation. The ordinance was approved by the Office of the Area Director Bureau of Indian Affairs on October 30, 1990, (Docket 10065) and accompanied by a legal memorandum from the Regional Solicitor for the Department of the Interior which analyzed the

legality of the ordinance. (Docket 10066-69) No appeal was filed from the approval of the ordinance by the Bureau of Indian Affairs. (TR 33)

4. The operations of the Lummi Tribal Sewer District are performed entirely within the boundaries of the Lummi Indian Reservation. (Ordinance §1.01)

5. Under the tribal ordinance and in accordance with the decisions and decrees of the Federal Court, the services of the District are available to its customers without regard to whether they are members of the Lummi Indian Tribe. (Ordinance §8.03)

6. The rates charged by the District for its services are the same for Lummi tribal members and for non-members. (Ordinance §8.01)

7. The appellants in this matter are not members of the Lummi Indian Tribe. (Petitions, Docket 10004-14, 10083-353, 10355-64)

8. All accounts at issue in this appeal are listed in Appendix A. Each parcel is located on the Lummi Indian Reservation.

9. Each account at issue in this appeal receives sewer service from the Lummi Tribal Sewer District either in the form of direct collection and disposal of sewage or in the form of availability of those services.

10. The Lummi Tribal Sewer District has no source of funds for its operations other than monies collected from its customers in the form of rates and connection fees, and grants for construction or equipment which have been obtained for the District

by the Lummi Indian Business Council. (TR 36, 37, 40)

11. The Sewer District has received grant funding through the efforts of the Lummi Indian Business Council. In addition to grant funding for the initial system, the District has received periodic grants through the LIBC for line construction, pump station repairs and replacement, and safety equipment. (TR 36-40)

12. If the District had not received funding for these items from the LIBC, the District rate payers would have been charged for them. (TR 40)

13. In 1990 the District was informed by LIBC that the District was subject to a 5% tax on its gross receipts under Resolution 90-89. (TR 39, Docket 10059-060)

14. In 1993 the District made a decision to show the existence of the tax on its customers' bills as an element of the sewer rates. The District's purpose in doing so was to inform its customers about that element of the rates and the reason for the increase its rates. It was not the intent of the District to tax its customers. (TR 39)

15. Since the time the District commenced operations it has had a problem with slow paying customers. This has created cash flow problems for the District. To encourage prompt payment the District adopted a penalty fee in the amount of $5.00 per billing period. (TR 40)

16. The late payment penalty fee was not adopted in connection with the utility tax and has no relationship to it. However, if a customer fails or refuses to pay to any portion of

the monthly bill, the penalty fee is assessed on the unpaid balance. It would be impractical and unduly expensive for the District to segregate those billings where the customer failed to pay a portion of the monthly charges as a matter of principle, from those where the customer simply failed to pay the entire bill for other reasons. (TR 40)

17. The penalty fee is not excessive in amount in light of its purposes.

18. Appellant Marlene Dawson has paid the portion of her monthly sewer bill which is attributable to the utility tax. She did so to avoid the penalty fee for late payment, not because she agreed with the tax or felt it was legally imposed. (TR 24)

19. There was no evidence presented at the hearing regarding the payment of the monthly sewer bills by any of the other appellants.

20. The monthly sewer bill is currently $24.15. Of this amount, $1.15 is attributable to the pro-rata cost to the District of the utility tax. For a standby customer, the monthly bill is $12.08. Of this amount, $.58 is attributable to the pro-rata cost to the District of the utility tax.

21. There was no evidence at the hearing that a cost of either $1.15 or $.58 per month was an economic hardship for appellant Marlene Dawson or any other appellant. The Board finds that the charge does not present an economic hardship.

22. There was no evidence at the hearing that payment of the penalty fee in the amount of $5.00 was an economic hardship for

appellant Marlene Dawson or any other appellant. The Board finds that the penalty fee does not present an economic hardship.

23. The penalty fee can be avoided by paying the monthly bill on time in full. The economic and efficient functioning of the District are dependent on a predictable cash flow and prompt, full payment of monthly billings. The District has provided other avenues to challenge the validity of the District's rates besides non-payment.

24. If the District were to withhold payment of the utility tax, it would be subject to legal action initiated by the Lummi Indian Business Council. (Docket 10054, 10061) The costs of defending that legal action and of challenging the validity of the utility tax would have to be borne by the District's rate payers. (TR 40) In addition, any unpaid utility tax assessments bear interest at the rate of 12% per annum. (Docket 10061) Those costs would also have to be borne by the District customers if the challenge were not successful. The District must pay the tax regardless of whether it collects sufficient funds from its ratepayers to do so. The District has no source of funds for this tax payment other than funds collected from its ratepayers and no ability to raise funds from any other source. (TR 40)

25. The District's decision in the Fall of 1995 not to challenge the validity of the utility tax was made on the basis of its analysis of the legal merits of such a challenge and on its analysis of the interests of its rate payers.

26. The District's Board consists of both Lummi Tribal

members and non members. It is not necessary to be a tribal member to run for or vote for certain Sewer Board positions. (Ordinance §1.04, 1.07)

27. According to the testimony at the hearing, the budget of the LIBC, which includes funds collected from the utility tax, is published annually and is available to both members and non members. There was no evidence to the contrary. (TR 33)

28. District customers residing on the Lummi Indian Reservation benefit from the expenditure of tribal funds for services in addition to sewer service. The provision of law enforcement and certain road maintenance services are two examples. (Docket 10055)

Based upon the foregoing Findings of Fact and the records, files and legal authorities considered by the Board, the Board makes the following:

CONCLUSIONS OF LAW

1. The legal incidence of the Lummi Utility Tax is on the District as a utility providing service on the Lummi Indian Reservation. The legal incidence of the tax is not on the individual customer, irrespective of the fact that the economic burden of the tax is borne by the customer. All expenses incurred by the District are ultimately passed on to its customers, except to the extent that grant monies are obtained by the Lummi Indian Business Council for the benefit of the District.

2. The utility tax directly affects the District. It indirectly affects the District's customers. The District is not

a taxing entity and has no authority to levy a tax.

3. The indirect effect of the utility tax on the District's customers is the same regardless of whether the customer is a tribal member or not.

4. There is no requirement in the Lummi Constitution, any applicable Lummi Ordinance or in federal law that ordinances which have an indirect effect on non members of the Lummi Tribe be approved by the Bureau of Indian Affairs or any other government official outside the Lummi Nation.

5. Approval of the utility tax ordinance by the Bureau of Indian Affairs or other federal government official is not required in order for the tax to be validly imposed on the Tribal Sewer District.

6. The burden of demonstrating the invalidity of a government action is on the person alleging the invalidity. The appellants have failed to prove the approval of the tribal utility tax ordinance was invalid as applied to the District.

7. The Lummi utility tax as applied to the District does not discriminate against non members of the Tribe.

8. The decision to include the cost of the utility tax within the District rate structure was a prudent decision by the Board.

9. The decision not to challenge the validity of the Lummi utility tax as applied to the District was a prudent decision by the Board.

10. The penalty fee imposed by the District in cases of non payment does not discriminate against non members of the Tribe.

11. The penalty fee is reasonable in amount in light of its purpose and was validly imposed by the District.

12. The District's decision to include of the cost of the utility tax in the Sewer District rates does not violate any due process rights of the appellants.

13. All other issues argued by the appellants are beyond the scope of this appeal.

Any of the foregoing Findings of Fact which are more properly designated as a Conclusion of Law are hereby designated as such. Any of the foregoing Conclusions of Law which are more properly designated as a Finding of Fact are hereby designated as such.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law and each Board member's independent analysis of the record, the Board makes the following decisions:

1. The appeals regarding the utility tax are DENIED.

2. The appeals regarding the penalty fee tax are DENIED.

DISTRIBUTION OF DECISION

Copies of this decision shall be sent by certified mail to Ms. Marlene Dawson as representative for all appellants, and to Mr. Martin Bohl as representative of the Lummi Indian Business Council. It shall be the responsibility of the appellants' representative to inform the other appellants of the decision. For purposes of the timing of any appeal, the appellants shall be deemed to have

received notice of the decision at the time when the appellants' representative receives notice. The original of this decision shall be retained in the records of the District and shall be open for public inspection.

APPEAL RIGHTS

A copy Article XIV (Judicial Review) of the Lummi Tribal Sewer Ordinance is attached. In accordance with §14.02 ANY PERSON WHO DESIRES REVIEW OF THIS DECISION BY THE LUMMI INDIAN BUSINESS COUNCIL SHALL PETITION THE LUMMI INDIAN BUSINESS COUNCIL FOR REVIEW WITHIN TEN (10) WORKING DAYS OF THE DATE OF RECEIPT OF THIS DECISION BY PARTY'S REPRESENTATIVE. The petition for review shall be filed with the Lummi Tribal Sewer District Office and a copy mailed to the other parties' representative by the party seeking review.

The parties having stipulated on the record that the hearing before the Board was procedurally fair, any party may elect to bypass review by the Lummi Indian Business Council and seek review directly in the Lummi Reservation Court. If a party elects to bypass the LIBC, ALL ARGUMENTS REGARDING THE FAIRNESS OF THE HEARING BEFORE THE BOARD WILL BE DEEMED WAIVED.

ANY PERSON WHO DESIRES REVIEW OF THIS DECISION BY THE LUMMI RESERVATION COURT SHALL PETITION THE COURT FOR REVIEW WITHIN TEN (10) WORKING DAYS OF THE DATE OF RECEIPT OF THIS DECISION BY PARTY'S REPRESENTATIVE. The petition for review shall be filed with the Lummi Tribal Sewer District Office and a copy mailed to

the other parties' representative by the party seeking review.

Dated MAY 9, 1996.

Bill Ballew
BILL BALLEW, Chairman

JEFF McKAY, Vice-Chairman

KRISTINE HEINTZ, Secretary

TIM BALLEW, Member of the Board

ATTACHMENT #4

RECEIVED
AUG - 5 1996
Raas, Johnsen & Stuen, P.S.

FILED
LUMMI TRIBAL COURT
LUMMI INDIAN RESERVATION
JUL 3 1 1996
BY: CLERK

LUMMI TRIBAL COURT
LUMMI INDIAN NATION

In Re the Appeal of, MARLENE DAWSON, et al, Petitioner, LUMMI TRIBAL SEWER DISTRICT, LUMMI INDIAN BUSINESS COUNCIL, Respondent.	)	Case No. 96.6 CA 6175 JUDICIAL REVIEW OF LUMMI SEWER BOARD DECISION

THIS MATTER came before the Court by petition for judicial review of a Lummi Sewer Board decision. Petitioner is pro se. The Lummi Tribal Sewer District is represented by Harry L. Johnsen, Attorney at Law. The Court has reviewed the decision of the Sewer District, memoranda and supporting materials submitted by the parties.

The standard for judicial review of a decision by the Lummi Sewer District is found in Section 14.03 of the Lummi Sewer Ordinance which provides as follows:

> The Reservation Court shall conduct a review upon the written record, and shall permit for each party to present oral argument in support of his position. The standard used in this review shall be whether there was substantial evidence in the record to support the decision of the Sewer . . . Board. The Reservation Court shall issue a written decision.

Petitioner appealed several issues to the Lummi Tribal Sewer Board. A hearing was held on March 18, 1996. The "Final Decision" issued by the Sewer Board from the

Lummi Tribal Court
2616 Kwina Road
Bellingham, WA 98228
(360) 384-2305

hearing was appealed directly to the Lummi Tribal Court as provided for by the Lummi Sewer Ordinance. Petitioner filed a pleading titled, "Petition for Review As It Concerns Ms. Marlene Dawson", with the Lummi Tribal Court on June 4, 1996. On July 17, 1996, both parties were given the opportunity to present oral arguments in support of their positions. There were numerous procedural flaws in the petition submitted by Petitioner, such as failing to sign the petition and failing to request relief. The Sewer Board, through its attorney, waived procedural objections.

Petitioner requested the Court review several matters that were unrelated to the decision appealed from the Sewer Board decision. The Hallauer Consent Decree specifically provides at #19(b) that the, "The Reservation Court shall conduct a review upon the written record, and the standard used in such review shall be whether there was substantial evidence in the record to support the decision of the Lummi Sewer Board." Therefore, this Court is only reviewing the record and supporting materials used by the Sewer Board in making its May 9, 1996, decision.

The first issue addressed is whether there was substantial evidence in the record to support the Sewer Board's decision to deny the appeal regarding the utility tax. Courts rely on the skill of counsel to analyze large amounts of information associated with appeals and then present clear and concise arguments either favoring or cutting against the decision in question. Rather than focusing her arguments on whether the Sewer Board based its decision on substantial evidence, Petitioner spent much of her

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time and effort arguing issues not being reviewed by this Court. Petitioner did not present persuasive arguments sufficient to overcome the standard of review set out in the Lummi Sewer Ordinance and Hallauer Consent Decree. Based on the Court's review of the hearing record, the findings of fact and conclusions of law in the Sewer Board's "Final Decision", this Court finds that the decision was based upon substantial evidence in the record.

The second issue is whether there is substantial evidence in the record to support the Sewer Board decision to deny the appeal regarding a late payment penalty in the amount of $5.00 for monthly sewer bills.

At the March 18, 1996, hearing before the Lummi Sewer Board, Petitioner raised the issue of whether the late fee for not paying the sewer tax was excessive. Petitioner argues that in comparison to the City of Bellingham, which has a $2.00 late fee for a two-month cycle which includes both sewer and water, the Lummi Sewer District late fee of $5 is excessive. Petitioner did not offer any evidence that the fee was excessive, other than a comparison with the City of Bellingham's billing practice for late fee payments. There was no evidence that the late fee is an economic hardship.

The Lummi Sewer District (hereinafter District) imposed a five (5) dollar late fee as a result of problems with slow paying customers. Without the late fee, slow paying customers created a cash flow problem for the District. To encourage prompt payment the District adopted a penalty fee in the amount of $5.00 per billing period. The late

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payment penalty has no connection with the utility tax. The late fee is charged to any customer, regardless race, who fails or refuses to pay any portion of the monthly bill in a timely manner. The penalty fee is assessed on the unpaid balance. The penalty fee can be avoided by paying the monthly bill in full in a timely manner. The economic and efficient functioning of the District depends on a predicable cash flow and prompt, full payment of monthly billings. The Sewer Board's decision to deny the appeal was based upon substantial evidence in the record.

Accordingly, the Lummi Sewer Board decisions are affirmed.

Dated this 31st day of July, 1996.

RANDY A. DOUCET, CHIEF JUDGE
Lummi Tribal Court

Lummi Tribal Court
2616 Kwina Road
Bellingham, WA 98228
(360) 384-2305

ATTACHMENT #5

RAAS,
JOHNSEN,
&STUEN,P.S.

ATTORNEYS AT LAW

DANIEL A. RAAS
HARRY L. JOHNSEN
THOMAS E. STUEN
BRIAN K. VALENTINE
PATRICK J. LAKEY

LAURIE A. POWERS
Of Counsel

ADDRESS:
1503 E Street
Bellingham, Washington

MAILING:
P.O. Box 5746
Bellingham, WA
98227-5746

TELEPHONES:
(360) 647-0234
Facsimile (360) 733-1851

June 4, 1996

Ms. Marlene Dawson
4029 Saltspring Drive
Ferndale, WA 98248

Re: Petition for Review

Dear Ms. Dawson:

This will acknowledge receipt by the Lummi Tribal Sewer District of your "Petition For Review As it Concerns Ms. Marlene Dawson" on June 3, 1996. The petition was unsigned and you did not provide any indication that you had mailed a copy to the LIBC representative as required by the provisions of the Board's decision. Nonetheless, I have filed the petition with the Lummi Tribal Court and provided a copy of the petition to Mr. Martin Bohl, the LIBC representative. I have also paid the $25.00 filing fee on your behalf.

The court has assigned Cause Number 96.6 CA 6175 to the petition. A copy of the face page of the petition is enclosed. Please include the tribal court cause number in all future pleadings filed with the court. The Sewer District cause number (96-S-1) should not be shown on any new pleadings filed in the court.

The District will file the official record of the proceedings with the court in the next few days. You already have a copy of the transcript and you should have copies of each of the documents which makes up the record. If you are missing any of the documents please contact me and I will provide copies.

I cannot tell from the petition whether you are appealing on behalf of all the intervenors or simply on behalf of your husband and yourself. The petition title appears to limit the appeal to yourself since it states "AS IT CONCERNS MS. MARLENE DAWSON", and it uses the pronoun "I" repeatedly. However, the petition also uses the pronoun "we" at some locations. Because of the uncertainties raised by this usage, I ask that you take the following steps:

June 4, 1996

1. Since the last day for filing an appeal is June 6 by my count, please file a brief written statement with the court by that date indicating whether you are the sole petitioner or whether others are included. If others are joining in the petition, please list those persons. Mail or deliver a copy of the statement to my office and to Martin Bohl, LIBC Representative, 2616 Kwina Road, Bellingham, WA 98226

2. Please sign the enclosed copy of the signature page from your petition and file it with the court, requesting the clerk to attach it to the unsigned, filed original. Mail or deliver a copy to my office and to Mr. Bohl.

3. Please send a check or money order in the amount of $25.00 payable to Raas, Johnsen & Stuen, P.S. to reimburse us for the filing fee which we have advanced in your behalf. (A copy of the court's receipt is enclosed for your reference.)

4. Please confirm in writing to the court that the reference to the Lummi Indian Business Counsel in the caption of your petition is a typographical error and that it should read "Council". (As written, your caption implies that the tribal attorney is a party to the case.) Mail or deliver a copy to my office and to Mr. Bohl.

Please note that these are merely requests on my part. I am not ordering you to do any of these things, and I have no power to make such an order. However, the District reserves all rights to make any argument to the court which it deems appropriate in the event that you elect not to comply with these requests.

As I have repeatedly told you in the course of this appeal, I cannot give you legal advice regarding either substance or procedure. I recognize that you are not represented by counsel and that legal procedure can be confusing to lay persons. However, I have a client to represent and you are appealing a decision which that client has made. It is my job to defend that client's decision and its interests.

The District has made many accommodations to you in the course of this appeal, including those listed in this letter. But you should not anticipate that it will continue to do so. You have elected to represent yourself in this appeal and you have every right to do so. But I will expect you to know and follow the same rules and procedures as an attorney would in similar circumstances.

In that regard, I also acknowledge receipt of an eleven page document entitled "Appellant Marlene Dawson's Interrogatories and Requests for Production Propounded to LIBC". I filed a copy with the Tribal Court and provided a copy to Mr. Bohl. However, I do

not agree that this document is appropriate in an appellate proceeding of this type. The ordinance is very clear that review is limited to the transcript and written record made before the Sewer Board. No discovery is allowed on appeal. There is no possibility that the material sought could lead to admissible evidence since no additional evidence is allowed on appeal.

I do not intend to respond to the interrogatories or requests for production. If you feel you are entitled to responses, you may submit the matter to the court. However, I caution you that I will respond with a motion for terms (an award of attorneys' fees against you) for filing a frivolous motion and costing the District and its ratepayers additional attorney fees. I also reserve the right to contest the appropriateness of the interrogatories and requests on all other applicable grounds.

With regard to scheduling, the code does not specify a time for response or briefing. I suggest we submit an agreed scheduling order. Alternatively, we could request a pre-hearing conference for the court to set a schedule. I suggest that the District have 20 calendar days to respond to your petition (June 24) and that you have until July 8 to serve and file any rebuttal. Then oral argument would be scheduled by the court. If that is acceptable, please let me know and I will prepare an agreed order.

Very truly yours,

RAAS, JOHNSEN, & STUEN, P.S.

HARRY L. JOHNSEN
Attorney at Law

HLJ:slw

cc: Sewer District Board
Martin Bohl

ATTACHMENT #6

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA ROAD • BELLINGHAM, WASHINGTON 98226-9298 • (360) 384-1489
DEPARTMENT _____ EXT _____

LUMMI TRIBAL COURT RESPONSE TO MS. DAWSON'S TESTIMONY

October 2, 1996

The Dawson case was an appeal from a May 1996, Lummi Sewer District decision on two issues, a utility tax and a late penalty fee on bills. The hearing before the Lummi Tribal Court was conducted according to Lummi Tribal Code of Law Article XIV, Judicial Review. The standard of review is established under Section 14.03, as follows, "The standard used in this review shall be whether there was substantial evidence in the record to support the decision of the Sewer and Water Board." The scope of review was limited to the two issues appealed from the Lummi Sewer District decision.

This case has run the statute of limitations for appeal, therefore I can discuss the case. Ms. Dawson did not file an appeal. In response to the testimony of Ms. Dawson, I have chosen to respond by placing her remarks in italics, with my response below.

The tribal judge requested a pre-court hearing with himself, the sewer board attorney, Mr. Johnson and myself. The judge made a request, on behalf of the tribal council, that we try to settle out of court.
I did request a "pre-court hearing" for two reasons. First, Ms. Dawson's petition requested the court review six issues that were not ruled on by the Lummi Sewer Board. I wanted to inform her that I could only review the two rulings by the Sewer Board. The second reason, was to determine whether the parties had tried to settle the case. This is a standard practice in all courts, state and federal. As with state and federal courts I do not have the time nor resources for every case to go to trial or hearing. They responded that they had not talked. In her testimony, Ms. Dawson stated that I was asking for a settlement on behalf of the Lummi Indian Council. This is simply not true, as with all civil cases my interest was to have the case settled. I ask parties in every civil case if they have tried to work out a solution to their problems. I had not spoken with anyone from either side prior to the pre-hearing conference.

The tribal attorney, stated he would try to get Dept. of Interior approval. Knowing this tribe had failed to honor numerous contracts and agreements and knowing that six months earlier, to no avail, the sewer board had directed Mr. Johnson to get confirmation that the tribe's tax ordinance had been approved, I declined to consider an out of court settlement. I wanted a court determination on the facts.
Ms. Dawson stated she was not interested in settlement, and that her goal was to get this case into Federal Court, before Federal Judge Barbara Rothstein.

The tribal judge then requested to speak with me privately. While he stated I had a good argument, he stated it appeared he would have to dismiss my case on technicalities. I didn't have my signature notarized, so perhaps he thought, I'd want to reconsider a settlement. I explained that others were willing to bring the issue forward and that the second time loop holes could be addressed.
I did request to speak with Ms. Dawson privately in order to point out the potential strengths and weaknesses of her case. I intended to do the same with the Sewer Board attorney, but I did not because Ms. Dawson was not interested in discussing a possible settlement. No case is without flaws, therefore I hoped the two would consider at least talking about a settlement. This method of encouraging parties to settle was taken from the book by Judge Robert Satter, Doing Justice. I did state that she did have some good points, but most of them could not be considered because they were beyond the scope of review. It was my view that there was some room for negotiation on some of the issues, if both sides negotiated in good faith. This would allow all of the issues to be brought to the settlement table. It was my opinion then and still is that Ms. Dawson should have hired an attorney to represent her in this matter. I did tell her that her case would probably be dismissed if she went forward, because I expected that Mr. Johnson would make a motion to dismiss on the many procedural errors committed by Ms. Dawson. Not only was the petition not notarized, it was not signed by Ms. Dawson.

I was also told I would not be able to represent the 575 petitioners and that I could only represent myself.
I did tell her that she could not represent anyone but herself. She is not an attorney, nor is she admitted to the Lummi Tribal Bar.

I then documented what had occurred at the pre-court conference and asked for leniency from the court on technical issues because no one had been prejudiced or damaged by my omissions.
She did ask me to overlook the procedural flaws. I seriously considered dismissing her petition, with the advice to get an attorney. However, Mr. Johnson made no objection to the procedural errors. Both parties wanted to proceed, so I allowed the hearing to take place.

In addition, I stated my presence was for personal appearances only and wanted it known that I was not consenting to the court having any jurisdiction over me. The clerk stamped my statement, took it to the judge, and gave me a copy. When the court hearing opened, I was berated by the judge for taking up the court's time, asked why I had not informed him earlier of my feelings on the court jurisdiction issue and was also asked to be fined by the tribal attorney, Mr. Johnson. The Judge stated he was going to dismiss the entire case on my refusal to submit to the court's jurisdiction. The legal technicalities had not become a non-issue.
The legal technicalities were never a non-issue, however, both parties wanted to proceed so I allowed the hearing. At the beginning of the hearing Ms. Dawson, the petitioning party, stated the court did not have jurisdiction over her. This was the first time that she had raised that issue. I stated that if the court did not have jurisdiction, then why did she file her

petition in Lummi Tribal Court? I was not happy that this issue was brought up as a surprise issue at the hearing, it should have been raised in the petition or by motion, not at the time the hearing is about to proceed. I have never heard of the term "personal appearance only." I took it to mean personal jurisdiction. A court cannot proceed unless it has personal and subject matter jurisdiction. I stated that if the court did not have personal jurisdiction over the petitioner I was going to dismiss the case. I did threaten to impose sanctions, for wasting the court's time and resources. It was apparent that she was not making a good faith effort to win her case.

The attorney followed up by stating he had already spent thousands of dollars in preparing and addressing the court that the issue was sure to rise again, and that the Judge after all was there not to determine the legality of the tax but only whether it was appropriate and cost effective for the sewer board not to have addressed the issue of the tax's legality. Now, at no time was this a consideration I had raised. I wanted the facts reviewed, the illegal nature of the tax was always the focus along with the attorney's conflict of interest and conspiring by the tribal attorney.

I was only reviewing two issues ruled on by the Sewer Board using the applicable standard of review. That was the only purpose of the hearing as set out by the statute. I was not going to let either side bring in unrelated issues or issues that had not been raised at the Sewer Board Hearing.

The Judge then agreed to continue the hearing, but told me I would be subject to the jurisdiction of the court.

There were two options, dismiss the case or go forward. Both parties wanted to go forward. I found that Ms. Dawson had consented to civil jurisdiction by filing the petition in Lummi Tribal Court.

To make a long story short, the good argument, recognized privately by the judge was dismissed for lack of sufficient evidence.

Most cases usually do have some merit to them, that does not necessarily mean that they will prevail. She did not present sufficient evidence that the Sewer Board did not make its decision based on substantial evidence.

It is quite obvious that where there is no separation of power, the tail wags the dog as it concerns tribal court.

Ms. Dawson has no evidence to support this claim. There are several provisions in the Lummi Tribal Code (LTC) that offer protections of separation of power between the Court and the rest of the tribal government. First, Judges are appointed to a six (6) year term and can only be removed for cause. LTC 1.3.06. Second, Judges can be disqualified from a case, by submitting an affidavit of prejudice in accordance with LTC 1.4.04. Had Ms. Dawson done a little research, she would have found out that I am currently the only sitting Judge of the Lummi Tribal Court. Pro-tem Judges are selected from the list of twenty-four (24) Washington State attorneys that practice in Lummi Tribal Court, and Judges from other Tribal Courts. If Ms. Dawson would have filed an affidavit of prejudice, the pro-tem judge most likely hearing the case would have been a licensed attorney in private practice in

Whatcom, Skagit or Snohomish counties, who was selected by the Court clerk based on the attorney's schedule and availability. Third, the Lummi Nation government structure chart places the Court separate and above the L.I.B.C. and has done so in every chart that I have seen. This chart is recognized as the official structure, and it has been my experience that it is recognized and followed by all tribal departments and agencies. Fourth, there is an appeal process. Appeals are composed of a combination of local attorneys and Tribal Judges from other reservations. Attorneys working for the Lummi Tribe do not sit as Pro-tem Judges or Appeals court judges. Finally, it is against the law to try and influence a Judge in accordance with LTC 4.1.09. I have no reservations about reporting someone to the police for violation of this law.

The same tribal court story can be retold as it concerns two non-Indian property owners who tried to hold the tribe accountable for their bad faith negotiations with the city of Bellingham.

Those cases came through this court at the same time as Ms. Dawson's case. Ms. Dawson was at their hearing with her own court reporter. I advised her at the time that she should have hired an attorney rather than a court reporter. I repeatedly asked both parties to specifically address the standard of review and the evidence. However, they only read from prepared statements.

In closing, it is my practice to advise pro-se parties to obtain representation. I have made numerous requests for local attorneys to practice in the Lummi Tribal Court at Whatcom County Bar Meetings. Currently, twenty-four (24) local attorneys practice in our court. I have never heard of a complaint to me, the local bar or the state bar about separation of powers or fairness to parties, Indian or non-Indian in Lummi Tribal Court. In fact, last year the Associate Judge of the Lummi Tribal Court was asked by the Whatcom County Superior Court to sit as a Pro-Tem Commissioner. She currently retains that honor. Had the Superior Court Judges had doubts about the professionalism and integrity of the Lummi Tribal Court they would not have asked her to sit on their court.

Finally, I am a licensed attorney with the Washington State Bar. The Lummi Tribal Court treats everyone fairly regardless of sex, race, religion, or any other human traits. I invite a State or Federal Judge, or non-partisan attorney to review the record and my decision in this case.

Sincerely,

Randy A. Doucet, Chief Judge
Lummi Tribal Court

RECEIVED
AUG - 5 1996
Raas, Johnsen & Stuen, P.S.

ATTACHMENT #7

LUMMI TRIBAL COURT
LUMMI INDIAN NATION

In Re the Appeal of, SUSAN BAILEY, and ALBERT and JUDY SPERRY, Petitioner, LUMMI TRIBAL SEWER DISTRICT, LUMMI INDIAN BUSINESS COUNCIL, Respondent.	)	Case No. 96.6 CA 6179 JUDICIAL REVIEW OF LUMMI SEWER BOARD DECISION

THIS MATTER came before the Court by petition for judicial review of a Lummi Water Board decision. Petitioners are pro se. The Lummi Water Board is represented by Harry L. Johnsen, Attorney at Law. The Court has reviewed the decision of the Water Board, memoranda and supporting materials submitted by the parties.

The standard for judicial review of a decision by the Water Board is found in Section 14.03 of the Water Ordinance which provides as follows:

> The Reservation Court shall conduct a review upon the written record, and shall permit for each party to present oral argument in support of his position. The standard used in this review shall be whether there was substantial evidence in the record to support the decision of the Sewer . . . Board. The Reservation Court shall issue a written decision.

Petitioners requested a hearing before the Lummi Water Board to appeal the decision to deny them water service. A hearing before the Lummi Water Board was held on March 25, 1996. The Water Board issued a written decision on May 21, 1996,

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2616 Kwina Road
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(360) 384-2305

denying the appeals. Petitioners filed with this Court a written stipulation regarding fairness of the hearing before the Water Board. They petitioned directly to the Lummi Tribal Court for judicial review of the Water Board decision. On July 24, 1996, both parties presented oral arguments in support of their positions. There were numerous procedural flaws in the petition submitted by the petitioners, such as failing to sign the petition and failing to request relief. The Water Board, through its attorney, waived procedural objections. This Court reviewed the written record and supporting materials used by the Water Board in making its final decision. Evidence and documents filed with the Court after the Water Board hearing and decision were not considered.

The first issue for review is whether there was substantial evidence in the record to support the Water Board's decision to deny the appeal for water service to Susan Bailey. Petitioners have the burden to prove that the decision by the Water Board was not supported by substantial evidence in the record.

During oral argument before the Lummi Tribal Court, Petitioner Bailey read from a prepared statement. When the Court asked her to focus her arguments on whether the Water Board's decision was supported by substantial evidence, she seemed confused. She was allowed to continue reading from the prepared statement. It is not inappropriate to read or refer to written statements when addressing a court, so long as the prepared statement contains relevant information. Petitioner Bailey failed to address the legal standards set out in the Water Ordinance. She failed to discuss the evidence upon

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which the Water Board based its decision. Finally, she did not present persuasive argument sufficient to overcome the burden set out in the standard of review. Based on the Court's review of the record, the Findings of Fact and Conclusions of Law in the Water Board's "Final Decision", this Court finds that the decision by the Lummi Water Board was based upon substantial evidence in the record.

The second issue for review by the Court is whether there is substantial evidence in the record to support the Water Board's decision to deny Mr. & Mrs. Sperry's claim for a water hook-up.

At the March 25, 1996, hearing before the Lummi Water Board, Mr. Sperry claimed that during the late 1980's, he had been promised a water hook-up by Lummi Tribal Officials. The hearing record does not reflect a presentation of evidence supporting his claim. Mr. Sperry was given the opportunity during the Water Board hearing for a continuance to call witnesses, he declined and presented his case before the Water Board without evidence or witnesses.

During oral arguments before the Court, Mr. Sperry presented a compassionate argument. However, without sufficient evidence in support of his position he did not prove that the decision by the Water Board was not supported by substantial evidence.

Accordingly, the Lummi Water Board decisions are affirmed.

Dated this 2nd day of August, 1996.

RANDY A. DOUCET, CHIEF JUDGE
Lummi Tribal Court

Lummi Tribal Court
2616 Kwina Road
Bellingham, WA 98228
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ATTACHMENT #8

BEFORE THE LUMMI TRIBAL WATER DISTRICT BOARD

In Re the Appeal of SUSAN BAILEY, and ALBERT and JUDY SPERRY, husband and wife, Appellants, vs. LUMMI TRIBAL WATER DISTRICT, Respondent.	NO. 96-W-1 FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL DECISION

A hearing on the appeal of Susan Bailey and Albert and Judy Sperry was held before the Lummi Tribal Water Board on March 25, 1996, commencing at 9:00 a.m. Present were Board Chairman Bill Ballew and Board members Tim Ballew, and Jim Wilson. Attorney Edward Wurtz acted as hearing officer for the Board. Appellant Susan Bailey was present and represented herself with the assistance of Marlene Dawson. Albert and Judy Sperry were also present. At the Sperrys' request and with the consent of Ms. Bailey, the Sperry appeal was combined with the Bailey appeal. Shirley Leckman presented evidence and argument on behalf of the Lummi Indian Business Council. Water District Manager Eugene Decoteau presented evidence on behalf of the District. Various members of the public also attended the hearing.

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Testimony was taken from Appellant Susan Bailey, Appellant Albert Sperry, Harry Johnsen, Leroy Deardorff, and Eugene Decoteau. Mr. Sperry indicated that he desired to call as witnesses Henry Cagey and G.I. James who were not present. He was offered a continuance of the hearing to arrange for their attendance, but he declined the offer and elected to go forward without the witnesses. Appellant Bailey requested and was granted a recess to obtain the presence of Mark Asmundson as a witness. He was unable to attend but faxed a letter stating his proposed testimony. The Nation objected to the letter on the grounds that it could not be cross examined. The letter is included in the record as Docket No. 20068. The letter is hearsay, but even if it were considered by the Board it would not alter any Finding of Fact or Conclusion of Law by the Board. The letter purports to be the present recollection of Mr. Asumundson regarding the water line negotiations between the City of Bellingham and the Lummi Nation in 1989 and 1990. The best evidence of those negotiations is the tape recording and transcript of the meetings at which the negotiations took place (Docket Nos. 20007-10, 20050-59, 20067), and the December 7, 1989 letter from tribal attorney Harry Johnsen to City attorney Bruce Disend regarding those negotiations (Docket No. 20040-41). To the extent that Mr. Asmundson's March 18, 1996 letter is inconsistent with those documents, it is not persuasive.

. Certain documents were submitted by the parties and a listing is included on the attached docket sheet. Written legal arguments were submitted on behalf of the Appellants. Oral opening

statements and closing arguments were made by the Appellants and the Nation. No party requested an opportunity for post-hearing briefing.

The Board invited the parties to submit proposed findings of fact and conclusions of law. The Lummi Nation submitted proposed findings; the appellants did not. Appellants Albert and Judy Sperry submitted no post-hearing materials. Appellant Susan Bailey submitted a post-hearing document entitled "Findings to Water Appeal Hearing on March 25, 1996" which was received by the District office on April 1, 1996 (Docket No. 20069-85). This document contains an mixture of legal argument and purported new factual material not submitted at the hearing. The Board has considered the legal argument but not the purported new factual material since it was not presented at the hearing and was not subject to cross examination or rebuttal.

The record on this appeal consists of the written notice of appeal, documents submitted before and during the appeal hearing, the oral testimony of the witnesses as recorded on tape, the oral closing arguments of the parties, and the post-hearing materials submitted by the parties, subject to the limitations noted in the preceding paragraph.

The two appeals involve similar but not identical allegations. The Bailey appeal alleges that she owns property on the Lummi Indian reservation, that she is not a member of the Lummi Indian Tribe, that she has applied for water service from the Lummi Tribal Water District, that she was denied water service to which she was

otherwise entitled on account of race, and that she offered to construct a water main extension to serve her property.

The Sperry appeal alleges that the Sperrys own property on the Lummi Indian Reservation, that they are not members of the Lummi Indian Tribe, that at one point they were promised water service by the Lummi Tribe, that later they were refused water service, and that the refusal was based upon their race.

Both appellants allege that at the time the Tribe negotiated with the City of Bellingham for a water supply contract, the Tribe promised the City that it would provide water service to all persons who applied, regardless of whether they were members of the Tribe.

The Board has fully and carefully considered the records and files, the testimony at the appeal hearing, and the arguments of the parties and now makes the following:

FINDINGS OF FACT

1. Appellant Susan Bailey owns Lot 4 Block 5 Plat of Gooseberry Point No. 1 on the Lummi Indian Reservation.

2. Appellants Albert and Judy Sperry own a lot located on county tax parcel 380134 404399 on the Lummi Indian Reservation.

3. The properties owned by the appellants are located in the central peninsula of the Lummi Indian Reservation.

4. Neither of the appellants' properties currently receives water service from any purveyor.

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5. Appellant Bailey's property is located within the Gooseberry Point Water Association area and the Association has service lines fronting her property. She did not testify about why she is not served by that Association.

6. The Lummi Tribal Water District does not have a service line fronting her property. Appellant Bailey offered no evidence regarding any offer to construct a water main to her property as alleged in her notice of appeal.

7. Appellant Sperrys' property is located outside of the service area of any water association.

8. Both appellants have requested single family domestic water service from the Lummi Tribal Water District. Both have been turned down for service at present. Neither appellant is a member of the Lummi Tribe.

9. The Lummi Tribal Water District obtains water from two principal sources: groundwater wells on the reservation and a pipeline from the City of Bellingham. The City is located several miles from the reservation, and the City does not provide direct service on the reservation.

10. There is a limited amount of groundwater available on the Lummi Indian Reservation, and there is extensive competition for that limited supply.

11. The competition for groundwater on the reservation is between the Lummi Nation and persons who are not members of the Nation.

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12. Litigation over ownership and governmental control of groundwater on the reservation in the 1970's resulted in a determination by the state of Washington that there was no more groundwater available for appropriation on the central peninsula of the Lummi Reservation.

13. In addition, the litigation focussed attention on the substantial saltwater intrusion problems on the reservation which adversely affect the reservation groundwater supplies, especially in the Lummi peninsula. Saltwater intrusion poses a substantial threat to the integrity and long-term usefulness of the reservation aquifers.

14. By 1989 non members of the Lummi Tribe were using more than half of the domestic groundwater consumed on the reservation even though the plats in which the water was consumed comprised only 3% of the reservation land area.

15. At that time rather than attempting to force the non member water users to cease using the reservation groundwater through litigation or other means, the Lummi Tribe decided to avoid confrontation and obtain an additional source of water for its long term needs by contracting with the City of Bellingham.

16. In 1990, the Tribe also offered to take over operation of the on-reservation water associations and to supply water to all of their legal commitments, regardless of whether the associations had the legal or physical ability to fulfill those commitments. With two exceptions, the associations refused that offer.

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17. Neither of the appellants' property is located in water association service areas taken over by the Tribe under those agreements.

18. The Tribe's intent in making its offer to the water associations was to end dispute and to unify groundwater management on the reservation.

19. The City of Bellingham did not require the Tribe to open its water system to non members as a condition of purchasing water from the City.

20. The Tribe did not promise the City of Bellingham that it would open its water system to non members in exchange for obtaining water from the City.

21. The contract between the City and the Tribe makes no mention of service to persons who are not members of the Tribe.

22. The history of the negotiations between the Lummi Tribe and the City of Bellingham shows that the City's concern was that if the Tribe elected to open its water system to non members of the Tribe, those persons would be charged fair, equitable and non-discriminatory rates.

23. The District has non member customers under voluntary contractual commitments. Those customers are charged the same rates as Lummi tribal members. The rates charged to non members are fair, equitable and non-discriminatory.

24. The Water Associations on the reservation currently limit the persons to whom they supply water to members of the Association

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and others to whom the Association has voluntarily committed to serve.

25. The Lummi Water District currently limits the persons to whom it supplies water to members of the Lummi Nation and others to whom the Tribe has voluntarily committed to serve.

26. The Lummi Water District has great uncertainty regarding the supplies of water which will be available to it in the future and the extent of the demand for water which the Lummi Nation will face in the future.

27. Currently available supplies of water do not appear to be sufficient to satisfy the long term demand for water facing the Lummi Tribal Water District.

28. It would not be prudent for the District to commit to serving additional persons to whom it is not already committed until it has more certainty regarding the supplies and sources of water that will be available to it to meet that demand.

29. The District has refused to provide water service to Indians who are not members of the Lummi Tribe.

30. The basis for the distinction in service policy is tribal membership, not race. Tribal members are to some degree analogous to part owners of the tribal water system and other tribal resources. Non members do not share in that status.

31. The Lummi Water District has not held itself out as willing and able to serve all persons requesting service, and it would not be prudent for the District to do so until it has certainty regarding both supply and demand.

32. The Lummi Water District did not promise to provide water service to the Sperry property. Appellant Sperry submitted no evidence on this issue.

33. In 1993 the Lummi Nation began aggressively seeking federal and state negotiations to resolve long-standing water issues on the reservation. In July 1995 the federal and state governments agreed to negotiations and water issues are now being negotiated in that forum. Uncertainty of supply and demand will likely continue until those negotiations are successfully completed.

34. The Lummi Tribal Water District and the Lummi Tribal Sewer District are two distinct entities with separate Boards, assets, liabilities and budgets.

35. The Lummi Tribal Water District receives no funds from sewer availability or "standby" charges assessed by the Lummi Tribal Sewer District. The appellants pay sewer standby charges to the Lummi Tribal Sewer District, but do not make any payment to the Lummi Tribal Water District.

36. The appellants submitted no evidence regarding the amount of water available to Lummi Tribal Water District, or the reasonably foreseeable demands which the District will face in the future from the Lummi Nation, tribal members and others to whom the District is contractually committed.

Based upon the foregoing Findings of Fact and the records, files and legal authorities considered by the Board, the Board makes the following:

CONCLUSIONS OF LAW

1. The appellants have the burden of proof as to all matters necessary to their appeals.

2. The appellants have failed to prove that they have a right to demand water service from the Lummi Tribal Water District.

3. Appellant Sperry has failed to prove that he was promised water service and then denied service.

4. The appellants have failed to prove that the quantity of water available to the Lummi Water District is in excess of the reasonably foreseeable demands which the District will face in the future from the Lummi Nation, tribal members and others to whom the District is contractually committed.

5. The appellants have failed to prove that the limiting of water service by the District to tribal members and other persons with whom the District has a voluntary contractual commitment violates any right of the appellants.

6. Limiting the use of tribal property to tribal members and others whom the tribe has voluntarily elected to include as users does not violate the Indian Civil Rights Act or the similar provisions of the Lummi Constitution.

7. Limiting the use of tribal property to tribal members and others whom the tribe has voluntarily elected to include as users does not violate the Consent Decree entered in Lummi Indian Tribe v. Hallauer.

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8. Payment of a sewer availability or standby charge to a Sewer District does not give rise to an obligation by the Tribal Water District to provide water service.

9. An Indian tribe is not obligated to allow non members of the tribe to use tribal property, even if those individuals are willing to pay for the use of the property.

10. The Lummi Indian Tribe did not bargain in bad faith with the City of Bellingham to obtain a water contract, and has not violated the terms of that contract by electing not to supply water service to the appellants.

11. There is no requirement that tribal decisions limiting the use of tribal property to members of the tribe be approved by the Department of the Interior.

12. There is no requirement that tribal water management decisions based on anticipated supply and demand be submitted to or approved by the Department of the Interior.

Any of the foregoing Findings of Fact which are more properly designated as a Conclusion of Law are hereby designated as such. Any of the foregoing Conclusions of Law which are more properly designated as a Finding of Fact are hereby designated as such.

DECISION

Based upon the foregoing Findings of Fact and Conclusions of Law and each Board member's independent analysis of the record, the Board makes the following decisions:

1. The appeal of Susan Bailey is DENIED.

2. The appeal of Albert and Judy Sperry is DENIED.

DISTRIBUTION OF DECISION

Copies of this decision shall be sent by certified mail to Ms. Susan Bailey and to Mr. and Mrs. Albert Sperry and to Ms. Shirley Leckman as representative of the Lummi Indian Business Council. The original of this decision shall be retained in the records of the District and shall be open for public inspection.

APPEAL RIGHTS

A copy Article XIV (Judicial Review) of the Lummi Tribal Water Ordinance is attached. In accordance with §14.02 ANY PERSON WHO DESIRES REVIEW OF THIS DECISION BY THE LUMMI INDIAN BUSINESS COUNCIL SHALL PETITION THE COUNCIL FOR REVIEW WITHIN TEN (10) WORKING DAYS OF THE DATE OF RECEIPT OF THIS DECISION BY THE PARTY OR HIS OR HER REPRESENTATIVE. The petition for review shall be filed with the Lummi Tribal Water District Office and a copy mailed to the other parties' representative by the party seeking review.

Dated May 21, 1996.

Bill Ballew
BILL BALLEW, Chairman

Jim Wilson
JIM WILSON, Board Member

Tim Ballew
TIM BALLEW, Board Member

ATTACHMENT #9

RAAS,
JOHNSEN,
&STUEN,P.S.

ATTORNEYS AT LAW

DANIEL A. RAAS
HARRY L. JOHNSEN
THOMAS E. STUEN
BRIAN K. VALENTINE
PATRICK J. LAKEY

LAURIE A. POWERS
Of Counsel

ADDRESS:
1503 E Street
Bellingham, Washington

MAILING:
P.O. Box 5746
Bellingham, WA
98227-5746

TELEPHONES:
(360) 647-0234
Facsimile (360) 733-1851

June 17, 1996

Ms. Susan Bailey
6784 North Star Road
Ferndale, WA 98248

Re: Appeal of Decision

Dear Ms. Bailey:

This will acknowledge receipt on June 11, 1996, by the Lummi Tribal Water District of your "Appeal of Findings of Fact, Conclusions of Law and Final Decision".

I have forwarded the appeal to the Tribal court rather than to the Lummi Indian Business Council in accordance with your direction. A handwritten note accompanying the Appeal stated "I am waiving any concerns with the fairness of the hearing and want to proceed straight to Lummi Court."

Neither the note nor the Appeal was signed, but I assume that the note was written by you and that it represents not only your own intentions but also those of Mr. and Mrs. Albert Sperry. I filed the note with the court along with the Appeal notice. Tha court will send you a receipt for the filing fee.

Would you please sign the enclosed copy of the signature page from the Appeal notice, and send it to the Lummi Tribal Court with a copy to my office? I cannot guarantee the court will accept it or that it will treat the appeal as timely filed because of the missing signature, but I do want to bring it to your attention.

I noticed that the caption on the notice of appeal spells the other appellants' name as "Speery" whereas our records indicate it is spelled "Sperry". He did not sign his letter to the board which initiated his appeal, so I do not know the correct spelling. Please check on this so the court record is correct.

I also noticed that the caption lists the "Lummi Trial Sewer District" as a Respondent. I assume the word "Trial" is a typographic error and it should read

COPY MAILED TO CLIENT

"Tribal". I do not want to make any assumptions about your use of the word "Sewer", but the appeal was directed to the Water District, not the Sewer District and the decision was made by the Water District Board, not the Sewer Board.

I ask that you sign the enclosed stipulation to confirm the waiver of your right to review by the LIBC. Please also have the Sperrys sign their stipulations if that is what they intend to do. The original signed stipulations should be filed with the Tribal court and a copy sent to my office.

A copy of the transcript of proceedings is enclosed for your use. The original has been filed with the court. You should have copies of each of the documents which makes up the record. If you are missing any of the documents please contact me and I will provide copies.

The court has assigned the Cause Number 96.6 CA 6179 to the appeal. Please include it on all future filings. It is no longer necessary to include the Water Board cause number W-96-1.

I cannot give you legal advice regarding either substance or procedure. I recognize that you are not represented by counsel and that legal procedure can be confusing to lay persons. However, I have a client to represent and you are appealing a decision which that client has made. It is my job to defend that client's decision and its interests.

You have elected to represent yourself in this appeal and you have every right to do so. But I will expect you to know and follow the same rules and procedures as an attorney would in similar circumstances.

In that regard, I also acknowledge receipt of a six page document entitled "Interrogatories and Requests for Production to Respondents". I filed a copy with the Tribal Court. However, I do not agree that this document is appropriate in an appellate proceeding of this type. The ordinance is very clear that review is limited to the transcript and written record made before the Water Board. No discovery is allowed on appeal. There is no possibility that the material sought could lead to admissible evidence since no additional evidence is allowed on appeal.

I do not intend to respond to the interrogatories or requests for production. If you feel you are entitled to responses, you may submit the matter to the court. However, I caution you that I will respond with a motion for terms (an award of attorneys' fees against you) for filing a frivolous motion and costing the District and its ratepayers additional attorney fees. I also reserve the

right to contest the appropriateness of the interrogatories and requests on all other applicable grounds.

With regard to scheduling, the code does not specify a time for response or briefing. I suggest we submit an agreed scheduling order. Alternatively, we could request a pre-hearing conference for the court to set a schedule. I suggest that the District have 20 calendar days to respond to your petition (July 1) and that you have until July 12 to serve and file any rebuttal. Then oral argument would be scheduled by the court. If that is acceptable, please let me know and I will prepare an agreed order. If that is not acceptable, contact me so we can arrange a pre-hearing conference with the court.

Very truly yours,

RAAS, JOHNSEN & STUEN, P.S.

HARRY L. JOHNSEN
Attorney at Law

HLJ:slw

cc: Water District Board
Shirley Leckman

ATTACHMENT #10

INTERGOVERNMENTAL AGREEMENT

THIS AGREEMENT is made and executed by and between WHATCOM COUNTY, a municipal corporation of the State of Washington, hereinafter designated as the "County", and the Lummi Indian Tribe, an Indian Tribe recognized as such by the federal government, hereinafter designed as "LIT".

WHEREAS, the parties to this Agreement recognize the need for closer governmental ties in order to promote the efficient administration of a variety of governmental services for the benefit of their constituents.

NOW, THEREFORE, IT IS MUTUALLY UNDERSTOOD AND AGREED AS FOLLOWS:

1. The County recognizes the importance of identifying the boundaries of the Lummi Reservation and hereby acknowledges the propriety of placing suitable signs identifying same at appropriate boundary points.

2. The County shall recognize and give effect to building, construction, zoning, shoreline management, development, and other similar permits issued by the LIT planning office for property located upon the Lummi Reservation; provided, that the standards for issuance of such permits by the Tribe shall be the same as those imposed by the County.

This provision is not intended to limit or remove the County's authority to issue permits for those properties within the Reservation subject to County jurisdiction.

3. With regard to land located within the Lummi Reservation, the County shall cause a stamp to be placed upon all deeds, permits, records and tax statements filed with or issued by the County to the effect that such land is located within the Lummi Indian Reservation and tribal laws may apply to the land and activities occurring thereon. The stamp shall give the address and telephone number of the LIT offices.

4. The County and LIT shall seek to obtain grants or other funding for the purpose of repairing and/or upgrading Lummi Shore Road.

5. The County Engineer shall determine whether access for children to the beach area on Lummi Shore Road, at the Portage, is feasible either through removal of a portion of the rip rap, construction of a walkway, or by some other means which will not adversely affect the roadway or incur significant cost. If such access is feasible, the County and LIT will jointly undertake implementation of such project.

6. A name, to be chosen by LIT, shall be added to Haxton Way so as to create a new roadway designation incorporating both names. Ten years subsequent to creation of the new designation the parties shall determine, by mutual agreement, whether the designation shall be retained, altered, or otherwise changed.

7. The LIT is working on plans for the development of the Gooseberry Point Small Boat Harbor. The County recognizes that this project involves LIT property located exclusively within the boundaries of the Lummi Reservation and, therefore, that the LIT has jurisdiction over said project. LIT agrees that the construction, use and enjoyment of the Gooseberry Point Small Boat Harbor shall be conducted in such a manner as not to interfere with the operation of the County ferry service to Lummi Island.

8. The County Sheriff shall recommend members of the tribal police force to the State Patrol Academy; provided, that the tribal police meet the Sheriff's standards for deputies.

9. Whereas, the County has agreed to formally recognize the LIT as the government of the Lummi Indian Reservation

within the framework of Federal, Tribal and State law, and to treat the Lummi Indian Tribe as a self-governing entity, the LIT hereby agrees to exercise its governmental powers, as to all people coming within its jurisdiction, in accordance with the requirements and principles of due process of law and the equal protection of the laws.

10. This Agreement is conditioned upon the entrance, and approval by the court, of a Consent Decree by the parties hereto in the federal district court under Civil Action No. 79-682R.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals this 16 day of SEPTEMBER, 1982.

LUMMI INDIAN TRIBE

BY: Edward L. Jones

WHATCOM COUNTY

BY: John Louws
JOHN LOUWS
County Executive

ATTACHMENT #11

Herald 3-15-96

▼ LETTERS: FOCUS ON LUMMI RESERVATION

Dawson's campaign counterproductive

I appreciate your coverage of the conflict between Lummi Nation and Whatcom County Councilwoman and Sandy Point resident Marlene Dawson (March 19 Herald, Page A1).

I am appalled, as a non-Indian resident of Whatcom County, to know that one of my County Council representatives is using her elected position of power to carry out a personal agenda against Lummi Nation.

Dawson and her Sandy Point neighbors, as non-tribal residents of the Lummi Reservation, should have implicit respect for tribal law and land.

Why did they purchase reservation land in the first place if they were so opposed to Lummi Indians having jurisdiction over their own reservation lands?

I will actively campaign against Dawson should she run for re-election, as her actions do seem "anti-Indian."

In the meantime, I hope County Council members will realize that not all of their constituents agree with Dawson's agenda.

In working on the issue of jurisdiction over fee lands on the reservation, it is imperative that communication lines stay open and that tribal law and history be considered.

The self-interested efforts of Marlene Dawson are distinctly counterproductive to the cooperative effort that must exist between Indian and non-Indian residents of the Lummi Reservation.

Anna Merrill
Lummi Island

Dawson's crusade will be costly

I find it very disturbing that, while community leaders are calling for greater understanding and tolerance among diverse peoples in Whatcom County, Councilwoman Marlene Dawson is waging a one-woman campaign against Lummi Nation (March 19 Herald, Page A1).

Dawson was elected to the at-large position, representing the county as a whole, not just as a paid lobbyist for non-tribal property owners on the Lummi reservation, where Dawson also happens to live.

I also find it most ironic that Dawson is fighting a reservation rezone for a recreational-vehicle park in a "residential" neighborhood, while supporting council actions to convert a rural neighborhood in Custer to industrial use.

The County Council members who support Dawson's agenda, as well as the Custer rezone, will cost all county taxpayers a bundle in protracted litigation fees.

Doris Prather
Deming

Bellingham Herald 3/26/95

▼ LETTERS: FOCUS ON LUMMI JURISDICTION

Beware of further restrictions

Councilwoman for the people? What people?

Surely not the Indians who were here to receive the explorers and settlers.

Surely not the true Americans, who were told to exist only on government-appointed land called reservations.

Now that Lummi Nation has its own elementary, high school and college system, they are prospering. The (white) non-Indian person says, Whoa!

Complaining non-Indian people saw a comparatively inexpensive place to start an expensive lifestyle of housing and pleasure boating, on reservation-appointed land.

The word reservation was a way by treaty the non-Indian man could restrict the Indian tribes people. Now a Whatcom County councilperson (Marlene Dawson, March 19 Herald, Page A1) is trying to restrict them even more.

We saw it happen in Hawaii.

Russell & Lori Apana
Ferndale

Respect tribal sovereignty

I am a non-Indian living on the Lummi Reservation. There are many non-Indians living here who do not support the agenda of Whatcom County Councilwoman Marlene Dawson (March 19 Herald, Page A1). It seems apparent that Dawson does not understand, or chooses to ignore, the concept of tribal sovereignty.

What's wrong with the Lummi Nation governing themselves and their reservation? Indians were deprived of their lands in 1855 by the federal government, and given small reservations to live on. But politics and bad decisions have created a "fee land" system on many of these reservations. Now, our local government wants to deprive these native people once again.

Dawson does not speak for me. Problems on the reservation should be worked out respectfully and cooperatively with the tribe. To deliberately attack Lummi Nation's decisions on how they chose to manage their land is arrogant.

The native culture has witnessed the disappearance of salmon runs, sacred sites, wildlife and clean water. These problems didn't exist before European settlers arrived. So why should they abide by our laws?

I thought Dawson was a supporter of private property rights. Maybe she is, unless of course, you're Indian. If you don't like living among the Lummis, then move off the reservation.

Colleen Berg
Bellingham

Recognize jurisdiction of Lummis

My wife and I are not Indians, but we live on the Lummi Reservation. We enjoy our beautiful surroundings and the neighborliness of the tribal community.

We came expecting to be subject to the jurisdiction of the Lummi government. Like Canadians who own homes in Bellingham, we expected to pay taxes and not vote on the reservation.

We find the county jurisdiction claim an affront to the Treaty of 1855 between Lummi Nation and the United States of America.

Why can't we white Americans honor treaties with American Indians? Is it a cultural trait we learn from our forebears? Or a gene that won't allow us to accept being subordinates to a non-white governing body? Are we inherently incapable of keeping our word to those who were here before us?

When fear, dishonor, racism and selfishness push this into the Supreme Court, may we finally demonstrate the capacity to honor our nation's agreement with the first nations.

Meanwhile, Whatcom County Councilwoman Marlene Dawson (March 19 Herald, Page A1) and others who don't like living on this Indian reservation under Lummi jurisdiction could move off the reservation.

My wife and I will stay as long as we continue to feel welcomed by the Lummi Nation.

Tom Richardson
Bellingham

Saddened by Dawson's actions

As a non-Indian, living on the Lummi Reservation (Sandy Point), I must express my sadness and frustration with the actions taken by Whatcom County Councilwoman Marlene Dawson against the Lummi tribe.

I bought my home in 1988, fully aware that it was within the boundaries of the Lummi Reservation, and fully expecting to be subject to any laws and assessed fees instituted by the Lummis. I have been treated with respect in all encounters I have had with members of the tribe, and have assumed that I was a guest (albeit uninvited) on the reservation.

Dawson's actions appear rooted in mistrust and a desire to undermine and overturn rights negotiated between Lummi Nation and the U.S. government. Beyond being embarrassed by her actions, I fear that she puts at risk the relationship that we have most enjoyed — the ability to live in quiet enjoyment in this extraordinarily beautiful place. I urge her to stop her adversarial actions.

Ruth Parker
Ferndale

Bham Herald
3.22.95

▼ LETTERS: FOCUS ON LUMMI JURISDICTION

Dawson doesn't speak for her

I am a resident of Whatcom County. Whatcom County Councilwoman Marlene Dawson is absolutely no way speaking for, or represents me, in her attitudes toward, or dealings with, the Lummi Nation (March 19 Herald, Page A1).

Kathryn L. Utter
Whatcom County

Article creates difficult obstacles

Most American Indians move from their Indian reservation to large cities in different states to find a better way of life.

The article on "Lummi property battles looming" (March 9 Herald, Page A1) has caused difficult obstacles for other American Indians living in the Bellingham area who are searching and trying to secure the American dream for a better way of life.

Finally, it would be helpful to remove these difficult obstacles for the other decent American Indians by keeping these kinds of reports out of the news media. This can be done by taking positive action through talk sessions by all concerned parties.

Of course, all parties must show up in good faith. Everyone suffers, including the Lummis.

David J. Red Fox
Bellingham

Dawson plunders Indian rights

Re: The March 19 front-page article about conflicts over Lummi tribal lands.

White people came to this continent and pillaged lands from indigenous people. That was barbaric, and in today's society you would think that such actions would have long been discontinued.

Instead, Whatcom County Councilwoman Marlene Dawson and people like her continue to plunder what little rights Indians continue to hold.

The land that Lummi Nation is situated on was "granted" to them by white people who stole the land from them in the first place. Just because Marlene Dawson and people like her covet the land that the Lummis now have does not mean they have any rights to it.

Camille Hackler
Bellingham

Beware loose-cannon approach

I want to express my concerns and my reaction about Whatcom County Councilwoman Marlene Dawson's letter-writing campaign.

Dawson's efforts to impact Lummi Nation and tribal behavior by requesting that federal funds be drastically cut reflect a desperate, loose-cannon approach, in my opinion.

Rather than a positive approach of mutual resolution, or one of "neighborly" conflicts, or even one of respect for the laws governing treaties and sovereign nations, Dawson seeks to coerce — as in dominate, control, and/or punish — the tribal leadership for opposing her.

If she wrote these letters in her official elected position, I hope her constituents share my concerns.

Davell Seversen
Bellingham

Agrees with Dawson

I agree with Whatcom County Councilwoman Marlene Dawson 100 percent (March 19 Herald, Page A1). We should slash federal money to Lummi Nation. I also feel Lummi Nation should have to pay federal income tax, just the same as the rest of the U.S. population.

As of today, they do not have to pay federal income tax, which is not fair to us.

Steve Radisich
Bellingham

▼ LETTERS

Talk of racism arises

Residents struggle to resolve conflicts on Lummi land

Y RACHEL PRENTICE
HE BELLINGHAM HERALD

The word doesn't come easily hen talking about neighbors

Racism

But that's how several non-ndian residents of the Lummi Reservation describe efforts to rengthen Whatcom County's jurisdiction over land owned by on-Indians on the reservation

"I think to a large extent it's acism," said Tom Richardson, who has lived on Haxton Way since 1987

▼ Inside

■ Looking for solutions

Page A2

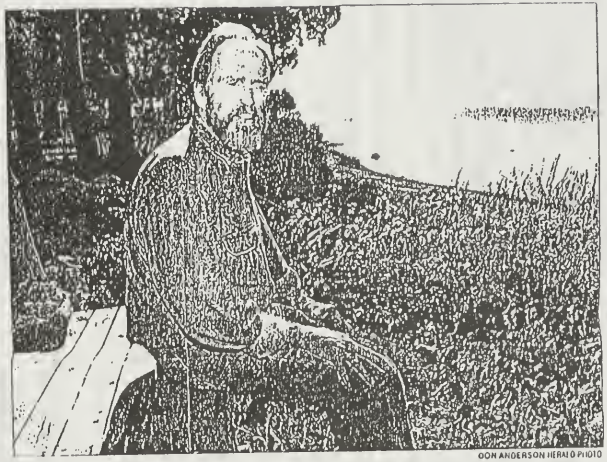
"I think backing it up is the fear (of some residents) that sooner or later, the tribe will try to take our property away from us ... this is ... [illegible]

Richardson is talking about efforts by County Councilwoman Marlene Dawson and some other reservation residents to influence local, state and federal policies on Lummi Nation

Dawson has worked — mostly by writing dozens of letters and making dozens of telephone calls — to strengthen non-Indians' rights on the reservation

Lands on the 12,500 acre reservation are divided into two categories: fee and trust land. Trust land — about two thirds of the reservation — is owned by the federal government and held forever "in trust" for Lummi tribal members. It isn't subject to property taxes

Fee lands are reservation lands sold off by some tribal members and federal agencies earlier this century. Most fee land is owned by non-Indians, and questions arise about who has jurisdiction tribal government or county government



DON ANDERSON HERALD PHOTO

HE SEES BIGOTRY: Tom Richardson, who moved back to Washington after eight years in California, says he is stunned by racism he has encountered in Whatcom County

Some non-Indian reservation residents believe they should have rights similar to those of foreigners living in this country — nothing more. Others believe they should have all the rights of county residents living in Whatcom County

Ruth Parker, who has lived on the reservation since 1988, said the deed to her house stated it was on the Lummi Reservation.

"I assumed at the time we would be subject to their laws and subject to any fee structures they had," she said

She believes Dawson's efforts to strengthen non-Indians' rights on the reservation may force Lummi Nation into taking legal action to regain reservation land, a move Lummi leaders have threatened.

Some reservation residents have questioned tribal jurisdiction over water, sewer, law enforcement and zoning, among other issues.

An example of such tensions is law enforcement on the reservation.

Lummi Nation has its own police force, Lummi Law and Order. Law and Order can arrest or detain tribal members or members of other Indian tribes. The agency also can detain non-Indians, but must allow the county Sheriff's Office to handle arrests

Dawson has said Law and Order has been involved in harassment of non-Indians living on the reservation, including hassling

See RACISM, Page A2 Col 1

▼ OFF PAGE A1

Racism

Continued from Page A1

residents walking on the beach

But other residents say the force is responsive, efficient and helpful

"I've had nothing but real positive encounters," Parker said. "At one point, my daughter's car had broken down. I was pushing her in my car and the Lummi police stopped and asked if they could help push us back to my place."

Reservation resident Joy Ellis said she believes Law and Order officers do a wonderful job

"It's one of the pluses of living out here," she said. "Any time you need help, they're right there."

Richardson, who moved back to Washington from California eight years ago, said the racism he encountered in Whatcom County stunned him

For example, he said his son was told by non-Indian fellow students at Ferndale High School that they could hang out with them or with Lummi kids, but not with both

"It was a real shock and surprise for all of us," he said. "I had assumed the world had changed."

Reservation residents are uncertain how to resolve the conflicts

Henry Cagey, chairman of the Lummi Indian Business Council, has said the conflicts won't end until the county recognizes Lummi jurisdiction over the reservation. Dawson has said Lummi Nation must stop trying to drive non-Indians off the reservation

Gwen Norment, a retired minister who rents a house on the reservation, said all sides must forget past injustices and move on from here. The key is get people to talk with one another and avoid further polarization, she said

Parker said she doesn't know what the solution is

"I love the place I'm living," she said. "It's a beautiful place. But I don't know that it's right that I'm living there. I'd like to be there as long as I'm welcome."

Shouldn't break treaties, promises

I was shocked to learn of Marlene Dawson's actions against the Lummi Indians. Has she no feeling of pride in her country that she would encourage it to so wantonly break promises and treaties made?

What kind of a reputation are we, as a nation, to have when we treat our Indians as lesser human beings? The whole world would be judging us.

We have lived on the Lummi Reservation for almost 20 years and have found that we've been most fairly treated. We did not come here to take over or push aside.

We are grateful to be allowed to live in this beautiful place where we really, as non-Indians, are here by the grace and kindness of Lummi Nation.

Jean Hammes
Bellingham

B'ham Herald
4/4/95

GOP puts out contract on American children

If the welfare reforms already passed by the House also sail through the Senate as

Lummi Nation workers must pay income tax

If the information given by Steve Radisich of Bellingham in his letter (March 27 Herald, Page B4) is correct, then we would like all of the federal income tax that we have paid over the years returned to us immediately.

As employees of Lummi Nation, this is the first we have heard about not being required to pay income tax. This type of misinformation is at the root of many biases in which the native people in Whatcom County, as well as across the nation, must constantly work against in their daily lives.

Not only do we pay FICA and federal income tax, but we are also required to pay a 2 percent tax to Lummi Nation for earning money on the reservation.

Perhaps Radisich should learn more about his neighbors so that he doesn't pass along any more inaccurate information, which does nothing but perpetuate ill feelings between the two communities.

Nancy Carroll, library director
Lummi Reservation Library System
Whatcom County

▼ LETTERS POLICY

Letters must not exceed 200 words and should be signed. Letters must be verified. Include a telephone number at which you can be reached between 8 a.m. and 5 p.m. Monday through Friday.

Writers are limited to one letter a month. We do not print thank you letters, or those that focus on personal matters, level personal criticisms, promote a particular business or advance or disparage a particular religion.

Address letters to: P.O. Box 1277, Bellingham, WA 98227 or fax to 647-9260.

▼ LETTERS: FOCUS ON LUMMI RESERVATION

4-21-95
Bham Herald

Who took whose land away?

I am a student at Ferndale High School. I am writing to you about an article I have just read "Talk of racism arises" (April 3 Herald, Page A1).

In this article, I felt that there is a lot of racism going on out on the Lummi Reservation.

From the article, my sense was that the Indians were the only ones exhibiting racism. Not true.

There are many different incidences where racism has been shown, such as past articles about property and water rights for non-Indians.

There is one quote from Tom Richardson I would like to respond to: "I think backing it up is the fear (of some residents) that sooner or later the tribe will try to take our property away from us — this is sort of a pre-empitive strike."

Who took whose land away from whom?

I would love to see this happen so we could get some of our homeless in a home and use the rest for future use.

The land was given to us to use. It seems non-Indians want to take the little bit of beautiful pieces of land that we now have, after they took all of North America.

Jonathon Lane
Ferndale

Tribal rights should be respected

I hope all of you fully appreciate the extra vigilance shown by your duly and properly elected County Council member Marlene Dawson in her frantic efforts to protect non-Indian fee land owners now living within the boundaries of the Lummi Reservation.

From whom? I have lived on fee-patent land within these boundaries for 15 years and my relations with my Indian neighbors are good. I have never felt that the tribe was in any way trying to drive me from the reservation. Could that be because I respect tribal rights? Are Dawson's condemnations of the Lummi Nation legitimate council duties?

I would like to quote from the article by Rachel Prentice (April 3 Herald, Page A1): lands "held forever in trust."

I point out that the tribe removed no lands from trust, this was done by the federal government through the Bureau of Indian Affairs in what all knowledgeable historians agree was one of the most dishonorable actions (the Dawes Act) against the Indian people. Its sole purpose was to remove land from Tribal Trust so that it could be acquired by non-Indian homeowners and developers.

John H. Brunson
Bellingham

Dawson's, council's actions deplorable

The General Allotment Act of 1887 was passed with the clear purpose of destroying tribal government. This destructive intent was recognized in the 1989 Supreme Court decision on fee lands.

The County Council should burn with shame for its complicity in the attacks on the dignity and sovereignty of Lummi Nation. Councilwoman's Marlene Dawson's role had been particularly deplorable.

Swastikas and burning crosses are not the only signs of racism. The long history of the anti-Indian movement has always been tinged with white supremacy. As time has gone by, the racism has become shrouded in fuzzy language like "property rights." The false assumption of inferiority due to heritage and ancestry still lurks behind the attacks.

Nobody is fooled by the recent letters denying that racist bias against Indians is an issue. It's there, it's real — the letters themselves show it. As an attempt to silence criticism, those letters are a failure.

The people of Whatcom County deplore and condemn racism. Individually and acting together, we will continue to expose and confront racism — no matter how it may be disguised or what company it may travel in. The Herald's reports on racism are a public service.

Paul de Armond
Bellingham

Dawson's actions display chutzpah

10-5-96 Bham Herald

It is troublesome that county official Marlene Dawson has a serious conflict of interest in her overzealous attack on the Lummi Tribe's federal right to conduct its own business (story, Sept. 25 Herald, Page A1).

Ethics require that she excuse herself from working on issues involving questions of her property holdings vs. a group of citizens within her representative jurisdiction. Is she pursuing her agenda as county official or as a private citizen? If this is a personal action on her part, just who is paying for it? If it is an official action, how can she justify it ethically?

People who buy property on the reservation, know, or should know, of the complexity of jurisdiction there. The complexities have kept the market value low for fee land. Even so, the amenities — the beach, the view, and the price — have been deciding factors for non-tribal buyers such as Dawson.

But for a person to take advantage of the cheap land, then try to change the rules to increase her chance to make a profit from it, and throughout, whine how victimized she's been — what chutzpah.

Neither Dawson — nor Gorton — is representing us without bias in this matter.

Patricia Hayes
Lummi Island

92

Embarrassed by Dawson's testimony

10-7-96 Bham... Herald

I am a homeowner in the Squalicum Valley who has lived and worked in Whatcom County for 20 years. I must object, in the strongest terms, to what Whatcom County Councilwoman Marlene Dawson is doing on my behalf as the council's member at-large.

I believe that Dawson, who has more than $500,000 in real estate holdings on the reservation, has confused her private self-interest with her sense of public duty.

This is nowhere more apparent than in her testimony before the Senate.

After reading through the testimony, I was first embarrassed, then ashamed. I believe her characterization of Indians as playing the role of "Peter Pan" and of tribal governments as socialistic "tyrannies" is a vicious distortion of the truth.

I urge the council to remind Dawson that her duty as member at-large is to all the citizens of Whatcom County and to reprimand Dawson for her racist remarks made on behalf of the citizens of Whatcom County.

Kurt Russo
Bellingham

1060

▼ POINT/COUNTERPOINT: FOCUS ON TRIBAL SOVEREIGNTY 10-6-96
Bellingham Herald

Tribal land conflicts stem from Congress

CONFLICT: Gorton and Dawson's actions and approach are disgraceful.

Editor's note: The following column was written by Lummi Indian Business Council Chairman Henry Cagey, Business Council Vice Chairman Merle Jefferson, Business Council member G.I. James and Jewell James of the Lummi Treaty Protection Task Force.

Indian leaders speaking in the United States Senate hearing requested by U.S. Sen. Slade Gorton, R-Wash., on Indian sovereignty reminded Congress that the treaties between sovereign Indian nations and the United States set reservations aside for the exclusive use of Indian people.

Congressional law unilaterally altered those treaties, leading to non-Indian land ownership on reservations. What is needed to correct the problem is a federal policy that is in keeping with the intent of the treaties, for it was the federal government that created the problems between Indian governments and non-Indians on reservations.

While the conflicts voiced at the hearings are the result of failed federal policies, the solution proposed by Sen. Gorton is to further deprive Indian tribes of their rights.

The Lummi Nation understands that innocent people are involved and we are trying to solve the problem with the resources that we have. By contrast, the actions of Whatcom County Councilwoman Marlene Dawson and congressional attacks by Sen. Gorton serve only to polarize the issues.

It is disgraceful that Sen. Gorton, who called the hearings, left after listening to the non-Indian speakers and was notably absent for the presentation by the Indian leaders. By refusing to listen to all points of view, he insulted the invited speakers and dishonored Congress and the voters of the state of Washington he is there to represent.

The problem originated during a shameful chapter of United States history when the Indian nations, who had ceded vast holdings of land, water, minerals, and other resources to the United States while reserving certain lands and resources for Indian people, had reservation lands taken unjustly under the historical pressures of manifest destiny and the end of the frontier.

Sen. Gorton's hearings demonstrated that that history continues today in the attempt to remove sovereign immunity in order to appropriate the natural resources of Indian reservations, which comprise 4 percent of the land but contain an estimated 67 percent of remaining natural resources.

Marlene Dawson's testimony consisted of a litany of distortions and fabrications she has developed in her long-term campaign to discredit the Lummi government. We would ask why, as she continues to complain, she continues to buy land on our reservation.

We also would ask who she was there to represent. Her testimony was submitted to Congress on County Council stationery — did she speak as a County Council member, as the Sandy Point Improvement Company vice president, as a reservation land speculator, or as a private citizen?

She resorts to political maneuvering to compromise the U.S. Constitution because her legal arguments are invalid. Is it her expectation that justice cannot be served in her complaints in tribal court, as she claims, unless she has been told yes?

One week before the hearing, Dawson drilled a well on the underdeveloped nine acres she purchased only last year at Sandy Point. This provocative act and her support for congressional legislation that would force litigation over water rights actively undermine the water negotiations.

Dawson misrepresents the truth to engender fear among reservation non-Indians, so that she can then ask Congress to resolve the conflict.

Her goal is to appropriate tribal tidelands and additional water for her four Sandy Point houses and two undeveloped reservation properties and to avoid liability for an association that sold lots promising water without water rights and tidelands it does not own.

It is unfortunate that Whatcom County citizens were represented at these congressional hearings by her racially biased and untruthful statements.

Sen. Gorton's practice of attaching riders to congressional appropriation bills is neither a fair nor reasonable way to address Indian policy issues.

He implies that state and federal courts are "neutral" courts, but as the tribes have learned, they are nonneutral. The World Court is a neutral court — would the United States waive its sovereign immunity to the extent proposed for Indians by Sen. Gorton and subject itself to a hearing in World Court regarding its contracts with Indian nations?

Although the fact that our rights and resources were denied for so long has led to the perception that we have no rights to claim, we are confident that in a truly neutral court, the [illegible] affirmed.

Treaties weren't meant to be permanent

Bellingham Herald 10-6-96

CONFLICT: It is time tribal members living on reservations become "real" Americans.

BY MARLENE DAWSON
GUEST COLUMNIST

The outcome of the hearing before the U.S. Senate Committee on Indian Affairs will hinge on congressional members' views of tribal sovereignty and their personal obligation to uphold the U.S. Constitution.

The state's view, as most perceive this claim of sovereignty, is that it does not now exist and never existed in any true sense of the word.

One cannot be a dependent as set forth in the treaties, a ward of the government, and at the same time be sovereign. When Congress formalized the declaration of war with sovereigns, the history of Indian "warfare" lacked even the pretense of warring against sovereigns. Certainly Congress never went through the formalized process of declaring war against the Indians as was done when dealing with others.

While visiting the National Archives in Washington, D.C., I read their general-information leaflet that addressed the volumes of historical material under their management. The brochure stated that under the Record Administration's care were "hundreds of Indian treaties with their transitory promises." Yes, Virginia, the treaties were meant to serve a transitory period.

While segregation kept the clashing cultures temporarily separated, the ultimate goal of the Union was assimilation. Somehow or other, treaty promises made by the Confederate government for a forever segregated society have been falsely transferred to the intentions of the Union government.

When Congress passed the following — "No Indian nation or tribe within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty," it was not addressing their sovereign status but their dependent status and the fact that Congress would be taking a new course of conduct. The governing of tribes was to be shifted from individual treaties through acts of Congress.

There are nearly 600 federally recognized tribes. At the hearing, several tribal chairman suggested the tribes not be treated in any blanket legislation to be brought forward by U.S. Sen. Slade Gorton, R-Wash. Yet, to do otherwise is far too cumbersome. It also would not accomplish the goal of exposing, on a national level, tribal criminal conduct, ensuring tribal accountability and guaranteeing "all" their civil rights.

If we are to deal meaningfully with race problems, we must be honest about the dealings and the goings on found on reservations. We should not segregate the American Indians by race, allow their segregated schools, allow them to maintain a racial-based court system and further subject non-Indians to their race-biased courts.

For years, individual tribal members have been claiming they have no proper due process in tribal courts. Tribal members returning from active duty have faced the cruel twist of fate that the liberties they fought so hard for didn't exist on the reservations in their home state.

It may take tribes' sister and brother citizens to help pave the way to reality. Together, we must demand our congressional members open their eyes to the injustices occurring in Indian country. Together we can demand the dictates of Brown vs. The Board of Education 347 U.S. 483, 745 S. Ct. 686 (1954) which states that separate but equal is unconstitutional be acknowledged in Indian country.

Ensuring separation of powers, freedom of information, the privacy act and other citizenship protection for reservation residents will not dilute the financial obligations the federal government views as mandatory. Certainly securing the health and welfare of our domestic dependents is a far greater call than that to true foreign sovereigns.

If tribes aren't viewed as sovereigns, can they maintain their culture? If we can preserve the lifestyle, culture and religion of the Amish, which is as different from mainstream America as any traditional Indian community, then most certainly we can protect the unique way of Indian life.

It is time that tribal members living on reservations become "real" Americans. And it is also time that we protect the civil rights of non-Indians who bought Indian land in good faith from their fellow citizens who elected to pursue the American dream off of the reservation.

Illuminating tribal sovereign immunity and providing direct access to state and federal courts will be that first step forward.

Marlene Dawson is a member of the Whatcom County Council, Sandy Point Improvement Company vice president, and owns land on the Lummi Reservation.

▼ ANOTHER VIEW

Bham Herald 10/9/96

Untruths about Lummis show ignorance

SOCIAL ISSUES: Voters should hold Dawson and Gorton responsible.

An issue at Lummi lately is the sovereignty hearing in Washington, D.C., and the things Congress hears about us from Whatcom County Councilwoman Marlene Dawson.

Since we don't receive copies of the County Council letters that Councilwoman Dawson sends out about Lummi, it was quite an eye-opener. I wonder how many others have developed a bad impression of our community from her statements.

In her testimony, Dawson told Congress: "Certain Lummi leaders refuse to pledge allegiance to the flag." Anyone hearing this must think we are unpatriotic to elect leaders who disrespect the flag. And nothing could be further from the truth, as those who know our community can tell you.

Ralph C. Jefferson Jr.

Every workday morning, the U.S. flag is raised and saluted by a member of Lummi Veteran Post No. 33. Along with the Lummi Nation Flag, it flies proudly over the Lummi Tribal offices. It is also displayed in our Council Chambers, and is carried by veterans at all events on a special flagpole decorated with an eagle carved by our veterans.

Indian people have sacrificed proportionally greater numbers to the nation's wars than has any other ethnic group. Out of a total population of 600 during World War II, 105 Lummi members saw military service. Three were killed in action, a number were wounded and many more decorated. Every family was affected.

Our veterans are honored members of our community for serving and protecting the flag and all it represents. The color guard salutes all veterans at funerals. And Veterans Day and Memorial Day are honored with dinners and services.

Our veterans also perform many hours of community service. Lummi Veteran's Coordinator Frank Cordero, U.S. Marine Corps, is on the local Se[illegible] Lummi veterans in a number of national veterans organizations. Every major national veterans organization is represented at Lummi.

Of the many insults and untruths Councilwoman Dawson has tried to perpetrate, this is by far the most cruel. There are no words to express how we feel about her statement, given what our veterans and every family at Lummi sacrificed.

There is no leader at Lummi who does not honor the U.S. flag and those who serve and protect it. Our people especially cherish the U.S. Constitution and its symbol, the flag, for representing the laws that uphold our treaty. These things are so important to our culture and future that no individual could be a leader and dishonor them.

Dawson wrote recently that when Lummi veterans return to the reservation their rights are denied by their own government. I invite anyone to come and meet our veterans and ask them who is attacking their rights. They will tell you Marlene Dawson and U.S. Sen. Slade Gorton. Ask them who is defending their rights and they will tell you the Lummi government.

Marlene Dawson does not speak for our people; our tribal leaders do. We trust the leaders we elect. If our tribal leaders don't respond to our concerns, they are recalled or not re-elected. We hope her views don't represent those of our neighbors. We'll see when she runs for re-election.

The councilwoman said many things to Congress that I'd like to respond to here but cannot for lack of space. If the people of Whatcom County don't know the Lummi people well enough to tell a lie from the truth, then we need to change that. Before you believe these negative things, come visit us and attend our events. If you do, you will find that our community has decent, hard-working and patriotic people.

Marlene Dawson could learn a thing or two about dealing with differences of opinion if she would examine how the Lummi people have tolerated her as a neighbor for all these years. Instead, she tried to convince the Congress of the United States of America to share her hateful views.

Something is wrong when one group of people starts believing this type of rumor about another group of people. We are all trying to raise our children as good people, and need to set an example by examining the truth behind rumors and making up our minds fairly.

Ralph C. Jefferson Jr., a Lummi tribal member and longtime resident of the Lummi Indian Reservation, is the tribe's police chief. He is one of 12 community columnists who write for The Bellingham Herald.

Bellingham Herald Editorial

▼ OUR VIEW

Rhetoric slows search for solutions

Bellingham Herald 10/16/96

SOCIAL ISSUE: Dawson's comments, efforts to end tribal sovereignty create barriers.

Cooperation is the key to resolving water, property rights and other disputes between non-Indian landowners and Lummi Nation on the Lummi Reservation — not stripping tribal governments of their sovereign immunity.

Regrettably, Whatcom County Councilwoman Marlene Dawson has set back efforts to work out solutions by making inflammatory comments that border on racism.

Dawson and Lummi tribal officials recently testified at a U.S. Senate hearing on a proposal by Sen. Slade Gorton, R-Wash., to allow non-Indian reservation landowners to challenge tribes' authority and collect damages in state or federal court.

Tribes with sovereign nation status can't be sued for monetary damages.

In a guest column published in The Bellingham Herald explaining her position on the matter, Dawson made a number of outrageous remarks and leaps in logic.

In one instance, she claimed that treaties between the federal government and tribes were meant to be transitory — which implies they ought to be disbanded. We disagree.

Indian reservations were set aside as permanent homes for indigenous people who were displaced from their traditional homes by white settlers and government authorities.

The fact that Indians later sold reservation parcels to non-Indians doesn't — and shouldn't — change the fact that tribal governments and courts have sole jurisdiction over all reservation landowners.

While Realtors should have an obligation to make that crystal clear to anyone who buys property on the reservation, it's absurd to argue that non-Indian landowners shouldn't be subject to tribal authority.

Most disturbing of all is Dawson's statement that it's time tribal members living on reservations become "real Americans."

Technically, the "real" Americans are the Lummis and other Indians descended from the people who populated North America before the first Europeans arrived.

But beyond that, every citizen of the United States is just as "American" as any other citizen, regardless of skin color, sex and ethnic background. The fact that tribal governments are considered sovereign nations in no way diminishes tribal members' status as American citizens.

On the other hand, there's no denying that there are a number of non-Indian reservation residents beside Dawson who feel they haven't been treated fairly by tribal officials and courts.

Tribes have a responsibility to recognize that those hard feelings exist and that they may have contributed to the problem. What's more, it's in their best interest to mediate those disputes and ensure that all reservation residents are treated fairly.

Lummi officials say they understand those realities and have pledged to continue efforts to address the concerns of non-Indians on the reservation. The water negotiations between the tribe, Whatcom County and state and federal officials are one example of that commitment.

The bottom line is that legally binding tribal treaties are not likely to be overturned. Nor is it realistic to expect that all non-Indian owned land will revert to tribal ownership.

The sooner all sides accept that fact, rein in the rhetoric and commit to looking for cooperative solutions, the more likely — and quickly — disputes are to be settled.

▼ LETTERS

Bellingham Herald 10/05/96

Dawson should avoid a conflict of interests

Although I am a white living on the reservation, Whatcom County Councilwoman Marlene Dawson doesn't represent my viewpoint nor that of many others.

In using her position on the County Council, it would behoove her to avoid conflicts of interest by keeping her concerns limited to personal stationery. If she wishes to persist with her land speculation and personal vendetta, I, as a voter, think she should withdraw from public office to pursue her goals.

To represent members of the Lummi Nation or any other Native American as less than "real" Americans goes beyond decency. Native Americans fought in wars of "American" interests long before they were granted "citizenship" in 1924. Many gave their lives to keep this country safe; they continue to serve in our Armed Forces.

What is a "real" American? Who is Dawson to judge?

This continued invective pervades our children's lives at school and within the community. Why are we teaching our children to hate? Must they carry adult viewpoints and misrepresentation of history around like additional weight in their backpacks?

We could debate upholding treaties with our world allies, former enemies and our neighbors north and south. Our county's word and signature is its bond and should remain so.

Kristine Donahue
Bellingham

▼ LETTERS

Bellingham Herald 10/16/96

Question Dawson's false information

Whatcom County Councilwoman Marlene Dawson apparently thinks that federal policy is made by brochure writers for the federal archives.

By "transitory promises," the writer meant the treaty promises were later broken, not that the United States intended to break them.

When Northwest Indians signed the treaties, U.S. negotiator Isaac Stevens called on three witnesses: the tides, the rivers and the sun. He said, "The promises will be carried out as long as these three witnesses continue."

Is Marlene saying that the United States intended to break those promises, and the nation negotiated in bad faith?

The land and resources ceded in treaties made the American dream possible to pursue. Yet the American dream was not open to Indians, on or off reservations.

Marlene imposes her cultural values on that dream when she assumes we want her version of it. She also assumes it can't be lived on an Indian reservation, within our culture. We are "real Americans," too. Our American dream may be different from hers, but we're building it as a community, for our children.

I hope your readers have broader minds than Marlene Dawson, and question the false information she is putting out on our tribe, Indian people and our history.

Vernon Lane
Lummi Business Council member
Bellingham

County Council should censure Dawson

Bellingham Herald

Marlene Dawson's anti-Lummi testimony at Sen. Slade Gorton's one-sided "hearing" may have irreparably damaged any positive future relationship between Whatcom County and the Lummi Nation.

Dawson's warped view of history and false propaganda increase racism toward Indian people in our community, sowing seeds of distrust for years to come.

Why are we as a community letting our county representative promote her personal profit in all our names?

We all benefit as the Lummi Nation lifts its people out of poverty and social disruption. I am opposed to cutting off the federal funding that Lummi channels into our local economy primarily to benefit the environment for all future citizens.

Is it our collective will to further violate our nation's treaties and end these benefits to our community so as to turn reservation resources over to Dawson and her group?

We should elect people who work to solve problems instead of creating them. Until Dawson's term in office ends next year, the County Council should censure her self-serving actions as a public official.

We need to begin to repair the damage she has done, not only to the Lummi people, but to our entire community.

Su Lee
Bellingham

10/17/96

State recognizes tribal sovereignty

Bellingham Herald

Re: Marlene Dawson's attempt to "illuminate" or eliminate history:

Dawson said that the state does not recognize tribal sovereignty. Washington state does recognize tribal sovereignty, most recently through a 1989 government-to-government agreement.

The U.S. government in 1855 was not a "Confederate" government whose treaty promises were "somehow or other ... transferred to the Union government." Some treaties post-date the Civil War. The U.S. government made those treaties and recognizes them under federal law, Supreme Court rulings and the Constitution.

Congress made the statement on making no treaties at the end of the treaty era. That process was more or less complete. It did not nullify existing treaties.

Congressional policy repudiated "assimilation" in 1934, ended Indians' status as "wards" in 1952, and since the 1970s mandates tribal self-determination and self-governance.

Incidentally I am a Lummi Indian living on the Lummi Reservation. I served in the U.S. Navy for four years, including Southeast Asia during the Vietnam War.

I have a college degree, vote, work, pay my mortgage and taxes, attend church and try to help my children and grandchildren become good adults.

I consider myself a "real American" even if Marlene has decided I am not.

Leroy Deardorff
Ferndale

10/17/96

Speak out against racism

10/17/96
Bellingham Herald

I am appalled that Whatcom County Councilwoman Marlene Dawson would have the audacity to call the Lummis racist, when she states "it's time tribal members on reservations became 'real' Americans."

What is a "real" American? Someone white who believes the way she does — that since we have now stolen most of the original land the indigenous people of America occupied, it is our "American duty" to see that Indians "assimilate"?

This is a bigoted, racist attitude, but the sad thing is that Dawson doesn't see this concept as racist and meanspirited. How can any one person define what a "real" American is?

Now Dawson wants to take away native rights to govern the tiny reservations we forced them onto. It makes me sad and angry to see these old colonial ideas once again be used to attempt to subjugate Indians because some "real American" wants the Indian's land or resources. This is a repeat of American policy in the 19th century — are we going backward in time?

I challenge other white Americans to speak out against such racism, and to protest against Sen. Gorton's proposed federal policies that would further deprive Indian tribes of their rights.

Aurora Fox
Bellingham

Racism is root of the problem

10-20-96 Bellingham Herald

I have lived in this county 20 years. For the past couple of years I've listened to a lot of whining about the situation at Sandy Point.

Frankly, racism is the root of the problem. The people who bought property there, I believe, knew they were buying property that is ultimately governed by natives (defined as original or aboriginal property owners or inhabitats).

My point of view is, love it or leave it. If conditions are intolerable, divorce yourself from the situation. I think the problem with the whiners is they maybe aren't able to make the kind of profit they expected (greed).

When people start accusing the tribe of racism, it may be that the pot is calling the kettle black. History taught today has a little more truth in it, than what was taught in the fifties.

Robert L. Tripp
Ferndale

Don't question Lummi's patriotism

10-18-96 Bellingham Herald

Whatcom County Councilwoman Marlene Dawson may have some legitimate concerns in her dealings with Lummi Nation, but the question of their patriotism or their respect for our flag or our veterans should not be one of them.

I recently had the sad honor to be a pall bearer for a lifelong friend and fellow veteran. All the veterans present were recognized and honored. Our flags was carried by a Lummi veterans guard throughout the ceremony.

It was a full military funeral at the cemetery and the flag that we all fought for some 50 years ago was always front and center.

Bob Lorenzo
Bellingham

Dawson seeks to re-create injustices

10-19-96

Regarding Whatcom County Councilwoman Marlene Dawson's comparison (column, Oct. 6 Herald, Page B4) of the Amish with American Indians:

Amish farmers came to this county voluntarily and enjoyed freedom of religion. Indians, denied their fishing and hunting rights, were expected to farm with no tools, and were jailed for practicing their religion.

Amish children were raised in their homes. Indian children were forced to attend government boarding schools and were taught their culture was evil and backward. Indians were controlled by an indifferent and unscrupulous BIA, kept in poverty and forced to sell their land to feed their families.

These things happened within memory of Lummi people living today.

Lummi school children are learning their culture, their history and the skills to build their nation. Marlene no doubt preferred it when they (and their federal funding) went to Ferndale schools where she, with her racist historical ideas, was on the school board.

Recent federal policies of self-governance and tribally-controlled education are beginning to correct past injustices. Dawson's interest lies in re-creating past injustices in a contemporary disguise.

Our nation signed the treaties and is obligated to keep its word. Her misleading and unfounded assertion that it never intended to is no excuse.

Hamet Beale
Bellingham

Dawson, Sutter above their power

Bellingham Herald

Whatcom County citizens should be very disturbed that Whatcom County Councilwomen Kathy Sutter and Marlene Dawson are using their elected positions to further their private agenda.

Sutter represents a few special interests in her district, certainly not the people of Whatcom County in the Coalition of Washington Counties. Nor does Dawson represent Whatcom County in her fight against the Lummi Nation.

King, Snohomish and Pierce counties have not joined the Coalition of Washington Counties because it is too late for them. We don't want Whatcom County to become a Snohomish, King or Pierce county. There must be a plan for future growth.

It is an embarrassment to us that these women are using their elected titles while pursuing personal views. It is an abuse of power.

If either of these women want to continue involvement in their "extracurricular activities," they should resign as council members.

Donna Macomber
Bellingham

Bellingham Herald

Sewer utility tax isn't illegal

10-23-96

The Lummi tax on the sewer utility is not "illegal," as Marlene Dawson testified to Congress. The tax:

1. Is approved by the Washington State Public Utilities Commission and the Department of the Interior;

2. Pays for federally required administrative and environmental reports and other functions;

3. Is comparable to utility taxes in Bellingham and elsewhere that are passed on to the customer, just like the Puget Power tax.

The Lummi Sewer Board unanimously denied Dawson's appeal on the tax, including two non-Indian members elected by all state registered voters of the reservation.

Lummi obtained federal funding for sewer construction, which non-Indians received at hookup costs. Without it, non-Indian development would have been halted by septic pollution that had decertified shellfish beds. A Lummi moratorium did stop tribal development during the 1975-83 lawsuit over purveyorship, while county-permitted development skyrocketed.

The only sewer application not receiving service is an unstable development at the end of Sandy Point, an eroding flood and seismic zone that would jeopardize the sewer. All others have been connected.

A tax on the district amounting to $1.15 passed on to each service monthly is a small price to pay for the substantial additional property value.

Bill Ballew
chairman, Lummi Sewer Board
Bellingham

Dawson's actions spread cloud of shame

Whatcom County Councilwoman Marlene Dawson recently testified to a U.S. Senate committee hearing on Indian affairs.

As a taxpayer I would like answers to the following questions:

1. Does the County Council have a formal position about water rights on the Lummi Reservation?

2. Does the County Council have a formal position on the issue of Indian nations' sovereignty?

3. Was Dawson delegated responsibility to speak for this county on those issues?

4. Did she imply that she was?

Dawson does not speak for me. Her words spread a cloud of shame over all Whatcom County citizens. County citizens did not send her to represent them in Washington, D.C.

I suggest that Dawson may be misusing her elected office to advance her personal interests. Such actions are not ethical, and may not be legal.

Jean G. McKay
Bellingham

10-22-96

Dawson's testimony promotes conflict

Contrary to misinformation from Whatcom County Councilwoman Marlene Dawson and her group, Lummi government zoning and permitting for Indian-owned fee land on the reservation is legal. There are court rulings to support this.

Every reservation is different in the facts of litigation over non-Indian fee land zoning. The "Brendale" ruling frequently cited by Dawson, concerning a reservation with "open" and "closed" areas, does not apply to Lummi. To resolve that question, the facts specific to the Lummi Reservation would have to be litigated, at substantial cost to all of us.

A 1996 cooperative planning process for the reservation proposed by Lummi was unanimously approved by the Whatcom County Planning Commission. The County Council, with Dawson in the lead, voted it down, preventing a potential solution.

Dawson is not "defending" Indian property rights when she sanctions trespassing on tribal tidelands and asks Congress to declare our tidelands "public" to avoid the lease payments.

It is important for local citizens to realize that in her testimony to Congress at Sen. Gorton's invitation, Dawson described supposedly "illegal" Lummi actions that are actually legal. Her untrue testimony as an elected Whatcom County official raises ethical concerns and promotes conflict, not solutions.

Bham Herald 10/26/96

Shirley Leckman
Ferndale

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Dawson's audacity is beyond belief

10/27/96 Bham Herald

Thank you to the Herald staff for pointing out that Marlene Dawson was asking the county to pay for her Washington, D.C., trip to dissolve sovereign immunity for Indians.

I cannot believe her audacity to request reimbursement for a campaign that, in my opinion, smacks of racism. Carefully consider what you are doing, elected county officials. Whether reimbursement is legal or not, is it ethical or moral to support her campaign?

What may have started out as disagreements, negotiations and threats of lawsuits surrounding Sandy Point's access to water has turned into an ugly racist conflict. I lived at Sandy Point from October 1994 to October 1995, and I felt physically ill with the animosity in that community toward Lummis. When I tried to learn more about the situation, I heard instead racial slurs and jokes and how bad the Lummis were.

Our country is rampant with xenophobia — fear of people who are "different." Marlene Dawson's campaign against Indians serves to widen the gap of racial misunderstandings.

Bham Herald 10/27/96

Debra Covert-Bowlds
Ferndale

Letter filled with racism

Bellingham Herald 10/27/96

This is in response to the letter titled, "Don't treat us as second-class citizens." This letter was filled with racism and hatred.

Part of the Lummi Casino's lack of business is due to the location and competition. The tribe has improved the reservation and can do more with funds from a new casino with better business.

The reservations were developed for the tribes who signed the treaty. Tribal governments have the right to limit resources for use by tribal members, and to conserve the resources. Those who want to take away this right are living in the past and want to control Indians.

A tribe has to take care of the tribal members. Reservations are all the tribes have. If it is necessary to limit a resource that is needed to survive, then the tribes should conserve it for the people it was meant for: the Indians.

The Lummi Tribe is concerned for Whatcom County and the damage that mass development could do. Clear cutting causes flooding, harms animals, plant life and livelihoods. Not only should the tribe be concerned about off-reservation development, but other community members should be concerned, as well, since this is their home, too.

Josephine A. James
Lummi tribal member
Ferndale

Dawson should pay her own travel bills

Excuse me, I am a county taxpayer and, since Whatcom County councilwoman Marlene Dawson got her trip expenditures reimbursed, there is no question in my mind why we face budget cuts.

Paying tax-collected dollars out needlessly for personal gain or gratification leaves fewer dollars for much more needed procedures. This person used part of my tax-paid dollars to assist her agenda of ill-crediting the Lummi Nation, our true county forefathers. She plans to make many dollars on land she owns in Lummi Nation: Why else would she have more than one lot?

At the same time, she is trying to dictate what can and cannot be done on reservation lands. Who does she think she is?

Bellingham Herald 10/27/96

Lori Apana
Ferndale

1070

Dawson should consider quitting

In response to a letter from Whatcom County Councilwoman Marlene Dawson:

I am appalled by the inference that a Lummi elder had disgraced the American flag by not pledging his allegiance. I believe your comments are motivated by prejudice.

If said comment was not motivated by prejudice, you also would have commented on the "disgrace to the flag" perpetuated daily by millions of Jehovah Witnesses etc. Not to mention the absolute refusal of a rich black Muslim basketball player to even be present when the flag and National anthem are honored at sports events. Instead, you pointed at one Native American.

As for the veteran supposedly denied admittance to the Lummi American Legion, there are other legion posts. The name does say "Lummi American." Just as said gentleman did not qualify as "Lummi American" he could not qualify as a "Kiowa" Black Legs, a "Yakima Nation Warrior" or even as an "African American" legion member.

As an elected official, you are supposed to represent all Americans, not fire pot shots at a specific ethnic group.

Perhaps it is time for you to reconsider your motivation to be an elected official and step aside to allow someone else represent all Americans.

11/5/96

Ardyth K. Winkler
Ferndale

Council ignores conflict of interest

Marlene Dawson is not the only County Council member with a conflict of interest regarding Lummi Reservation issues.

It is interesting that the Herald reported (Oct. 16 paper) that council members Bob Imhof and Alvin Starkenburg defended Dawson's congressional testimony against the Lummis. Council members voted to support Dawson without examining both sides of her accusations.

County assessor records document that Imhof and his family are the second largest non-Indian landowners on the Lummi reservation (187 acres). Alvin Starkenburg, whose Nooksack river gravel operations have been opposed by Lummi over habitat concerns, has an immediate family member who owns a home at Sandy Point and 3.5 acres in the Sunset area of the reservation.

The standard rule for a conflict of interst in public life is to remove oneself from official debates and decisions that, directly or indirectly, may financially benefit the elected official or his★er immediate family.

These days, even the "appearance" of a conflict is enough to bring action against public officials elsewhere. This standard is being ignored in Whatcom County, and should be immediately imposed on our County Council members.

Gregg Dunphy
Bellingham

11/5/96

Urges recall of Dawson

Herald
Oct 29, 1996

Obviously the only Whatcom Council member interested in protecting the interests and integrity of all county residents is Barbara Brenner.

The council, by voting to pay Councilwoman Marlene Dawson's expenses to testify before the Senate Affairs Committee, deliberately ignored the obvious thrust of her testimony, that is to protect her own financial interests.

Ms. Dawson hedged this request originally by asking that all council members except Ms. Brenner contribute some of their travel allowance for her trip. It did not work and the subsequent vote by the council smells to high heaven.

The fact that Sen. Slade Gorton, R-Wash., requested her testimony should have sent a clear message he expected a partisan response. Sen. Gorton has made his views concerning Indians very clear.

To suggest she spoke as a council member (to receive expenses) but not on behalf of the County Council (to avoid a charge of conflict of interest) is patently arrogant.

If she wants to go to Washington, D.C., to further her own agenda, let her pay her own expenses as any other citizen. Perhaps a recall effort would help her resolve this issue.

An examination of other free-spending council members should also be considered.

Robert A. Daniels
Bellingham

Dawson displays ignorance, arrogance

Others have written and will write appropriately condemning Whatcom County Councilwoman Marlene Dawson's racism and abuse of public office for private gain.

Here we address her typical combination of ignorance and arrogance displayed in a recent Herald column.

Dawson wants the U.S. government to unilaterally abrogate its treaty responsibilities to Indians, expecting readers to accept her misinterpretation of irony in a tourist pamphlet ("hundreds of Indian treaties with their transitory promises") as the law of the land. Because the government has broken so many promises to Indians already, she urges it to do so again now.

Then, noting that Congress legislated an end to treaty-making with Indian tribes, she lies by omission, strategically leaving off the immediate continuation of her quotation of the relevant law passed in 1871: "... provided that nothing herein contained shall be construed to invalidate or impair the obligation of any treaty heretofore lawfully made and ratified with any such Indian nation or tribe." The Lummi Indian Treaty of 1855 had, of course, been long since "lawfully made and ratified."

Dawson's willful misunderstanding of American history serves only her personal greed: Native sovereignty inconveniences her real-estate schemes. Whatcom County has had enough of this Marlene Dawson.

Bob Marshall, secretary, and seven other members of the Rainbow Coalition's steering committee

Herald
10/27/96

1071

Nov 4 1996

▼ LETTERS

Dawson should sell reservation property

According to "A History of Indian Policy," by S. Lyman Taylor, (Page 71) available in the Western Washington University reference library, Doc. I20.2, H62, the treaty making by the U.S. Government ended in 1871 with Native Americans. No further treaties with tribes in the United States were made after that date.

The Point Elliot Treaty, signed on Jan. 22, 1855, by Isaac L. Stevens, governor and superintendent; Chief Seattle; Chief of the Lummi; Chief of the Skagit tribe; and 12 other members of the Lummi Tribe, was not obliterated nor negated by the ending of further treaties in 1871.

Marlene Dawson, Whatcom County Councilwoman, gave me the date of March 3, 1879, for the basis of her quote in her article of Oct. 6 in the Herald about the U.S. government no longer dealing with "Indian Tribes as sovereign nations."

She added that one cannot be "sovereign and independent" if one accepts funds from the U.S. government.

Apparently, she implies that anyone on Social Security or in U.S. government service cannot vote because they are "dependent."

If Mrs. Dawson is unhappy with her property on the reservation, why doesn't she sell it?

Leonard Fitzgerald
Bellingham

▼ LETTERS

Bellingham Herald 11/5/96 B

Doesn't want Dawson to defend his rights

It is time for Whatcom County Councilwoman Marlene Dawson to step down and take her avaricious behavior elsewhere.

(A recent letter writer) applauds Dawson's defense of "everyone," but I want Dawson to know that I, for one, do not need a land-hungry politician to defend my rights. I get the distinct impression that the Dawson family might be in the land speculation business and even if that is half true she should be sent home and kept off the reservation.

People who speculate on the misery of others belong in the same grave as Ebenezer Scrooge. "Fellow citizens," indeed. It's farcical.

I hear also that Dawson is digging a well on some acreage on the reservation and that her family is in the construction business. That is the epitome of conflict of interest. How can Whatcom County or any such agency maintain such disaccord?

And while we are at it, Pete Kremmen, would you please consider a request wherein Whatcom County would pay for a trip to Washington, D.C., for my wife and me?

I would like to see if I can have all the Indian treaties broken, and just because I like you I will send all the Indians to Oklahoma.

Warren S. Pugh
Lynden

Dishonoring treaty dishonors Americans

Re: Letter by Whatcom County Councilwoman Marlene Dawson (Oct. 20 Herald):

Dawson states that one prominent Lummi leader has disgraced the American flag by not swearing allegiance to it.

It seems evident to me that Dawson has committed a far more serious disgrace to the flag and country it represents by advocating that the treaty this country made in good faith with the Lummi Nation be unilaterally discarded.

Our flag represents the symbol of our nation at the making of this treaty. To dishonor this treaty is to dishonor this flag and this nation. A treaty is an agreement between nations.

Furthermore, for th County Council to put their seal of approval on paying for Dawson's expenses for a trip to this nation's capital, in order for her to promote her racist and bigoted opinions before a Senate committee, brings dishonor and disgrace on this county and the good people that live here.

I should add that one member of the council, Barbara Brenner, did not endorse this improper use of county funds.

Who, in the name of Lucifer, designated Dawson to interpret the treaty? Who made Dawson the messenger? It must have been greedy real estate interests, since in the past the Supreme Court has ruled that tribal treaties be interpreted as the tribes understood them at the time.

John H. Brunson
Bellingham

11/5/96

Who has taken advantage of whom?

I would like to ask Whatcom County Councilwoman Marlene Dawson if it was her ancestors who were forced to give up their language, cultures, land, forced to put their children in boarding schools, and basically stripped of all their worldly possessions, if she would feel the same way she does now?

Who has taken advantage (and continues to take advantage) of whom?

If Marlene hates living within the boundaries of the Lummi Reservation, why does she stay here? Is it because she bought the land for cheap, now she wants the value to esculate? If Lummi is such a terrible place to live, why is she buying and selling land here? I believe her slanderous remarks about Lummi are hurting her own real estate business.

We value land as something for us to give our children and their children to come. When Marlene thinks of land she sees dollar signs. She makes profit on our tribal members' pain and suffering, like a vulture. I am glad that most of the non Indians who live here are not like Marlene Dawson.

It is my opinion that Marlene Dawson is miserable and never will be happy until we are as miserable as she is.

Yvonna M. Cagey
Bellingham

11/5/96

Truth isn't selective information

11/5/96 B'ham Herald

Recent implications of misinformation and distortions of truth seem part of Whatcom County Council politics.

Whatcom County Councilwoman Marlene Dawson's recent trip, paid for by the County Council, puts their money where their mouths are.

Dawson's logic fails in implying that the Lummi community isn't patriotic because of a singular incident of someone not saying the pledge of allegiance.

If her ideals are so afire, perhaps she'll expend as much energy attacking non-Lummis.

Off the reservation, at parades, schools or public events, I have seen numbers of citizens not standing when the flag passes. It's their constitutional right. I have never accused the citizens of Bellingham or Whatcom County of being a "disgrace to the flag."

The American Legion is a national entity separate from tribal government. Lummi Post 33 has non-Indian members. Had Dawson asked post officials, she would have known that; otherwise, her intent is to falsely and deliberately manipulate the public.

Elected officials have a responsibility to understand that truth isn't selective information and facts.

Shame on Whatcom County Council for spending a nickel to promote personal profit agendas or anytime Marlene signs her name as council member for personal views.

It's no wonder that most of you are in the same huddle.

Mark Monroe
Bellingham

Dawson's column contained many errors

The recent column by Whatcom County Councilwoman Marlene Dawson had many historical and factual errors.

She attacks Indian tribes because their government, institutions and culture, she says, are based on "race." This is completely in error. Tribes are political entities not racial. A member of one tribe cannot vote or enjoy the treaty rights of another tribe. Indians who are racially similar may have very different cultures, histories, governments and treaty rights.

By focusing on race, Dawson promote the idea that Indian tribes, and the Lummi in particular, discriminate based on race. An individual who is racially an Indian but not an enrolled Lummi is no more eligible for water or fishing rights under the Lummi treaty than a non-Indian.

Federally recognized tribes are politica governments that made treaties with the United States. If this is too complicated for Dawson, then she needs to practice the art of listening and learning.

It would prevent confusion and misunderstanding if the American education system really taught Indian history, which is also U.S. history and current politics. Dawson should not distort the truth so as to label the Indians racist. This is called "blaming the victim."

Vala Julius
Bellingham

11/5/96 B'ham Herald

1073

Supports native sovereignty

Well my faith has been somewhat restored in The Bellingham Herald.

Your editorial entitled "Rhetoric shows search for solutions" was excellent.

After I read Councilwoman Marlene Dawson's guest column in your paper I was in shock, and if that wasn't enough, I got a copy of her testimony to the Senate Committee of Indian Affairs.

I find it outrageous that she used her Whatcom County Council member position to misrepresent many people in this county to Washington, D.C., to promote her own personal agenda. In her statement to the Committee of Indian Affairs, she didn't mention the fact that she and her husband own four houses, a building lot, and just bought 9.82 more acres last year, all on the Lummi Indian Reservation.

I want to urge the people of Whatcom County to support efforts to ensure native sovereignty, and not see them destroyed by our own councilwoman's statements, which we paid for.

Write to the Senate Committee on Indian Affairs, Washington, D.C., 20510, and show your support to the Native American's rights on reservation land.

Brian Boatman
Bellingham

11/6/96

11/6/96

Dawson's comments were immature

Of all the things Whatcom County Councilman Marlene Dawson has done in the name of Whatcom County, I think her lowest example is in the Oct. 20 Bellingham Herald, Page B4. I thought only the young were immature and unable to "look before they leap."

Dawson lives at Sandy Point near where I was born. I'd love to live there again but bureaucratic red tape won't permit it. My ancestors lived there without complaint for hundreds of years. Their deaths created great confusion in the paperwork of the new Indian inheritance laws.

Therefore, after all is said and done, Indians not only have bad immigration laws, they have worse inheritance laws, which have made encroachment easy. However, the success of encroachment appears pointless according to Marlene Dawson's complaints.

Public schools don't present an accurate picture of the Indian people; is this how Dawson learned about "Indians'?' Dawson now bats her head against walls of the supreme law(s) of the land or treaties sworn to by the United States and the tribes.

Pauline R. Hillaire
Lummi Tribe

11/6/96

Awaits arrest by 'flag police'

11/6/96

Until Whatcom County Councilwoman Marlene Dawson's recent letter, I was confused as to who was the "prominent" tribal leader who was not pledging allegiance to the flag.

The August date brings to light that it probably was me. I was surprised that what I did or didn't do was being watched and how I responded at one gathering that I was invited to was being reported to the "flag police."

My next reaction was anger that in a county that constitutionally allows the burning, spitting upon and destroying of the American flag, that I and my people along with me could be accused in Congress of being un-American because I stood quietly during the flag ceremony.

I stand guilty of not doing things the way Marlene Dawson does things, of believing that a peoples' values and word are what is embodied in a flag, of being angry that the most powerful county in the world can't keep its words, especially to veterans who have put their lives on the line or died defending this country.

Of these I am guilty and I guess will surrender myself to the Committee on Un-American Activities, which I assume is the Whatcom County Council.

G.I. Jamaa Sealth
Bellingham

Wants his share of trip money back

I totally support and have fought for Whatcom County Councilwoman Marlene Dawsons' right to express her private, personal opinions regarding the status of the Lummi Nation or an any other topic, even when I completely disagree with her.

I totally oppose, however, any part of my taxes being used to pay for her to do so. In an era of restricted funds for needed services, I object to any tax dollars being spent on trips or other activities not preapproved by the county, not in the direct interest of the entire county, and certainly not when there is the appearance of a conflict of interest in which a county council member might personally benefit.

If at all possible, cooperation and negotiation should be used by civilized adults to solve problems, not divisiveness and not casting aspersions.

If some see divisiveness as the only option, let us, at the least, not support it with taxpayers' dollars.

If we must be childish about this, then I want my part of the taxes back, even if is .00001 part of a penny.

Anthony C. Zold
Bellingham

11/6/96

1074

Restore trust to county government

11/5/94 Bellham Herald

As a resident of Whatcom County, who happens to be a native-born American of European descent, I feel gravely disappointed with the actions of Whatcom County Council in regards to growth management, environmental protection, and in regards to the people of Lummi Nation.

We obviously have council members with private agendas. The private interests of these public officials in their efforts to manipulate and repeal environmental protection measures of the state Growth Management Act, demonstrates greed and and disregard for the well-being of others.

It is inappropriate and illegal for pubic officials to be lobbying for private interests with public funds. I feel it was an abuse of pubic trust and public funds to finance Ms. Dawson's trip to Washington D.C., especially in light of the fact that Whatcom County funds are limited and essential programs are being cut.

And the total disregard of water quality management of the Nooksack River has resulted in pollution to the extent that not only the fishing industry, but the health of the people of the Lummi Nation suffers.

Whatcom County Council's abuse of environmental resources and public funds and their lack of regard for federal treaties and state laws must stop. Let's bring public trust and responsible stewardship back to Whatcom County government.

Beth D. Marsau
Ferndale

Dawson should put aside personal agenda

I've recently begun to read the letters to the editor in The Bellingham Herald somewhat out of interest and partly as a barometer of our community.

To be quite honest, the mood stinks. In particular, I am referring to the rebuttal letter of Whatcom County Councilwoman Marlene Dawson referencing the column of Ralph Jefferson Jr.

Ms. Dawson has made her stand quite clear through her words and actions concerning her views of the Lummi Nation and their sovereignty. Her crusade to tarnish and demean an entire group of people based on two alleged incidents of "reverse racism" is ludicrous.

Ms. Dawson sooner or later must face the fact that Native Americans do have a just claim to govern themselves and maintain their way of life. How this is accomplished is open to interpretation and debate. Instead of perpetually laying blame and fostering an "us" versus "them" mentality which produces nothing but ill-will, perhaps an open, honest, and frank discussion with no agenda of either side could dispel myths and shed some light on the issue of tribal sovereignty.

As an "elected official" I would hope that Ms. Dawson at some point would have the wisdom and maturity to put aside her personal agenda and earnestly seek to work for the good of the entire community.

Jennifer Reidel
Bellingham

Ashamed by Dawson's rhetoric

Marlene Dawson's "expert" opinions on treaty issues include her well-publicized complaint that a Lummi man refused to recite the pledge of allegiance.

The Constitution gives us the freedom to decide whether or not we want to make public declarations of patriotism, and Dawson's opinions are too much like the views of the late Sen. Joseph McCarthy for my taste.

In the past, white Vietnam War protesters refused to recite the pledge, as did certain civil rights activists and members of some religious sects.

White rock musicians have been observed wearing the stars and stripes as clothing, and we've all heard of political protests that involved flag-burning. Indians don't cite these kinds of incidents as reasons for declaring treaties invalid.

As our elected representative, Dawson substitutes diatribe in place of dialogue. We need only to consider Bosnia or Palestine to see what happens when society becomes preoccupied with ethnic hatreds instead of negotiating constructive solutions to its problems.

As a citizen, I'd like to feel proud of our County Council.

Dawson's rhetoric makes me feel ashamed.

George Mustoe
Bellingham

11/08/94 Bellingham Herald

Trip wasted public's money

The Whatcom County Council sent Marlene Dawson to Washington, D.C. at taxpayers' expense to carry her obvious conflict-of-interest agenda to anti-Lummi senator Slade Gorton.

The public's money would have been far better spent if the council had allocated it to a food bank, conservation measures, or the parks department.

Ralph Miner
Bellingham

Dawson owes public an apology

Whatcom County Councilwoman Marlene Dawson (letter, Oct. 20 Herald, Page B4) says she is responsible for reporting information given to her as a council person.

I believe the "information" should first be verified — creating "data" (information which has been validated).

Lummi American Legion Post 33 has many non-Indian members, and an outstanding record of 100 percent participation in enrollment, active volunteer work in every aspect of "Indian and Non-Indian" field work all over the Northwest, into Canada, and Alaska.

I believe all veterans served to defend American's rights — to pledge, burn (the flag), not pledge or whatever according to the Constitution, which has not been changed.

Lummi Indians are Canadian/American citizens, have their own U.S. Congress-approved Indian constitution/pledge of allegiance and can salute or not salute who or whatever they please.

They also have an extraordinary record of American military service.

I believe Marlene Dawson owes everyone an apology. She does not qualify as a representative of the local people.

Karen Ridley
Bellingham

Expose, remove the mean and bigoted

As the three-year cover up of links between property rights groups, racists and militias begins to unravel, it is important that we reaffirm our commitment to self-government by holding accountable political opportunists who exploit prejudice.

We must lend our hands and voices to the public institutions whose job it is to put things right, and see to it that those who've been misled are set straight as to the facts.

Over the next 12 months, we need to expose and remove the mean and the bigoted who now disgrace public office in Whatcom County.

Only then can we begin to heal the rift in our community and come to terms with the grievances of our neighbors.

Jay Taber
Bellingham 11/9/96

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The Bellingham Herald's opinions are expressed in the column below. Opinions expressed in letters and elsewhere on this page are independent points of view.

▼ OUR VIEW

Help put water talks back on track

COMMUNITY: All parties should avoid behavior that jeopardizes the progress that's been made.

It's encouraging to see the Lummi Nation, state officials, water association members and the Whatcom County lawmakers working to kick start the stalled federal water talks.

Clearly, the only hope for resolving this complex reservation issue is to have everyone return to — and remain at — the bargaining table.

If and when the talks resume, it's in everyone's best interest to steer clear of the provocations that derailed the negotiations.

The Lummis pulled out of the talks after Whatcom County Councilwoman Marlene Dawson agreed to work on a resolution supporting an end to tribal sovereign immunity.

Dawson and Lummi Tribal Chairman Henry Cagey had previously testified in a Senate hearing about the sovereignty issue, a legal doctrine that prevents some governments from being sued for monetary damages. Dawson opposes sovereignty; Cagey supports it.

Dawson further fanned the flames by writing a column in The Bellingham Herald suggesting that tribal members living on reservations become "real Americans" and that treaties between the federal government and tribes were meant to be transitory.

Lummi leaders also objected to the fact that Dawson and her family are drilling a well on the reservation to serve an 8-acre parcel they own.

The well drilling is legal, albeit aggravating to the Lummis. And Dawson's concerns that non-Indian reservation residents are sometimes treated unfairly by the tribe aren't totally without merit.

But as an elected lawmaker, it's short-sighted to endanger the progress that has been made in the water talks with rhetoric and a sovereignty petition sure to create controversy.

Whatcom County Executive Pete Kremen recognized that fact, saying he could "see why there was such an outcry of disapproval and dissatisfaction from the Lummi tribe."

To her credit, Dawson withdrew the petition from council consideration, after which Cagey arranged to meet with Kremen and County Council President Ward Nelson.

It would be naive to assume that the water talks will mend all the conflicts between Indians and non-Indians on the reservation. But an agreement would greatly improve the situation and lay the foundation for constructive dialogue and progress on other fronts.

Everyone with a stake in reservation issues ought to recognize that fact and commit to getting the water talks back on track — keeping them cordial and productive.

Group seeks recall of Dawson

11/12/96
Bellingham Herald

BY MARK PORTER
THE BELLINGHAM HERALD

Whatcom County Rainbow Coalition members say they will start a campaign this week to recall County Councilwoman Marlene Dawson.

She allegedly has misused her office to promote self-interests on the Lummi Reservation, the political group said today in a statement.

Dawson received a travel reimbursement from the county for a September trip to Washington, D.C., to testify for changes regarding Indian treaty rights. The reimbursement was approved by fellow council members.

Dawson owns property on the Lummi Reservation that would benefit from the changes, the group said.

Attempts to reach Dawson this morning for comment were unsuccessful.

The coalition needs at least 9,378 valid signatures from registered voters to hold a recall election.

The group claims Dawson also allegedly filed three false public disclosure forms, failing to report her position on the board of directors and as vice president of the Sandy Point Improvement Co.

"The positions Dawson promotes are designed to exploit racial and cultural divisions in Whatcom County," the group said in a statement. "Dawson's actions continue to insult all concepts of justice, fairness and human dignity."

11-12-96

Dawson doesn't have a clue

Whatcom County Council Member Marlene Dawson is abusing her position of power to serve herself.

I don't understand why she has made a mission to attack the Lummi Nation. If she doesn't like Indians or their court system, why does she buy land on the Lummi Reservation?

She has repeatedly stated that non-tribal individuals cannot get a fair shake in tribal court, this stemming from her ideas that the Lummi court system is racist.

Maybe she forgets who has broken treaties over and over. Maybe she also didn't learn, in grade school, about the countless massacres of native peoples, and about the children who were forced to go to boarding schools.

After the attempted genocide and assimilation of native peoples, she has the nerve to talk about fairness from their court systems. With all of this history evident, she still has the audacity and arrogance to call them unfair and racist.

She doesn't understand that U.S. society is composed of hundreds upon hundreds of different cultures and ethnic backgrounds. Today, society is respecting and embracing diverse cultures and heritages, not destroying them. She just doesn't have a clue about the real interests of society.

Paul Fuller
Bellingham

JEFF KENT Interview with HENRY CAGEY
K G M I
August 11, 1995

Jeff Kent's words are in this print.
HENRY CAGEY's WORDS ARE IN THIS PRINT.

OH, MR. KENT. HOW ARE YOU?

No problem. Yourself?

GOOD. WELL, UM, WE DID AGREE TO COME ON KGMI, AND I JUST SPOKE WITH MR. CUMBERLAND, JIM CUMBERLAND, AND WE'RE GOING TO BE DOING A SERIES OF INTERVIEWS WITH MR. CUMBERLAND.

(A little confusion because the name "Dennis" was on Jeff's screen.)

THIS IS HENRY CAGEY, CHAIRMAN OF THE LUMMI NATION.

There must have been a mix-up. O.K., Henry; I'm sorry. Welcome to the program.

O.K.

O.K. Are you willing to offer any input today?

YOU SAY I CAN SAY WHAT I WANT TO SAY ON THIS BASIS?

Certainly, within reason; let's just not get nasty about it.

WHY NOT?

When I say nasty, I mean something that's not fit under FCC rules.

O.K. WE ARE GOING TO BE DOING A SERIES OF INTERVIEWS WITH MR. CUMBERLAND, LIKE I SAID. WE FEEL THAT THE FACTS AREN'T BEING REALLY EXPLAINED SINCE THIS IS A TALK SHOW, IS THAT CORRECT?

That is correct.

NOT A NEWS STATION. IT'S A TALK SHOW THAT YOU'RE DOING.

My program is an opinion-based talk show.

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT.

SO THERE'S NO FACTS REALLY THAT CAN BE BROUGHT OUT HERE, FROM THE TRIBAL PERSPECTIVE, AND YOU'RE NOT WILLING TO DO THAT, FROM WHAT I'M HEARING FROM OUR PEOPLE AND OTHER PEOPLE IN THE COMMUNITY, IS THAT ALL THE FACTS AREN'T BEING LAID OUT HERE. AND YOU STATED THAT WE GOT SOMETHING TO HIDE. WE DID POINT OUT IN THE BELLINGHAM HERALD - WE WROTE A ONE-PAGE ARTICLE ON WHAT WE SEEN AND SOME OF THE FACTS FOR THE NATION ON WATER. THAT CORRECT? HAVE YOU SEEN THAT?

Yes, I have. In fact I read it on the air in its entirety.

GOOD. I'M GLAD YOU WERE ABLE TO DO THAT.

Why is you feel that the facts aren't being presented on behalf of the Lummi Nation here on the program?

OH, JUST SOME OF THE HOSTS YOU HAVE ON THERE, PEOPLE LIKE LINNEA SMITH WHO IS FLAT OUT ANTI-INDIAN AND SOME OF THESE OTHER PEOPLE. THERE'S MARLENE DAWSON WHO IS FLAT OUT ANTI-INDIAN.

But on the other hand, if you want the facts to get out on my program, one of the best ways to ensure that is to take the opportunity I provided you to come on the program and to have it all to yourself.

OH, WE ARE GOING TO HAVE THE OPPORTUNITY, I GUESS, WITH ANOTHER SOURCE HERE, THROUGH MR. CUMBERLAND WHO HAS AGREED TO LISTEN TO THE FACTS, AND NOT INTERPRET THEM THE WAY THE OPINIONS SHAPE OUT ON YOUR PROGRAM.

And is there a reason that you - aside from the fact that you think I have an opinion on this - and of course I do, of course I do, is there a reason you're worried about expressing that opinion on the air at the same time as I happen to be in the room?

I THINK THESE OPINIONS ARE FINE, THEY'RE JUST FROM YOUR POINT,BUT ALOT OF THE FACTS NEED TO BE HEARD AND UNDERSTOOD.

I agree with you a hundred percent. How would you like to cover some of them right now?

WELL, WHAT WOULD YOU LIKE TO KNOW?

Oh, I'd like to hear your reaction to the passage of the legislation yesterday, Section 115 of the Senate Appropriations Bill and find out your feed back on what you think Slade Gorton's intentions were and how you react to the situation.

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT.

I THINK WE'RE NOT GOING TO TAKE THIS - TOLERATE ANY OF THIS ACCEPTANCE OF SECTION 115 - AS WE TOLD MR. GORTON, WE'RE WILLING TO BRING TWO PROPERTY OWNERS AT THE TABLE, AND THE STATE OF WASHINGTON AGREED, THE BUREAU OF INDIAN AFFAIRS AGREED, THE DEPARTMENT OF JUSTICE AGREED, AND THE TRIBE AGREED TO HAVE REPRESENTATION OF TWO PROPERTY OWNERS AT THE TABLE.

So why do you think that Slade Gorton followed through with this piece of legislation? What do you think his motive was?

I THINK HE HAS BEEN MIS-INFORMED BY THE RESIDENTS OF SANDY POINT THAT HAVE REALLY TAKEN A FLAT-OUT SMEAR CAMPAIGN OF THE LUMMI NATION.

Yesterday on the phone when we had a chance to talk, you said that you had listened to the program yesterday and had listened to Slade Gorton's comments, and that Slade, Senator Gorton had actually lied to the listeners. Can you tell us how he did that?

WELL, HE TALKED ABOUT THE MEETING THAT THE TRIBE HAD WITH SENATOR GORTON AND THE TRIBE'S REACTION TO SOME OF HIS COMMENTS OF BASICALLY TERMINATING INDIAN PEOPLE, AND WE'RE NOT ABOUT TO ACCEPT ANY TERMINATION, WHETHER OR NOT TRIBES SHOULD HAVE SOVEREIGN IMMUNITY AND EQUAL REPRESENTATION ON THE TRIBAL GOVERNMENT. THERE'S A LOT OF PEOPLE AT SANDY POINT THAT WOULD LIKE TO BE ON OUR TRIBAL GOVERNMENT WHICH ISN'T EVEN ACCEPTABLE. THEY DON'T MEET THE STANDARDS FOR MEMBERSHIP AND HE WAS WANTING TO HAVE REPRESENTATION OF RESIDENTS WITHIN SANDY POINT ON OUR TRIBAL GOVERNMENT.

Apparently Patty Murray did get involved in the crafting of this legislation, as well, and she was the one who added the language in part three, and that is that if the Lummis fail to reach a mutual agreement at addressing the concerns of the affected parties within 90 days after the enactment of this act that the funds would be withheld. How do you feel about Patty Murray's contribution to this situation?

WELL, PATTY HAS DONE THE BEST JOB THAT SHE CAN IN TRYING TO HELP THE TRIBE IN TRYING TO COMPROMISE WITH SENATOR GORTON. SENATOR GORTON, AS YOU KNOW HAS BEEN ANTI-INDIAN FROM THE TIME HE STARTED HERE AS THE ATTORNEY GENERAL. HE'S LOST A LOT OF CASES AGAINST INDIANS ALREADY. THERE'S STILL SOME BITTERNESS THAT HE'S HOLDING AGAINST INDIAN PEOPLE.

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT.

But specifically, how do you feel about the addition that Patty Murray had called for, and that was the 90-day time frame?

PATTY DIDN'T (unclear) . HOW DO YOU KNOW SHE DID THAT?

Apparently that was an amendment that was put forward. . .

HOW DO YOU KNOW THAT SHE DID THAT THOUGH?

I beg your pardon?

HAVE YOU CONFIRMED THAT?

That came out of Slade's office. That was an addition. . .

I DON'T THINK PATTY. . .

Well, do you know that it wasn't?

HAVE YOU SEEN THE ORIGINAL LANGUAGE THAT PATTY SUBMITTED?

Do you know that it wasn't Patty Murray? I'm just trying to clear this up right now.

THIS WAS A COMPROMISE BETWEEN SENATOR GORTON AND SENATOR MURRAY.

And so you feel this wasn't Senator Murray's language?

IT WAS A COMPROMISE BETWEEN SENATOR GORTON AND SENATOR MURRAY.

O.K. How do you feel about the fact that Patty Murray did in fact vote for this legislation as amended?

WELL, LIKE I SAID, YOU KNOW, THIS IS, UH, AN AMENDMENT THAT WAS TRYING - THERE WASN'T EVEN NO AMENDMENT INTRODUCED ON THIS.

Do you, uh, does the Lummi Nation plan to comply with this new piece of legislation should it be enacted into law, or will they challenge it in court?

I THINK THAT REMAINS TO BE SEEN, WHETHER OR NOT THE HOUSE CONFERENCE IS WILLING TO TAKE A LOOK AT THE UNCONSTITUTIONAL THINGS THAT CONGRESS IS DICTATING TO THE INDIAN PEOPLE.

P.

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT.

O.K. So you haven't made your decision up on that yet. Is it your intention to do a court challenge on this legislation or would you comply with it?

WELL I CAN'T COMMENT ON THAT RIGHT NOW, JEFF. WE'RE WAITING TO SEE WHAT IS GOING TO HAPPEN OUT OF THIS. LIKE WE SAID, THIS IS STILL NOT FIRM LEGISLATION; IT'S GOT TWO MORE PROCESSES TO GO THROUGH AND WE'RE GOING TO WAIT AND SEE WHAT THE REST OF CONGRESS IS GOING TO DO.

O.K. Yesterday when you and I were talking on the phone, you basically said that I had been spreading racism and making racist comments on the air, and I told you that I thought it was important that if you thought that way that you should be able to express that yourself.

SOME OF THE THINGS JEFF I'M COMMENTING ON THAT IS THAT SINCE YOU'VE BEEN KIND OF SMEARING THE TRIBE HERE AS FAR AS THESE DIFFERENT COMMENTS, ALOT OF THESE LISTENERS HAVE BEEN TAKING THESE COMMENTS (unclear) RACIAL TENSION. I'VE HAD ONE TRIBAL PERSON COME UP APPROACHED BY A NON-INDIAN ON THE STREET AND ACTUALLY SPIT IN THEIR FACE. BECAUSE OF WHAT THEY HEARD ON THIS SHOW BECAUSE OF THE WATER SITUATION. I'VE GOT ANOTHER TRIBAL MEMBER DECLINED A LOAN IN A BANK IN BELLINGHAM. I'VE HAD PEOPLE IN RESTAURANTS - NON-INDIANS - SAY THEY DON'T WANT TO SIT BY THESE INDIANS BECAUSE OF THE WATER SITUATION AND THESE THINGS ARE STEMMING FROM - I THINK ARE COMING FROM YOUR SHOW.

And do you know of anything I might have said on air that would support the conclusion that you came to that I was spreading racism or that I was racist myself?

I THINK SOME OF IT IS. I THINK SOME OF IT IS. YOU GOT PEOPLE LIKE MARLENE AND PEOPLE LIKE LINNEA WHO HAVE DONE THIS.

Can you tell us anything specific?

WELL THEY'RE NOT SPREADING - NOT TELLING ALL THE FACTS HERE, KENT, AND I THINK THAT YOURS IS ONLY A TALK SHOW, AND YOU'RE NOT INTERESTED IN THE FACTS.

Well, I don't think that can be accurately...

YOU'RE ONLY INTERESTED IN YOUR OPINION AND YOU'RE ONLY INTERESTED IN CONTROVERSY.

Well why is it that you...

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT.

THE MORE CONTROVERSY THAT YOU CAN (unclear) ,THE MORE RATINGS THAT YOU ARE GOING TO RECEIVE.

You were on the program a number of months ago, and I offered to do a series of programs with you; do you think that was my intention?

I WOULD ASK THIS, JEFF, ARE YOU INTERESTED MORE IN THE RATINGS OR ARE YOU INTERESTED MORE IN FACTS?

I have no interest in the ratings, to tell you the truth, because I don't do this as a job; this is a hobby for me. I'm more interested in getting to the bottom of the issues that are important to the people here in Whatcom County, sharing information, and that includes both sides of the issue. And in this situation I've offered time and time again for you to come on the air, and now you claim that I have some other kind of motive.

I THINK YOU DO, JEFF. JUST LIKE YOUR COMMENT ON PORTAGE ISLAND. YOU KNOW, WHERE YESTERDAY THAT THIS ISN'T GOING TO STOP THERE. (unclear) THE TERMINATION OF INDIAN PEOPLE, OFTEN.

What do you mean, "the termination of Indian people?"

WE'RE TALKING ABOUT A TOTAL TERMINATION BY APPROPRIATION. WE'RE TALKING ABOUT PEOPLE LIKE MARLENE WHO WOULD RATHER SEE THE TRIBAL GOVERNMENT GO AWAY, AND WE'VE BEEN HERE FOR GENERATIONS AND OUR PEOPLE ARE GOING TO BE HERE FOR GENERATIONS TO COME.

I can only assume that you don't listen to my program, because I have never espoused the termination of the Lummi Council nor of the Lummi people nor the Lummi treaty rights etc. etc. etc.

I HAVEN'T LISTENED TO YOUR PROGRAM SINCE WE BOYCOTTED IT, JEFF. AND I COULD CARE LESS WHAT HAPPENS. I JUST TELL OUR PEOPLE THAT IF YOU DON'T LIKE WHAT LISTENING TO KGMI, JUST TURN IT OFF.

Well, and I can appreciate your opinion on that, but on the other hand, if you are presuming to make judgments about what's said here on the air, but yet you've just said that you don't listen to the program, how is it that you can throw around such harsh labels as "racist?"

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT.

WELL, THAT'S WHAT'S HAPPENING, JEFF, AND THAT'S WHAT I SAID, YOU KNOW, SOME OF OUR PEOPLE HAVE HEARD IT ON KGMI, AND THEY DON'T LIKE WHAT YOU'RE DOING TO THE LUMMI PEOPLE.

But you haven't heard any comments yourself that you would be able to share with us.

COMMENTS? WHAT DO YOU MEAN?

Comments that were said here on the air.

OH, THERE'S BEEN A BUNCH. I JUST DON'T LIKE WHAT YOU GUYS ARE DOING TO THE LUMMI NATION. I THINK THERE'S A LOT OF PEOPLE OUT HERE THAT DON'T LIKE IT EITHER.

Well, Henry, I appreciate your taking the opportunity to phone in here today; it would be nice if you could have come in to the studio. I want to tell you right now that we...

(no break for news at the bottom of the hour)

O.K. Is there a reason - something that comes up a lot of the time in the discussion about water rights, water needs, etc. etc. etc., is the quantification process, and it's my understanding that the Lummis are supposed to go through a procedure of quantifying their water needs. What's holding up that procedure?

NOTHING. IT'S STILL IN THE PROCESS, JEFF.

How long do you think it might take?

WELL, I DON'T KNOW: I'M NOT A TECHNICIAN, SO I COULDN'T TELL YOU THAT.

Is that something that needs to occur before any meaningful negotiations about how water is divided in this county; isn't that something that needs to come up front?

I WOULD THINK SO. YEAH, BUT SOME OF IT, LIKE WE SAID, YOU KNOW, WE'RE LOOKING AT NEGOTIATING THIS WHOLE ISSUE ON WATER, BOTH ON RESERVATION AND OFF RESERVATION.

Um huh. . .

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT.

AND YOU LOOK AT WHAT'S HAPPENING IN THIS COUNTY, THAT MARLENE AND LINNEA ARE PROMOTING A FULL STREAM ADJUDICATION. AND IS THE COUNTY PREPARED FOR A FULL STREAM ADJUDICATION?

But when is it that the Lummi Nation is going to quantify their water needs?

WELL, WHEN - I GUESS WHEN THEY GET THE DATA AND THE FACTS PUT TOGETHER ON IT.

And you don't know when that might be.

NOT REALLY. SOME OF IT DEPENDS ON THE FUNDING FROM CONGRESS.

O.K. The suggestion has come out recently that the people at Sandy Point would like to bring water in from off of the reservation, but that apparently - but let me ask you, how do you feel about that concept?

THAT'S GOING TO COMPLICATE THE ISSUE.

How so?

WELL, YOU THINK ABOUT IT, JEFF. YOU HAVE MAYBE TWO CUPS OF WATER ON THE TABLE, RIGHT? AND IT'S GOING TO BE COMING FROM ONE CUP TO THE OTHER. WHO HAS TO COMPROMISE WHEN THAT CUP STARTS GETTING EMPTIED BY SANDY POINT RESIDENTS FOR THEIR OWN LUXURY OF DEVELOPMENT OUT HERE ON THE RESERVATION. THE FARMERS HAVE TO BE COMPENSATED, THE INDUSTRY HAS TO BE COMPENSATED, CITY OF BLAINE, THE CITY OF LYNDEN - ALL THESE DIFFERENT USERS OUT OF THE NOOKSACK RIVER.

So...

WHOSE BENEFIT?

It was my understanding that the dispute with Sandy Point was over the ground water that's available out there, and if they bring the water in from off of the reservation, your concern is that it only takes it out of another well - er, another cup?

YEAH, THINK ABOUT IT.

So is there any truth then, to the concerns, that the water rights dispute actually centers around controlling growth far beyond the boundaries of the Lummi reservation?

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT.

THAT IS CORRECT. AND THE PEOPLE OF WHATCOM COUNTY GOTTA BE PREPARED BECAUSE, YOU KNOW, IF THE PEOPLE FROM THE - WHAT IS IT, THE F.L.O.A. AND THE S.P.I.C. PEOPLE ARE PREPARED TO GO FOR A FULL STREAM ADJUDICATION IT'S GONNA BRING IN INDUSTRIES, IT'S GONNA BRING IN FARMERS, IT'S GONNA BRING IN USERS FROM THE DIFFERENT MUNICIPALITIES FOR THIS ADJUDICATION, AND FOR WHAT? FOR MARLENE'S 8 ACRES THAT SHE WANTS TO DEVELOP AT SANDY POINT.

Well, just so there's no misunderstanding on the behalf of the listeners or myself, then you are saying that there is more than just controlling growth on the reservation at stake here, that it is Lummi Nation's position that they want to somehow affect or control the growth of development off of the reservation.

NOT CONTROL THE GROWTH, JEFF. I SAID WE HAVE JUST AS MUCH RIGHT TO THAT WATER AS EVERYBODY ELSE ON THAT RIVER. IS THAT RIGHT?

I believe that you have senior water rights to the limit of your need, which means that... quantified..

WELL, DO WE HAVE A RIGHT TO THOSE FISH ON THE RIVER?

Well, apparently Judge Boldt says you do have a right to...

AND HOW DO THE FISH GET INTO THE RIVER?

(unclear)

THERE HAS TO BE ENOUGH WATER FOR THE FISH.

And so, we <u>are</u> talking about <u>growth in the county</u>, not just growth on the reservation.

YEAH.

O.K. I just wanted to make sure it was clear to everybody listening as well as myself.

YEAH. SO, YOU THINK ABOUT WHAT'S BEING SAID BY THESE PEOPLE THAT DON'T KNOW WHAT THEY ARE TALKING ABOUT, IF THEY WANT A FULL STREAM ADJUDICATION THEY'RE JUST GOING TO COST THIS COUNTY MILLIONS.

Well, I know it has been said on the program in the past and I know that I've repeated it on the program in the past that we're talking about much bigger issues, much broader issues that just the water available out on the reservation; we are talking about controlling growth in Whatcom County, not just within the Reservation.

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT.

Another question I had for you is, does the Lummi Nation, through its utility hook-ups, excercise discrimination against non-tribal members?

EXCUSE ME?

Does the Lummi Nation, through the hook-up of water, the access to utilities on the reservation, do they discriminate against non-tribal members?

WE HAVE PRIORITY FOR OUR PEOPLE FOR WATER. THAT'S RIGHT, WE DO HAVE PRIORITY FOR OUR OWN PEOPLE. THIS IS OUR RESERVATION, JEFF. AND I ASK YOU, HAS SANDY POINT DISCRIMINATED AGAINST OUR PEOPLE? I WILL TELL YOU, YES, AND I GOT LETTERS TO PROVE IT. I GOT LETTERS HERE FROM FAMILIES UP AT SANDY POINT THAT HAVE APPLIED FOR WATER FOR THE LAST SEVERAL YEARS THAT WERE DENIED, SAYING THERE WAS NO WATER.

Can you provide me copies of those?

DARN RIGHT I COULD.

I would very much appreciate it. This is exactly the type of information I'd like to share here on the program.

YEAH. SO - YOU KNOW - I CAN'T SEE HOW THEY CAN SAY THAT WE'RE DENIED WHEN THEY HAVE BEEN DENYING OUR PEOPLE UP IN THAT AREA FOR YEARS.

A number of years ago there was an agreement struck with Bellingham in order to bring in a water line and to bring in water to the Lummi reservation, and I believe at the time there was a lot of discussion over a non-discriminatory clause that there was some concern on behalf of the city council in Bellingham that non-tribal members would not be allowed to tie in to the sewer lines and the water lines that in fact come from Bellingham. How has that worked out? Is there discriminatory policies on behalf of the Lummi Nation on the hook-ups to that line?

THAT'S EXPENSIVE WATER - THAT WE HAVE TO PAY TO TWO DISTRICTS. THAT'S VERY EXPENSIVE WATER THAT WE HAVE TO PAY FOR. AND WHY SHOULD WE PAY FOR OUR OWN DAMN WATER?

Well if . . .

unclear ON THE RESERVATION RIGHT NOW, AND WHY SHOULD WE PAY FOR OUR OWN WATER?

Let me ask you: if non-tribal members on the reservation would like to pay those high rates and agree to pay those high rates, would you allow them to hook up?

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT

WELL THAT'S SOMETHING THAT WE NEED TO THINK ABOUT - AND TALK TO THE REST OF MY COUNCIL ABOUT.

But you cannot commit that you would deal with them in a non-discriminatory manner at this point in time?

YEAH (unclear) YOU KNOW WHAT MY THEORY IS? THAT THESE NON-INDIANS ARE GOING TO HAVE A FREE-FOR-ALL OUT HERE AND THEY WANT TO DEVELOP AS MUCH AS THEY CAN AS FAST AS THEY CAN BEFORE THE WATER'S ALL GONE.

Well, that doesn't seem to make much sense, if they're going to develop and there ends up to be no water.

(unclear) WHAT I'VE GOT TO WORRY ABOUT, JEFF, WE GOT OVER 4,000 MEMBERS DOWN HERE IN LUMMI.

Are they all living on the reservation?

THEY WOULD LIKE TO. THEY WOULD LIKE TO EVENTUALLY, AND LIKE I SAID, WE ARE GOING TO BE HERE FOR GENERATIONS. AND I'VE GOT THREE GIRLS MYSELF AND THEY EVENTUALLY ARE GONNA WANT TO HAVE THEIR OWN FAMILIES AND THEIR OWN HOMES. HOPEFULLY, ON THE RESERVATION.

Well, and I've seen some papers recently that indicate that that is a concern, of course, of the Lummi Nation, that there is actually physical room for Lummi peoples to be able to live and expand and develop and so forth. Is is possible that the properties out on Sandy Point are something that the Lummi Nation would like to get back? Certainly the documents I've seen indicate that. And that they'd like to secure that land back in order to present it to the future generations of Lummi people.

THAT'S RIGHT.

And is there any truth then to the fear then that this water dispute, the utility disputes, etc. etc. are merely a mechanism to try and pressure non-tribal members to either sell that property or to lose that property?

THAT'S SOMETHING THAT MIGHT BE A LAST RESORT HERE TO DO. IF WE'RE PUSHED TO A CORNER HERE, WE'RE GOING TO HAVE TO DO SOMETHING REAL DRASTIC HERE, AND WE MAY LAUNCH A LAND CLAIMS SETTLEMENT.

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT.

Let me ask you: why not just purchase the property back?

WHY SHOULD WE BUY OUR OWN PROPERTY BACK?

Because you sold it.

WE DIDN'T SELL IT: THE TRIBE DIDN'T SELL IT. SOME OF THIS WAS SOLD BY THE BUREAU OF INDIAN AFFAIRS. SOME OF THIS WAS TAKEN BY DOCTORS. I HAD A DOCTOR KENNEDY IN MY OFFICE HERE JUST A COUPLE OF WEEKS AGO WHO TOOK LAND FROM A FAMILY BECAUSE THEY COULDN'T AFFORD PAYMENT FOR THE MEDICAL EXPENSES.

When was this?

THIS WAS DONE IN THE EARLY SIXTIES.

In the early sixties, that a doctor actually took somebody's property because they couldn't afford to pay the - the tribal member couldn't afford to pay the medical bills.

THAT'S RIGHT. AND WE GOT OTHER STORIES LIKE THIS OUT HERE LIKE THAT.

How about the property...

WE GOT A STORY ABOUT A WASHINGTON STATE ORPHANS WHO WERE MADE WARDS OF THE COURT THAT COULDN'T OWN ANY ASSETS. THE BUREAU SOLD THEIR LANDS SO THEY COULD BE MADE WARDS OF THE STATE.

O.K. Again, in an effort so that the listeners don't misunderstand your position and that I don't misunderstand your position, the option of purchasing the property back on Sandy Point in a free market type situation is not something that you want to follow through with because it's your opinion that you shouldn't have to buy that property back.

WELL, WE GOT - WE'D LIKE TO GET THAT PROPERTY BACK HERE EVENTUALLY AND THAT'S ONE OF THE GOALS HERE IS TO BUILD OUR LAND BASE HERE FOR THE LUMMI NATION. AND LIKE I SAID, WE GOT GENERATIONS OF PEOPLE COMING; WE'RE UP TO 4,000 MEMBERS AND WITHIN 20 YEARS WE'RE GOING TO HAVE 8,000 members.

O.K., but you're not willing at this point in time to commit to paying fair market value for that property.

IF THEY'RE WILLING TO SELL IT FOR FAIR MARKET VALUE WE'D BE HAPPY TO BRING THAT TO CONGRESS AND TELL THEM THAT THE RESIDENTS ON THE RESERVATION ARE WILLING TO SELL AND THIS IS WHAT IT'S GOING TO TAKE TO BUY IT BACK.

Jeff Kent in this print. HENRY CAGEY IN THIS PRINT.

So you would look to the Federal government to come up with the funding in order to purchase that property.

YEAH.

Why is that?

WELL, SOME OF IT'S THEIR RESPONSIBILITY. SOME OF IT WAS IN THEIR HANDS AT THE TIME THAT THIS LAND WAS SOLD OUT OF TRUST.

And what about the property that was sold by tribal members, fee property that was sold by them, is that the Federal government's responsibility to come in and offer the funding to buy that property back?

I THINK SOME OF THAT'S GONNA HAVE TO BE A CASE-BY-CASE.

Alright, Henry, we've gone quite a bit overtime for the news. I appreciate your calling in today, and again, the invitation is always open. I hope that you feel that you were dealt with fairly on the air today.

WELL, JEFF, LIKE I SAID, YOU KNOW, WE'RE GOING TO COME ON TO THE SHOW HERE, BUT WE'RE NOT GOING TO COME ON TO A TALK SHOW. WE'D RATHER GO ON A SHOW THAT PROVIDES NEWS AND FACTS. JIM CUMBERLAND HAS OPENED AN INVITATION AND WE'RE GOING TO ACCEPT IT AND WE'D BE HAPPY TO ANSWER ANY QUESTIONS THAT YOU MAY HAVE AND GIVE THEM TO JIM AND WE'D BE HAPPY TO ANSWER THEM.

O.K. Well, I hope that in some point in time that you'll feel comfortable to do again what we just did.

WELL, I DON'T FEEL COMFORTABLE, BECAUSE, YOU KNOW, WHAT I SEE HAPPENING IS THAT BONNIE LOU ON THE OTHER STATION THERE WAS JUST BLASTING ME AS AN UNFIT TRIBAL LEADER, AND I CAN'T TAKE THAT KIND OF BEHAVIOR FROM A TALK SHOW HOST.

Well, you didn't hear that from me, but on the other hand you heard many offers for ...

(unclear) PROFESSIONAL, WHO KNOWS WHAT THEY ARE TALKING ABOUT AND IS ABLE TO GET THE FACTS OUT AND GET THEM STRAIGHT.

O.K! You had your say today. Thanks very much for your call.

JEFF KENT
K-G-M-I
August 24, 1995

SUBJECT: BELLINGHAM WATER DELIVERED TO LUMMI RESERVATION

Speakers:
"Jeff" - Jeff Kent
"Sp" - Albert Sperry
"MJ" - Johnny Murray-Jones
"TD" - Mayor Tim Douglas

Jeff: Today we're going to talk about racial discrimination.

Is there anyone listening to me - is there anyone listening to the program today - at this very moment - that believes in racial discrimination? Is there anyone out there right now who feels that our government should be directly involved in racial discrimination? And I'm not talking about affirmative action. I'm talking about blatant racial discrimination without legal or moral justification. Is there anyone listening to me right now that believes in racial discrimination?

Let me give you an example, so we know what we're talking about. Let's assume that a person - a human being - moves into our county, buys property, obeys all the laws, pays taxes, and becomes a productive member of our community. Would it be acceptable for our government to deny them hook-up to public utilities simply because of their race? Would you tolerate our government saying, "I'm sorry, but you're black, so you don't get any water." Would you tolerate our government saying, "I'm sorry, but you're black, so you don't get any sewer hook-up here in this county." How about Hispanics, or Orientals, or any other racial difference amongst people? Would we tolerate our government to discriminate simply because of somebody's race? Wouldn't that be racial discrimination? And of course, wouldn't that be against the law?

Well, today we're talking about a dirty little secret of racial discrimination - blatant - blatant racial discrimination, and I'm sad to say, that the Bellingham city government is a participant in that dirty little practice.

Five years ago a contract was written between the Bellingham City Council and the Lummi Business Council to sell water from Bellingham to the Lummi Water and Sewer District. That water was to be delivered through piping paid for by the taxpayers and then re-sold to customers within the boundaries of the Lummi reservation. At that time when this contract was drafted and signed, it was discussed in great detail that the water and sewer service provided should not be provided or withheld from any person based solely on the customer's race, on their religion, on their creed, their tribal status; nor was it a property to be served as owned by a tribal member or a non-tribal member. It was supposed to be

Jeff: non-discriminatory. Bellingham and the Lummi Council agreed that discrimination would not occur, and in fact, it could not occur under law, including the Lummi Nation's water district regulations, (which) forbid discrimination in the hook-up of utilities.

So the water and the sewer systems began to flow, under the contract. But what has happened since?

Joining me in the studio are two property owners of fee simple land out on the Lummi reservation, and they are here today to tell you about their personal experiences. Welcome to the program, Albert Sperry and Johnny Murray-Jones.

...

Both of you own property out on the Lummi Reservation. Is that right?

MJ:
Sp: } That's correct.

Jeff: How long have you owned it?

Sp: We bought ours in 1988.

MJ: I bought mine in 1983.

Jeff: So, long-standing property owners out on the reservation.

Sp: When we bought mine, I went and asked them if I had the availability of water, and he said within a year. ... the following year we verified it with him, and he said, "no problem, you can have it when you retire in 1992. Go ahead and get your driveway in and get it cleared - no problem with it." And that man was - he's history. ... We cleared the land, got our county permit, had it surveyed, put in the approach, had it inspected... . I talked with Vern Johnson ... in charge of the water district out there ... a tribal member ... . He informed me in '92 that they had a little problem with water at that time, but as soon as they got water from Bellingham, or from one of the well districts out there ... that I would have it. "You'll have it in '93; I'll see to it." They removed him in '93. ... In 1993 we got a letter from Henry Cagey ... that says they are going to do a water survey that would take a year, but after that they would be able to tell how much water they can give out. Now they tell me, "No way can you have water." In fact, the last communication I had with Henry Cagey ... he told me that the only way I'd ever get water out there would be to give the land back to the Indians and lease it, or sell it to an Indian and lease it. The only possible way.

...

Sp: Then I was informed that in 1990 they passed a resolution barring any white people from building out there ... they changed the wording to "non-Lummi". No non-Lummi can have water out there. The only way a non-Lummi can ever have water will be to give the land back or to sell it to an Indian and lease it.

Jeff: So everybody out there understands the proximity and the difficulty of you getting water on this property, the hook-ups that you would like to make, are to a water line that goes right by the front of your property. Is that right?

Sp: Right in front of it. I have ... a paper saying that water accessibility - "Yes"- the Lummi sewer board can hook me up immediately to water. All the tribal council has to do is let them.

Jeff: Right at the edge of your property.

Sp: Right in front of it.

Jeff: And the pipes that run right by your property contain Bellingham-purchased water.

Sp: I've been told that it is kind of blended in with some well water, but it's going towards the casino.

Jeff: And if you were a tribal member today, you would have water hook-up, wouldn't you.

Sp: Instantly, yeah.

Jeff: Johnny ... your situation is a little bit different, because it's about sewer hook-up rather than water. Tell us about your acquisition of the property - when it happened, and why it is today you still don't have sewer hook-up!

MJ: That's right. I bought the property in 1983, and for various reasons I didn't start to develop it until much later. And in 1988 the sewer engineer, Mr. Carl Reichhardt, produced a full engineering report on extending the sewer to my property, and there was absolutely no problem.

But the whole trouble started when the Sandy Point residents refused to renew the leases for the tidelands at the entrance because the tribe was demanding the exhorbitant sum of $269,000 a year, and the residents didn't want to pay that because it's not necessary to have a lease to get into the harbor. It is

MJ: under the Corps of Engineers and the Coast Guard. So from that moment on, I was put under considerable pressure, orally, by Mr. G. I. James and Mark Russell to try and get the residents to change their minds and renew the leases. And then letters started coming - letters started coming - and they said in black and white that we will not approve your development without establishing long term lease commitments for the tidelands. And this was re-iterated a year later from Daniel Farr, the chairman of the Lummi planning commission, when he wrote and said to me, "Until these water and tidelands (unclear) , the Lummi planning commission will not grant approval of this project." And that's the situation.

Well, later on, my engineers applied to the sewer board for the line to be extended to my property, and this was approved. But, later on, the Lummi Indian Business Council vetoed that approval.

Jeff: Did they say why?

MJ: They gave - at that time, they changed completely. First of all, they said the project had not been approved by the Lummi planning commission. Secondly, they say there was no assured supply of domestic water the project which, I quote, "complies with the Lummi Nation laws and policies." And the third reason was that the land-form is unstable and subject to ongoing erosion and flooding and is vunerable to damage from seismic activity. Well, that is nonsense because that is something the Dept. of Ecology had looked into and found that it is not unstable.

Jeff: What do you think the reason is that they don't want to hook you up to the sewer that they promised you?

MJ: Well, I think the reason becomes apparent because, later on, in '93, Mr. Cagey wrote and asked to buy my property. ... and of course, the property without sewer is worth much less than property with sewer.

Jeff: And so the evaluation of the value of your property was based on not having sewer.

MJ: In his mind, I suppose.

Jeff: So he offered to buy the property at a deflated rate.

MJ: Well, he didn't say; (unclear) would give me a reasonable return on my investment. But we didn't discuss the figures. But I wrote back to him and said I would be delighted to sell to him at the sell-out price assuming the property had sewer and water. And of course they then said that they hadn't got the funds and so on and so forth.

Jeff: O.K. So you've got two issues wrapped up in this one. One is, do you believe that you would have sewer today if you were a tribal member?

MJ: Oh, I'm quite sure I would.

Jeff: O.K., then you're talking about an issue of discrimination for one. But secondly, if you were willing to sell your property, do you think the person who bought it would get sewer today?

MJ: If he was an Indian, he would. But not if he was a non-Indian.

Jeff: So you were offered a value for your property based on not having the utility that you were promised up front.

MJ: Exactly. It is the declared aim of the Lummis to buy back the properties that are presently owned by non-Indians.

Jeff: And so, do you think that withholding utility hook-ups is an intentional activity to de-value the property, so that they can buy it back at a lower rate?

MJ: Absolutely. I have no doubt about it what-so-ever. ... This has been written as a water resources report - It was produced, I think, in 1981 - in which they say that one way of controlling non-Indian growth on the reservation is by the denial of utilities. It can be found in black and white.

Jeff: It is, and we've had Henry Cagey on the program and said much the thing as that. ...

We're talking about discrimination today, folks. Pure and simple, blatant racial discrimination and I'm sad to say, again, that the Bellingham city government is actually participating in that discrimination at this point in time, and that's the main reason I'm trying to bring it to everybody's attention today, because we shouldn't participate in the discriminatory manner in which utility hook-ups are provided for out on the Lummi reservation.

...

Jeff: ...I think that we also have to hold Bellingham city government somewhat responsible here, if they are knowingly going along supplying water to the reservation that they know to be doled out in a discriminatory manner.

I have somebody phoning in that I need to get on air right away. Mayor Tim Douglas, welcome to the program.

TD: Thank you, and I know you're not taking calls yet, but -

Jeff: Oh, you're more than welcome.

TD: I had been called about the program, and I wanted to be real clear about something (unclear) the statements made.

The City of Bellingham did in fact discuss whether or not to provide treated water to the Lummi water system, and the decision was made to do that. There was discussion about discriminatory practices and whether or not to include language in the agreement that would specifically prohibit that, and the decision was made not to include any written language. That the Lummi water district would be the sole purveyors; they would have to make the decisions out there, and the city would not be caught in the middle as I think is right now clearly the implication, too.

Jeff: Was it your understanding at the time that the contract was drafted that the Lummis would discriminate on how they appropriated the water amongst their customers?

TD: No, it was not. It was not my impression that the Lummis would discriminate.

Jeff: Was it not, in fact, your impression and that of the council that passed the agreement that the Lummis had assured the City of Bellingham that there would be no discrimination?

TD: The Lummis told us that they would not discriminate. I shouldn't say the Lummis told us, but their lawyers, their representatives, did tell us that. But - in weighing all the pros and cons and everything, the decision was made - the council's decision was not to put explicit wording in, because we would not be in a position to be purveyors out there, and making all those individual decisions.

Jeff: So your concern wasn't so much that - you didn't want discrimination, obviously.

TD: That's right.

Jeff: But your concern was that you didn't get sued because somebody was denied water.

TD: A lot of different things were considered. But the fact is that when you say that the city is participating in discrimination, I think that would be a fair charge if we had a written agreement which had specific wording in it. Then we might be in court

TD: about the whole thing. But we - the decision was made not to include that specific wording. We've already reviewed this with the council and with legal counsel, and there's not a legal basis in which we can intervene to change their practices as purveyors of water. We are contracted to deliver the water to the system. They're responsible for making the decisions about distributing it.

Jeff: You don't deny the fact that there is discrimination going on at this time?

TD: I'm not - I have inquired about one particular situation that was drawn to my attention out there to find out, and I got additional information that - I thought there was a house on the property and there wasn't and some other kinds of things. I'm not trying to judge. I don't have all the detailed information about the situation, and the purveyors and the people who want to buy the water out there will in fact be the ones who are experts on all of those things. We're not trying to get into the middle of figuring all of that stuff out.

Jeff: So if the Lummi Nation is discriminating, you feel it is not really the city's business; is that what you are saying?

TD: What I'm saying is that the city has a written contract to deliver water to the system. That contract does not have any enforceable language that would put us in the place of the purveyors to make those decisions. That was a specific policy decision to go that way, after much discussion.

Jeff: O.K. If you found out, conclusively, to your satisfaction that discrimination was occurring, do you think that the city should re-visit that contract?

TD: We can certainly re-visit the contract when the time term of the contract is up, but it's binding upon the city until that time.

Jeff: What is the term of the contract?

TD: I don't honestly know what the term is; I think it is a fairly long term contract. But that is something certainly I would look at.

Jeff: O.K. I understand you actually had written to Henry Cagey, Chairman of the Lummi Business Council, on behalf of one particular property owner that came to you, and Mr. Sperry, who is in the studio with me right now. Did you get any response from Henry Cagey?

TD: Yes, and he didn't...come directly to me and I don't think he would say he did. The contact was through Marlene Dawson. And we did, in fact, contact the Lummis and wrote to them and we did receive a response which talked about the study they were doing and the water supply difficulties. Also there was one other issue raised - I don't recall definitely on Mr. Sperry's property ... All the water lines out there don't necessarily carry Bellingham water. ...

Jeff: They're all inter-connected.

TD: I don't know how functionally inter-connected they are. But the point is that we don't know - it's not necessarily Bellingham water that is going right past somebody's front property line. It may be, in some cases, but it also may not be, in some cases.

Jeff: O.K. Can you offer any suggestion at this time to Mr. Sperry, who is in the studio with us right now, has no water, cannot develop his property. What would you suggest he do?

TD: If I were in his shoes I would be pressing on the very process that's underway right now, which is the effort to resolve the water rights issues on the Lummi reservation. There's been an agreement, as I understand it, between the Lummis, the county, and I thought, property owners out there as well, but those issues need to be resolved, and that they are underway with negotiations at the present time.

Jeff: Well, as I understand it, the negotiations don't deal directly with access to water that comes from Bellingham.

TD: I would make no assumptions about ... settle the issues of water rights and water supply on the reservation.

Jeff: Correct me if I'm wrong, but the negotiations going on right now simply deal with ground water on the reservation.

TD: I think they are going to have to do with water supply, because that affects the wells; one of the reasons why the city of Bellingham was asked to supply water...was the fact that there was salt water infusion ...into some of the wells...concern about the quality of water being long term out there.

Jeff: O.K. One last quick question, and we appreciate your participation today. The contract calls for one million gallons per day... Do you know how much they are using today?

TD: I don't have the specific amount, but it is certainly not close yet, even, I think, to the one million.

Jeff: Would you be surprised to find out that it is actually 127,000 gallons per day?

TD: I was going to say it is about 10 percent... .

Jeff: Then can you understand any of the claims that the reason non-tribal members are not allowed to have hook-ups to that water is simply because there isn't enough water to supply everybody.

TD: My understanding is that the issue under review...is, as you said, the ground water supply - the wells as well as this source of water, and they are trying to get all of those questions resolved. But I think that's a better question to put to the Lummi and the parties directly involved in this.

Jeff: But knowing that 90 percent of the water that is accessible from Bellingham isn't being utilized, it certainly would call into question the claims that there isn't enough water to be able to hook up Mr. Sperry.

TD: Well, I can simply say that the city is committed to supplying that which we contracted for...the decision the purveyors have made, as long as it doesn't exceed a million gallons, we'll be providing the water.

Jeff: O.K. Thank you very much for your call.

...

Jeff: After hearing his (Mayor Tim Douglas') explanation, I'm not convinced that Bellingham city government is not participating in racial discrimination by supplying water under a contract they were assured, if only verbally...the water would not be re-sold on the reservation in a discriminatory manner. In fact, I have a letter in front of me from John Garner, who's the Director of Public Works for the City of Bellingham, and he very explicitly in this letter, and it's dated only this past May, 1995, that there was considerable discussion before the city council on the subject of prohibiting discriminative practices by the Lummi district... and he goes on to say that "My recollection is that it was resolved on January 8, 1990 when tribal attorney, Harry Johnson, indicated to the council - Bellingham City Council - that the district was not and could not practice discrimination with that water."

...

Jeff: Mayor Douglas also said that possibly they should re-visit this contract...possibly it should be re-visted when the term of the contract is up. I quickly breezed through the contract. I can't find any term... . It's my understanding of simple legal

Jeff: philosophy is that if there is no term, that contract can be challenged at any time... .

...

I can't find cancellation clauses in this contract. So does that mean that the City of Bellingham is obligated to continue to supply the water? I have meager amounts of background in legalities, but I don't think it does! ...

MJ: ... But I think the important thing is, the district tribal attorney as I believe he did, assured ... that there would be no discrimination. That is as good as a written contract.

Jeff: Now, that I do know....A verbal contract, especially if it frames the intentions of a written contract, is as binding as the written word.

MJ: And is of course recorded, recorded in the minutes.

Jeff: And nobody has ever denied the fact that - in fact, I have newspaper articles from that time as well - that there was assurance that this water would not be divided up in a discriminatory manner. Obviously it is. Now, the question is: what should the City of Bellingham do about that? ...

...should we allow discrimination to go on in this community, using water provided with our tax dollars, to the Lummi Nation from the City of Bellingham? That's the real question in my mind.

New Address -
220 W. Champion,
Suite 290

PUBLIC UTILITY DISTRICT NO. 1
OF WHATCOM COUNTY

[redacted] • Bellingham, Washington 98225 • FAX (206) 733-5811 • Phone (206) 733-5810

June 20, 1995

Post-it™ Fax Note 7671	Date	# of pages ▶
To Jennifer	From Rudy	
Co./Dept. FAX TO	Co.	
Phone # Phil - Charlie	Phone #	
Fax #	Fax #	

Marlene Dawson, Vice Presi
Sandy Point Improvement Company
P. O. Box 1418
Ferndale, WA 98248

Dear Marlene:

This letter is in response to several questions you have recently posed to the PUD. First you asked, is the PUD willing to supply water for Sandy Point from its Nooksack River water right? Secondly, will the PUD act as a sponsor for the Sandy Point Improvement Company so they can apply for a State backed loan for the pipeline?

The PUD's position on supplying water to the Sandy Point Improvement Company is best quoted from our Service Area Policy which states, "Jurisdictional, legal, and economic factors will be considered when assessing the ability of the PUD to provide water to feehold lands on the Lummi Reservation." Identification and resolution of these issues are required prior to the PUD committing to supply water to Sandy Point.

Specifically, the answer to your first question is yes. The PUD is willing to contract with Sandy Point for water supply from our Nooksack River water right. However, before the PUD can commit to that supply several things must be accomplished:

1. Jurisdictional and legal matters must be cleared up.

2. The PUD is a rate based utility and Sandy Point is not currently a rate payer. We require contract negotiations and a reimbursement contract prior to any cost being incurred by the PUD.

One of the jurisdictional issues is that according to the Coordinated Water System Plan, Sandy Point is in Bellingham's long-range service area. You need to approach Bellingham first for service before we can be in a position to contract with you.

COMMISSIONERS
ROBERT E. EBRIGHT, PAUL D. KENNER, JAMES C. ROBERTS
MANAGER: TOM ANDERSON

The PUD is also willing to act as a sponsor enabling you to apply to the State for a low interest loan or grant. However, before we proceed down that path we need a reimbursement agreement to cover the costs of our participation in that process. Again, I encourage you to contact the City of Bellingham since you are officially in their service area or the County Health Department who may be willing to assist you on easier terms.

Sincerely,

Tom Anderson

Tom Anderson
Manager

TA:avw

cc: Mr. Roy Pottle
Mr. Leroy Dearderff
Mr. Dick Grout

CHAIN OF OWNERSHIP
OF
SANDY POINT

Includes: Govt. Lots 1,2,3,4, in Sec 8, Govt. Lots 5 & 6, in Sec. 9, Govt. Lot 1, in Sec. 16, and Govt. Lot 1, in Sec. 17, all in T.S. 38 N.,R 1 E, W.M - [In Whatcom Co. , Wash.]

PARCEL NO. 1: Includes: BOLSTERS SANDY PT. TRACTS, BOLSTERS SANDY PT. TRACTS NO. 3, SANDY PT. GARDEN TRACTS, SANDY PT.SHORES NO.1, NO.2, [PART], NO. 3 & NO.4.[PART] & SANDY TP SHORT PLAT [PART].

DESCRIPTION: Govt. Lots 1, 2, & 3, in Section 8, Govt. Lots 5 & 6, in Section 9, and Govt. Lot 1, in Section 16, all in Township 38 North, Rang 1 East, W. M., containing 141.26 acres more or less, "together with all improvements thereon and appurts. thereunto belonging". .....etc.

June 4, 1957:

Richard C. and Lucy Altina Finkbonner

 # 841341

Sold to

James F. Bolster

[By Deed to Restricted Indian Land.]
Land conveyed was allotted to Henry Finkbonner, Alllottee **No.4-A**, Probate Nos. 16825-47 and 17573-53.

September 6, 1957 to 1960:

Jas. F. Bolster platted]platted 1960 [aprox.]

June 4, 1965:

Remaining unplatted land, **Govt. Lots 1, 2, & 3, in Section 8, Govt. Lots 5 & 6, in Section 9, and Govt. Lot 1, in Section 16:**

James F. Bolster

Sold to

R. E. Rogers, Stewart Rogers, and R.R. Walker

1966 to 1969.

R. E. Rogers, Stewart Rogers, and R.R. Walker, Dba Sandy Pt. Shores Ltd Prts, platted **SANDY PT.SHORES NO.1, NO.2,**[PART], **NO.3 & NO.4.**[PART], dug "Agate Lake" and dredged "Main Canal" and finished "East Basin".

May 2, 1978: Sandy Pt Short Plat filed.[Plat includes adjacent area in PARCEL NO.2] Includes Sandy Pt. Improvement Co. Marina and unplatted land on Main.

SP-HIST3.DOC 9/28/95 2:48 PM

PARCEL NO.2. [BOLSTERS SANDY PT TRACTS NO.2 & SANDY PT. SHORES NO.2 [part] & SANDY PT. SHORES No. 4[part]

DESCRIPTION: **Govt. Lot.4, Section 8**, Township 38 North, Range 1 East, W.M. and APPURTENANCES, Together with GRANTORS interest in abutting Tidelands, if any, owned by State, and EXCEPTING therefrom the North 200 Ft. [Twinner Prop.], comprising aprox. acres.....etc.

March 28, 1907

United States of America

#354962

Transferred to

Frank Finkbonner

Patent Dated: March 28, 1907
Filed: Jan 9, 1929, 1:15
Vol. 4, page 2.
[Part of Allotment **No.5a**
#354583: Cert. of Competency dated August 10, 1928

May 24, 1957:

Frank And Celena Finkbonner

Sold to

James F. Bolster

December 30,1958: BOLSTERS SANDY PT TRACTS NO.2. platted.

June 4, 1965: Remaining unplatted land in **Govt. Lot 4, Section 8.**

James F. Bolster

Sold to

R. E. Rogers, Stewart Rogers, and R.R. Walker.

1966 to 1968: SANDY PT. SHORES NO.2[part] & SANDY PT. SHORES No.4 part], platted.

May 2, 1978: Sandy Pt Short Plat filed.[Plat includes adjacent area in PARCEL NO.1.] Includes unplatted land on Main Canal.

1995: Remaining holdings in Parcel No.1:

Sandy Pt. Shores Ltd. Prts.

Sold to

Ron Jepson

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PARCEL NO. 3: [Includes Sandy Pt. Tracts No. 4, North Cape, Sandy Pt. Sea Ranch Condominium, South Cape Short Plat and South Cape. [unplatted].

DESCRIPTION: Govt. Lot 1, Section 17, Township 38 North, Range 1 East, W.M., **"with appurtenances"** ... etc.

March 28, 1907

United States of America

#354962:

Transferred to

Frank Finkbonner

Patent dated March 28,1907,
Filed: Jan 9, 1929.
Vol. 4, page 2
Part of Allotment **No.5A**

#354583: Cert. of Competency dated August 10, 1928

April 8,1953

#753227: Frank & Celena Finkbonner

Sold to

William P. Wood & Justin F. Wood

Includes, "all *second class tide lands* owned by the State of Washington lying in front of Govt. lot 1."...etc.

May 27, 1953

#755754: William P. Wood & Justin F. Wood

Sold to

C.V. and Jessie Wilder

Wilder mined gravel and produced concrete, on site, for Mobil Refinery (Tosco)-1954

August 7, 1959

#929888: C.V. and Jessie Wilder

Sold to

Sandy Pt Gravel, Limited

1959 -1960: Entrance and Main Basin dredged and material barged to Tsawwassen to create causeway for ferry land

PARCEL NO. 3.: [cont.]

April 27, 1962

#940644
#949285
#930294

Sandy Pt. Gravel Co. Inc.

Sold to

Bellingham Marine Inc.

Note: The above includes Sandy Pt. Tracts No. 4, North Cape, Sandy Pt. Sea Ranch Condominium, South Cape Short Plat and South Cape [unplatted

1962-1963: West and East Reaches (Canals) dredged, and Sandy Pt. Tracts No. 4. platted, part of lots 99 to 112, Bolsters andy Pt. Tracts No.2 replatted into lots C-1 to C-11 & C49 to C-58.

1967 : Land on South side of Main Basin including what is now Sea Ranch Condominium, South Cape Short Plat, and South Cape [unplatted]

Bellingham Marine Inc.

Sold to

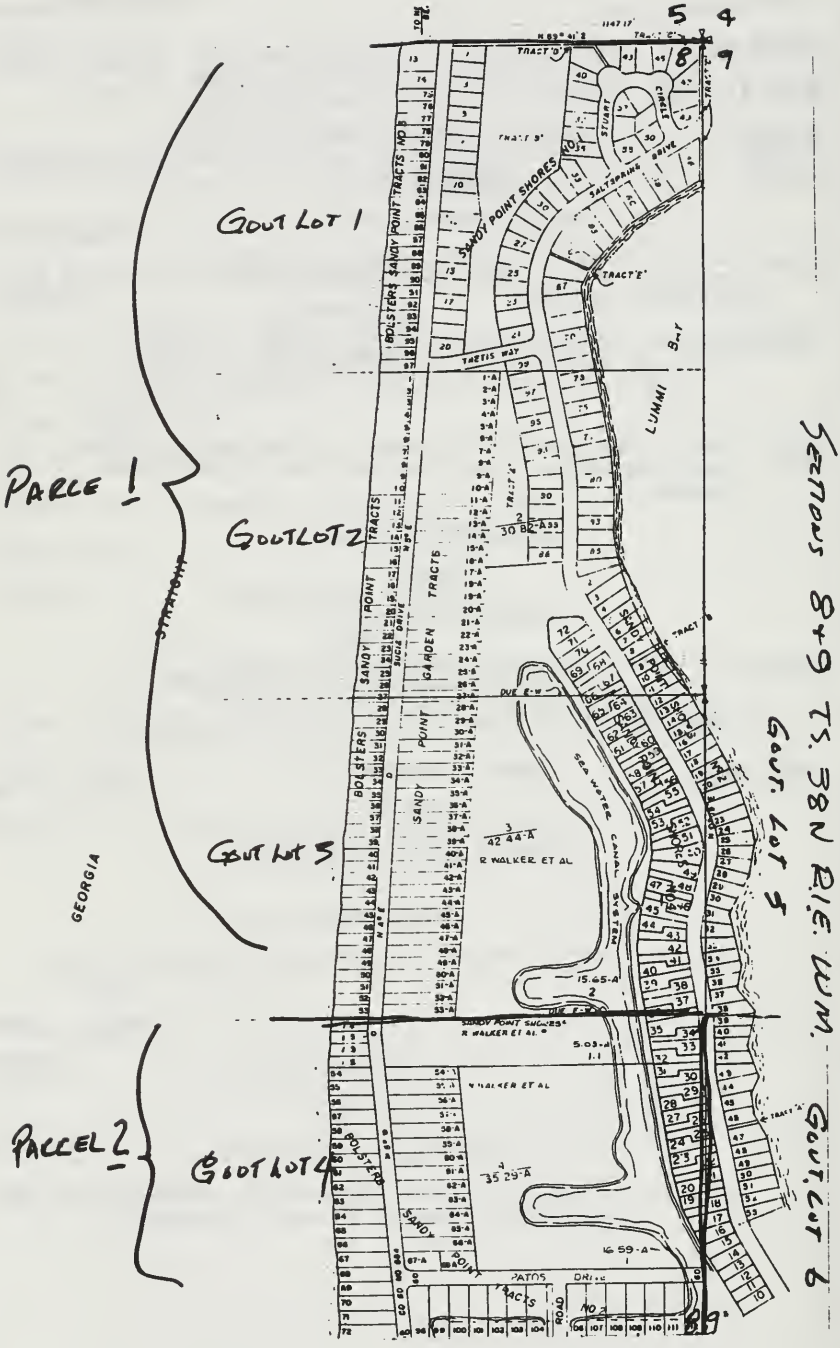
Campbell Investment Co.

1967-70 C.I.C built Sea Ranch Condominiums, did some additional dredging of main basin and constructed rock and pile Breakwatter on South side of marine "Entrance" .

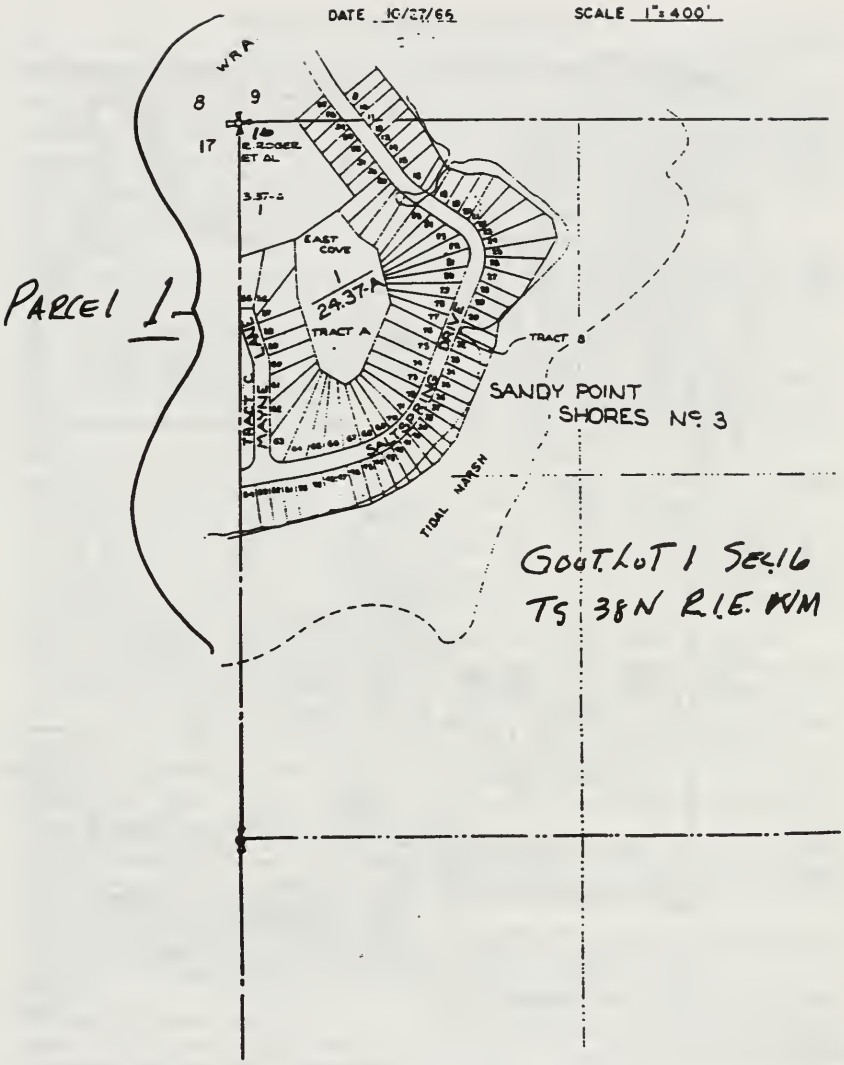
1984 [Aprox.] Campbell Investment Co.

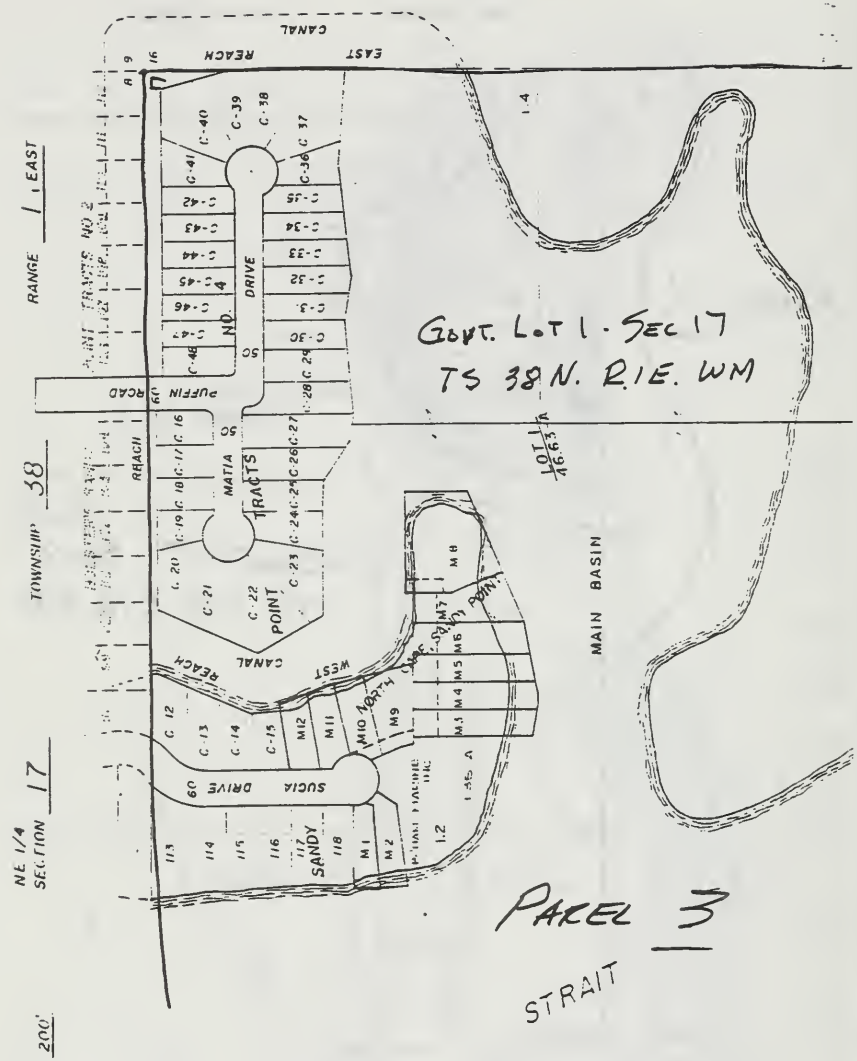
Sold To

Commander Johnny Murray-Jones



Sections 8+9 TS. 38N R.1E. W.M.
Gout. Lot 5
Gout. Lot 6
Gout Lot 1
Gout Lot 2
Gout Lot 3
Gout Lot 4
Parcel 1
Parcel 2
Georgia
Stratigraphy
Lummi Bay
Sandy Point Shores No. 1
Sandy Point Tracts No. 3
Bolsters Sandy Point Tracts
Sandy Point Garden Tracts
Sea Water Canal System
R Walker et al
Patos Drive
Tracts No. 2
Road
Tract 'A'
Tract 'B'
Tract 'C'
Tract 'D'
Tract 'E'
Salt Spring Drive
Stuart Circle
Tracts Way
Due E-W


DATE 10/27/65
SCALE 1"=400'
W R A
8
9
17
E. ROGER ET AL
3.37-A
EAST COVE
24.37-A
TRACT A
TRACT C
MAYNE
SALTSPRING
DRIVE
TRACT B
SANDY POINT SHORES No. 3
TIDAL MARSH
PARCEL 1
GOVT. LOT 1 SEC. 16
T5 38N R.1E. WM


RANGE 1 EAST
TOWNSHIP 38
NE 1/4 SECTION 17
200'
EAST REACH CANAL
WEST REACH CANAL
PUFFIN ROAD
MATIA TRACTS
NO. 4 DRIVE
POINT
SUCIA DRIVE
SANDY
NORTH CAPE SANDY POINT
MAIN BASIN
LOT 1 46.63 A
GOVT. LOT 1 - SEC 17
TS 38 N. R1E. WM
PAREL 3
STRAIT

In old English law, certain men sent into the several counties to increase the farms (rents) of hundreds and wapentakes, which formerly were let at a certain value to the sheriff. *See* Hundred; Wapentake.

Approximate. Used in the sense of an estimate merely, meaning more or less, but about and near the amount, quantity, or distance specified. Near to; about; a little more or less; close. "Approximately" is very nearly synonymous with "proximately", meaning very nearly, but not absolutely.

Approximation. Equitable doctrine by which precise terms of charitable trust can be varied under certain circumstances. Applicable to charitable trusts and employed only where on failure of trust the court finds a general charitable intent. Under this doctrine, the general intent of the donor is carried out as nearly as may be even if the particular method pointed out by him cannot be followed. Harris v. Attorney General, 31 Conn.Sup. 93, 324 A.2d 279, 283. *See* Cy-Pres.

Appruare /æpruwériy/. To take to one's use or profit.

Appurtenance /əpə́rtənəns/. That which belongs to something else; an adjunct; an appendage. Something annexed to another thing more worthy as principal, and which passes as incident to it, as a right of way or other easement to land; an outhouse, barn, garden, or orchard, to a house or messuage. Joplin Waterworks Co. v. Jasper County, 327 Mo. 964, 38 S.W.2d 1068, 1076. An article adapted to the use of the property to which it is connected, and which was intended to be a permanent accession to the freehold. A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another. *See also* Appendant.

Appurtenant. Belonging to; accessory or incident to; adjunct, appended, or annexed to; answering to *accessorium* in the civil law. Employed in leases for the purpose of including any easements or servitudes used or enjoyed with the demised premises. A thing is "appurtenant" to something else when it stands in relation of an incident to a principal and is necessarily connected with the use and enjoyment of the latter. A thing is deemed to be incidental or *appurtenant* to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of a passage for light, air, or heat from or across the land of another. *See also* Easement.

APR. *See* Annual percentage rate.

A.P.R.C. *Anno post Romam conditam*, /ænow powst Rówməm kóndətəm/ in the year after the foundation of Rome.

A prendre /à prándər/. L. Fr. To take; to seize. *Bref à prendre la terre*, a writ to take the land. A right to take something out of the soil of another is a profit *à prendre*, or a right coupled with a profit. Distinguished from an easement. Sometimes written as one word, *apprendre, apprender*. *See* Profit *(Profit à prendre)*.

A priori /èy prayóray/. Lat. From the cause to the effect; from what goes before. A term used in logic to denote an argument founded on analogy, or abstract considerations, or one which, positing a general principle or admitted truth as a cause, proceeds to deduce from it the effects which must necessarily follow.

A provisione viri /èy prəvizhiyówniy víhray/. By the provision of man.

Apt. Fit; suitable; appropriate.

Apta viro /æptə virow/. Fit for a husband; marriageable; a woman who has reached marriageable years.

Apt words. Words proper to produce the legal effect for which they are intended; sound technical phrases.

Apud acta /æpəd ækta/. Among the acts; among the recorded proceedings. In the civil law, this phrase is applied to appeals taken orally, in the presence of the judge, at the time of judgment or sentence. Credit Co., Ltd., v. Arkansas Cent. Ry. Co., 128 U.S. 258, 9 S.Ct. 107, 108, 32 L.Ed. 448.

Aqua /ækwə/. In the civil and old English law, water; sometimes a stream or water-course.

Aqua æstiva /ækwə iystivə/. In Roman law, summer water; water that was used in summer only.

Aqua cedit solo /ækwə síydət sówlow/. Water follows the land. A sale of land will pass the water which covers it. 2 Bl.Comm. 18.

Aqua currens /ækwə kə́hrenz/. Running water.

Aqua currit et debet currere, ut currere solebat /ækwə kə́hrət èt débət kə́hrəriy, ət kə́hrəriy sowliybət/. Water runs, and ought to run, as it has used to run. A running stream should be left to flow in its natural channel, without alteration or diversion; that water is the common and equal property of every one through whose domain it flows.

Aqua dulcis, or frisca /ækwə dəlsəs/*friskə/. Fresh water.

Aquæ ductus /ækwiy dəktəs/. In the civil law, a servitude which consists in the right to carry water by means of pipes or conduits over or through the estate of another.

Aquæ haustus /ækwiy hóstəs/. In the civil law, a servitude which consists in the right to draw water from the fountain, pool, or spring of another.

Aquæ immittendæ /ækwiy iməténdiy/. A civil law easement or servitude, consisting in the right of one whose house is surrounded with other buildings to cast waste water upon the adjacent roofs or yards. Similar to the common law easement of drip.

Aqua fontanea /ækwə fontéyniyə/. Spring water.

Aquagium /əkwéyjiyəm/. A canal, ditch, or water course running through marshy grounds. A mark or gauge placed in or on the banks of a running stream, to indicate the height of the water, was called *"aquagagium."*

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD. • BELLINGHAM, WASHINGTON 98226-9208 • (206) 734-8180
DEPARTMENT: EXT

RESOLUTION #90-108 OF THE LUMMI INDIAN BUSINESS COUNCIL

WHEREAS, the Lummi Indian Business Council is the duly constituted governing body of the Lummi Indian Reservation by the authority of the Constitution and By-Laws of the Lummi Nation of the Lummi Reservation, Washington, as approved on April 10, 1970, by the Assistant Commissioner of Indian Affairs; and

WHEREAS, The People of the Lummi Nation find that all Reservation natural resources are interconnected: and that the water resource has cultural, spiritual and economic values that guide the appropriate use, management and protection of that resource and the conditions of all water and land use activities in the watersheds, drainage basins of the Reservation and all usual and accustomed areas; and

WHEREAS, The Lummi Nation find that ground water are directly interconnected by the hydraulic cycle of the region and the Reservation, and therefore water is a unitary resource, whether occurring as surface water, springs, mineral water, soil moisture, precipitation, percolating water, recharge, drainage water, or otherwise; and

WHEREAS, The Lummi Nation recognize that clean water is vital to the health and welfare of the Reservation residents and to the vitality of the Reservation economy. Because resource uses may contribute to the degradation of water supply and quality, it is necessary to protect the environmental quality and integrity of all surface and ground water; and

WHEREAS, The Lummi Nation find that all waters reserved by treaty are held by them in trust for the benefit of the People of the Lummi Nation, as an essential attribute of sovereignty, the power to determine the proper uses of said waters and the management thereof is the Lummi Nations alone; and

NOW THEREFORE BE IT RESOLVED, that the Lummi Indian Reservation has no surplus water for additional non-Indian development and that all water present on the Lummi Indian Reservation is subject to the sole regulatory authority of the Lummi Indian Nation.

BE IT FURTHER RESOLVED, that the Chairman (or the Vice Chairman in his absence) is hereby authorized and directed to execute this resolution and any documents connected therewith, and the Secretary (or the Recording Secretary in his absence) is authorized and directed to execute the following certification.

SAMUEL McCAGEY
Chairman

WILLIAM F. JOHNS Vice Chairman	VIRGIL L. WILLIAMS Secretary	RICHARD P. JEFFERSON Treasurer	HENRY M. CAGEY Councilman	JAMES R. WILLIAMS Councilman
GERALD L. JAMES Councilman	ERNEST J. JEFFERSON Councilman	MERLE B. JEFFERSON Councilman	VERN JOHNSON JR. Councilman	JOE ORTIVO Councilman

INTERLOCAL AGREEMENT
LUMMI TRIBAL WATER AND SEWER DISTRICT
WATER SERVICE

WHEREAS, the City of Bellingham (the "City") is a municipal corporation formed under the laws of the State of Washington and a first class city which maintains a water supply serving the area within its corporate limits and certain areas outside those limits; and,

WHEREAS, the Lummi Tribal Water and Sewer District (the "District") is a municipal corporation, duly chartered by the Lummi Indian Tribe, which has duly applied for and received City approval of the provision of water for resale by it to its customers pursuant to Bellingham Municipal Code Chapter 15.36; and,

WHEREAS, the foregoing parties are authorized by RCW 39.34 to enter into an Interlocal Agreement finalizing the terms and conditions of the provision of water as herein agreed to;

NOW, THEREFORE, in view of the above recitals and in consideration of the mutual covenants and promises set out below, the parties hereby agree as follows:

1. Provision of water supply. The City agrees to provide to the District up to a maximum of 1000 gallons per minute of uninterrupted daily potable water service, at a minimum of 30 psi, for resale by the District to its customers residing within the District boundary as it exists as of the date hereinbelow. The District boundary is presently co-extensive with that of the Lummi Indian Reservation. Service to areas other than within the existing boundary will be as agreed to by the parties and by amendment to this agreement, except that the District may serve the area between the end of the City of Bellingham line at Marietta Slough and the Reservation boundary.

2. Construction of facilities. The District agrees to construct a transmission main ten (10") inches in diameter, from the City's existing water main on Curtis Road to a point approved by the City along Country Lane near the Marietta Slough, and there to construct a vault, water meter and backflow device(s); all costs shall be solely borne by the District. Such construction shall be in accordance with City standards, and subject to approval by the City Public Works Department. The District shall reimburse the City for its necessary costs of inspection, testing and acceptance of the main and meter assembly.

3. Ownership and maintenance of facilities. Upon approval of construction by the City and commencement of the service provided herein, the District shall forthwith transfer to the City ownership of the main, vault, meter, and backflow device(s). Thereafter, the City will be responsible for maintenance of the portion of the system it owns, and the District for the portion it owns.

City of Bellingham
CITY ATTORNEY
210 Lottie Street
Bellingham, Washington 98225
Telephone (206) 676-6903

4. Rates and billing. The City will charge the District, and the District agrees to pay, for water service herein provided at its usual rates for service out of the city as set forth in BMC 15.08.250(C)(2). It is understood that the cost of such service represents the costs of withdrawal, diversion, treatment, transmission and return on investment. The City will bill the District monthly, and payment thereon shall be due within thirty (30) days of receipt of billing. Failure to so remit in a timely fashion constitutes a breach of this Agreement antitling the City, at its option, to immediately discontinue service hereunder.

5. Latecomer agreement. The City agrees that, for any new sales of water by it to customers connecting to the transmission main described above, it will obtain "latecomer payments" from any party so connecting for reimbursement to the District of a pro rata portion of its construction costs.

6. Hold harmless. The District agrees to defend the City and hold it harmless as to any claims or lawsuits, well-founded or not, arising out of (a) the construction herein, (b) use of the facilities the District owns or maintains, and (c) provision of water services to District customers. The District understands, and will advise its customers as necessary, that no legal relationship exists between them and the City, and that the District is solely responsible for provision of water service to such customers and billing for same.

7. Rights preserved. Nothing in this agreement compromises or adversely affects the Tribe's reserved water rights under the Winters doctrine or other applicable law; provided, however, that by execution of this agreement, the City neither admits nor denies the existence of the Tribe's reserved water rights.

DATED this 2 day of MARCH, 1990, by the LUMMI TRIBAL WATER & SEWER DISTRICT, and the LUMMI INDIAN BUSINESS COUNCIL:

LUMMI TRIBAL WATER & SEWER DISTRICT

CHAIRMAN

MANAGER

LUMMI INDIAN BUSINESS COUNCIL

Tribal Chairman

DATED this 2nd day of January, 1990, by the CITY OF BELLINGHAM:

Attest: Finance Director

TIM DOUGLAS, Mayor

Approved as to form:

City Attorney's Office

Departmental Approval:

Public Works Director

City of Bellingham
CITY ATTORNEY
210 Lottie Street
Bellingham Washington 98225
Telephone (206) 676-6900

KVOS-TV
Thursday, June 29, 1995
Sandy Point/Lummi Indian Business Council Water dispute
Verbatim transcript of report

KVOS Anchor..."The Sandy Point water crisis has subsided somewhat after the Lummi Indian Business Council and Sandy Point Improvement Company met to map out a pumping regime. The water level of the aquifer is up after both sides agreed to pump water over a longer period of time."

Reporter Joe Bates..."The crisis surfaced early this Spring when Sandy Point residents were told the well that served the area was running dry. The Sandy Point Association pointed the finger at the Lummi Indian Nation, saying they were drawing too much water from their well next to the association's (well).

Henry Cagey, Chairman, Lummi Indian Business Council..."We've been accused of wasting water -- We're not wasting any water up there. We've also maintained that we're not here to take any water from domestic people up there, that are actually living up there. Where we have concerns is any future development. Until we move toward adjudication, until we move toward understanding, then that's where we see some problems."

Joe Bates..."The dwindling supply and the future of the aquifer has prompted residents to seek a solution to the crisis. They're looking to Ferndale for water, as well as other outside sources."

Dennis Beeman, Sandy Point Resident..."Basically Ferndale would be willing, as I understand it, to bring a pipe out here, they just want assurances from LIBC, Lummi Indian Council, that they will allow them to do that."

Joe Bates..."According to the tribe bringing water in from outside the reservation is not an option."

Henry Cagey..."It's not okay with us, as far as we're concerned right now, any water coming to the reservation belongs to the tribe and we've maintained that we're the sole purveyor on that reservation. Any water that does come in belongs to the tribe. And if they pursue that avenue it's going to complicate the whole process and I hate to see that happen, where a few people are doing that for their own pocket."

Joe Bates..."A few years ago the Lummi Nation offered to take over the association and manage the system. While a couple of other associations agreed, Sandy Point did not. The Lummi Nation still has that as their goal."

Henry Cagey..."Well yes, the long term is that we've maintained that we are the sole purveyor on the reservation, it is within our boundaries, they are living on the reservation and yes, we are going to operate those systems."

Dennis Beeman..."By controlling the sewer and controlling the water, then they can control growth. And that would be fine, they should be able to do that on reservation land, but this in not reservation land and we should be under the laws and restrictions of the County, not through the Lummi Indian Business Council."

Joe Bates..."If the Sandy Point Improvement Company pursues an outside source of water, the Lummi Nation believes it will force them into court. Both sides would rather solve the water issue through negotiation, rather than court action."

END

Excerpts from Civil Action No. C79 - 682R, US District Court for the Western District of Washington, Paul Johnnie MURRAY-JONES vs. The LUMMI INDIAN TRIBE/THE LUMMI INDIAN BUSINESS COUNCIL.

The following illustrates a pervasive pattern of discrimination, delay and obstruction perpetrated against Mr. Jones (hereafter referred to as MJ) by the Lummi Indian Tribe through actions of the Lummi Indian Business Council (LIBC).

SHORT SUMMARY OF MJ'S EXPERIENCES WITH THE LIBC (ET AL)

SEWER SERVICE EXTENSION

From a 1981 LIBC water resources document: "Another goal is to minimize growth of non-Indian land ownership and residence on the Reservation. In theory, utility extensions can be used as a method of growth control."

MJ acquired the South Cape property on 10 November 1983.

"It is the Goal of the LIBC to acquire all land sold out of trust...." (Squol Quol--1987)

MJ, under the impression that a Tribal Shoreline Permit would pave the way to an extension of sewer service to his property, applied for this permit as of 29 June 1989.

LIBC (Marc Russell) wrote (3 July 1989) to MJ, in reference to MJ's application for a Tribal Shoreline Permit, that "you can expect a detailed response within the next two weeks".

NO ANSWER WAS EVER RECEIVED.

An LIBC letter, 14 February 1990, to MJ states, "It is true that we will not approve any further developments at Sandy Point without establishing long term lease commitments for the affected tidelands." On the topic of water, the LIBC stated: "Your plan to develop lots at South Cape cannot be approved unless you develop an alternative plan to supply water to these lots that does not rely on reservation ground water."

A letter from the Director, Department of Ecology dated 4 April 1991 to the President, Lummi Property Owners Association, stated: "Our opinion is that sewer service should not be withheld solely on the basis of invalid water rights."

Whatcom county granted preliminary plat approval on 20 March 1992.

On or about 24 July 1992, Mr. Johnsen, the tribal attorney, is reported to have said that the resolution of the tidelands lease "will go a long way" to obtaining tribal approval of the subdivision.

An LIBC letter, 24 March 1993, says in part, "premature for the Lummi Nation to negotiate...prior to resolving other Sandy Point Tideland issues: leasing of Tidelands must be looked at in its entirety....Until these water and tidelands issues are addressed, the Lummi Planning Commission will not grant approval of this project".

MJ's Sewer extension was approved by Sewer District 29 April 1993.

MJ indicates that an undated LIBC draft resolution, circa June-July 1993 states, "In addition, the applicant has not made suitable arrangements for the use of tribal lands, including tidelands comprising the Sandy Point Channel. Therefore the application to extend sewer service to the South Cape area of Sandy Point is denied." MJ makes the point that the Lummi hoped their denial would compel him to persuade Sandy Point residents to renew the tidelands leases.

Sewer District approval was overruled by LIBC on 14 July 1993 (subsequent to a stated meeting on 15 June 1993) for the following reasons:

"The project had not been approved by the Lummi Planning Commission.

There was no assured supply of domestic water to the project which complies with the Lummi Nation laws and policies.

The landform is unstable and subject to ongoing erosion and flooding and is vulnerable to damage from seismic activity."

(MJ comments that the above reasons were presumably put forward because it was realized that linking the sewer extension to tideland lease renewal was untenable, [also], that the term "Lummi Nation laws and policies" is incapable of precise interpretation and thus meaningless.)

MJ states that he was invited to a hearing before the LIBC, but declined because Whatcom County is the sole planning and zoning authority and that the LIBC has no such powers over land owned by non-indians in fee simple. He replied on 16 july 1993 to Mr. Cagey that the power of the LIBC is limited to reviewing a decision of the Sewer Board "<u>for the purposes of ascertaining whether a fair hearing was held</u>".

MJ further points out that per the Sewer Ordinance, the LIBC resolution was invalid, having not been performed within the required 30 days. He further suggests that since the LIBC "has a duty to notify an applicant forthwith, it is likely that this meeting of the LIBC did not even take place until 14th July 1993". Additionally, he comments that the draft resolution of June-July 1993, in denying the extension, erroneously gives the date of the Sewer board meeting as 28 May 1993 instead of 29 April 1993, this, "an attempt on the part of the LIBC to cover up its procedural defects...."

MJ arranged a meeting with Henry Cagey for 21 July 1993 and reconfirmed the meeting on the morning of that date. Upon arrival, he was told he was to meet a "Chief Oliver". Instead, he was ushered into the presence of Mr. Johnsen, the tribal attorney and three others. He presented his views on the situation with the understanding that no meeting was deemed to have taken place. On 26 July 1993, MJ wrote to Mr. Cagey suggesting they meet for lunch or dinner.

Circa 30 July 1993, MJ heard from his engineer that Mr. Johnsen had asked her for the geological survey reports on the property, carried out for the Department of Ecology to confirm the stability of the land. This request was refused.

On 24 August 1993, having obtained a copy of the Lummi Tribal Sewer and Water Ordinance, MJ wrote to Mr. Cagey pointing out that the position stated in his denial letter of 14 July 1993 was inconsistent with both the Consent Decree and the Sewer Ordinance.

MJ states that he proposed to the Department of Ecology that he install a reverse osmosis system at South Cape. By letter dated 15 September 1993, the Lummi protested MJ's application on ecological grounds. It is noted that the LIBC claims that: "Marine waters and the tidelands of the Reservation are the property of the Lummi Nation. However, from United States v Winans, MJ quotes the following: "The States control navigable waters, including the soil under them and the fisheries within their limits, subject only to the rights of the General Government under the Constitution in the regulation of commerce." MJ also comments that Reservation tidelands are owned in trust for the Tribe and not owned by the Tribe itself.

Mr. Cagey, on 16 September 1993, without mentioning MJ's letter of 24 August, raised a new reason for denial of the sewer extension: a section of the ordinance requiring that an extension proposal by the Sewer Board be "accompanied by an amendment to the Facilities Plan", which the Sewer Board had apparently failed to do. (MJ comments that the above is just a procedural matter; further, that this requirement had not been imposed in relation to earlier extensions to the system; further, that the Sewer District was expecting to extend the sewer to this property from 1988 onwards, and had no problems with so doing.)

MJ comments that Mr. Cagey's letter also addressed the matter of connections to homes, a signal that this part of the ordinance permits the LIBC to refuse to permit connections from an extended sewer to houses; in effect frustrate the intentions of the Consent Decree and "swallow the rule of non-discrimination".

On 21 September 1993, MJ responded to Mr. Cagey's letter of 16 September, pointing out the inadvisability of maintaining the present course of the LIBC. His comment, "I now began to realize that 'negotiating' with the LIBC was pointless, as not only was the playing field not level, but the goal posts were always being moved--or even removed altogether."

On 25 October 1993, Mr. Cagey offered to purchase the land for a sum which would provide MJ "a reasonable return" on his investment. MJ responded, "offering the property at its sellout value after development , less future construction costs. A 30 November 1993 reply rejected the offer.

MJ states that on 7 June 1994, the Department of Ecology gave approval to proceed with the development and install an R.O. system without procuring a water permit. He further comments that one of the reasons given by the LIBC for not approving the sewer system is an alleged lack of water.

Finally, MJ observes that the Lummi Tribal Codes do not contain any of the provisions which have been incorporated into the Sewer Ordinance in accordance with the Consent Decree. He comments this is a cause for concern since the code presumably takes precedence over the Sewer Ordinance.

RACIAL DISCRIMINATION PRACTICED BY THE LIBC

The LIBC practices racial discrimination through violations of the consent decree.

For the Federal Grant which funded the sewage collection and treatment facilities, The EPA required LIBC to sign an "Assurance of Compliance for Title VI of the Civil Rights Act of 1964 and Section 13 of the FWPCA amendments of 1972."

MJ goes on to say that:

> When land is sold by an Indian to a non-Indian in fee simple, the United States has no further interest in the property... (letter, BIA, 6 August 1990), and there have been a number of recent court cases confirming that Indians do not have any regulatory control over non-Indian owned land on a reservation.

CONCLUSIONS

The LIBC seeks to assert control over MJ's property through denial of sewer service, which is:

Racial discrimination in violation of the Consent Decree.

Racial discrimination in violation of signed agreement with the EPA.

Racial discrimination in violation of DOE requirements associated with grants.

Racial discrimination in violation of MJ's civil rights as a landowner and taxpayer.

Usurpation of Whatcom County's sole authority as relates to zoning and planning jurisdiction over non-Indian land owned in fee simple.

Sandy Point Water Emergency Facts

...Lummi Indian Business Council (LIBC) purchased a fee simple lot in Neptune Heights under an assumed name, about two to three years ago. Dropped a production well within 100 feet of the Sandy Point Improvement Company (SPIC) well into the same aquifer. The SPIC well, established in 1971, is the source of water for 550 full-time families living in the Sandy Point/Neptune Heights area, plus an additional 150 hook-ups. It appears excessive water was pumped by this well over six week period, creating a water emergency.

...Construction of the new LIBC well, which began pumping in July of 1994, is on fee simple land and has not been reverted back to Trust. An industrial 100 KW Generator, an industrial cyclone fence (which originally had razor wire around the top and LIBC armed guards), an 80,000 gallon steel tank were all installed without proper County and State permits in a residentially zoned neighborhood. No conditional use permit, no well drilling permit, no discharge permit.

...a Stop Work order was issued by the County and was ignored about a year and a half ago. County did not enforce the order.

...Initially, when the LIBC fish hatchery was constructed, the LIBC used 23 gallons per minute provided from the old SPIC well, which is now dry. Then they dropped their own small well which pumped 23 gallons per minute and was used part time to supply water for their fish hatchery, which we understand was for a somewhat smaller operation than the current hatchery. Then they dropped this production well into aquifer supplying SPIC water.

...LIBC installed a 20 Horsepower pump capable of pumping 300-plus gallons per minute, which we understand had been running during this dry weather from mid-April and May between 12 and 22 hours per day and was only reduced to about half the volume when the Federal pressures began.

...The SPIC well has a 15 horsepower pump with capacity of pumping up to 230 gallons per minute and is run at three hour intervals currently this summer to try to stabilize the aquifer and assure an adequate supply water to 550 homes in the Sandy Point area, including some 30 to 40 Lummi residents.

...End result of the apparent excessive water being pumped for a month and a half, which has been confirmed by auditory valve sounds and professional visual outflow inspection, is a serious water emergency for 550 residents involved, creating a potential health and safety hazard. Initially it was estimated we had one week supply remaining. Area residents responded immediately to the water usage cut back notice, reducing their consumption by nearly half, according to Elden Balzer, SPIC Maintenance Supervisor.

...Lummi Indian Business Council is claiming they are using this water to support their fish hatchery as provided by the Point Elliott Treaty of 1855. However, they have stated they are currently using up to 80 GPM. With and estimated pumping at 200 to 300 GPM, up to 220 GPM of precious water was being wasted, going through the LIBC Sewer system and into Lummi Bay.

...Elden Balzer has spoken with Skookum Fish Hatchery in Nooksack in the past and described the LIBC Hatchery. They confirm that no more than 50 to 80 gallons per minute would be required to support the hatchery. Others have said 80 GPM is too high.

...In addition to creating a potential health hazard for the 550 residents of the Sandy Point/Neptune Heights area, a professional water hydrologist says there is danger of ruining the existing aquifer and well systems, with the potential of sucking in sand and sea water into the systems, if the aquifer is pumped too low.

Meetings between the LIBC and Congressman Metcalf and Senator Gorton have been held, as well as meetings including SPIC and LIBC. The wasting of water by LIBC has diminished, apparently cut by about one half, according to Elden Balzer and the Sandy Point Community has done an excellent job of conserving water, but the aquifer is still dangerously low, with the hottest and highest use months of July and August still ahead.

...The problem of the illegal well on fee simple, residentially zoned property, without proper permits from the County and the State still exists...with a Stop Work order being ignored. Precious water is still subject to being wasted.

...It is SPIC's speculation the excessive water pumping by the LIBC was in retaliation over the granting of building permits for the Sandy Point area by the Department of Ecology and the State Health Department. The LIBC excessive well pumping coincides with the granting of these permits. There has been a building moratorium for several years over the water issue, where several property owners have been paying taxes on their land, but have been unable to build. This essentially has been confirmed by Henry Cagey in his anti fee simple property growth position.

...The Sandy Point well has been in service since 1971. Each year the aquifer has been drawn down during the summer months but not to the current dangerously low levels. It is not a coincidence the well has been seriously depleted since the illegal LIBC well was put into operation. Some 550 families are threatened with potentially being deprived of their right of a fresh water supply, plus jeopardizing their health and safety. If the LIBC well is allowed continued operation at the current pumping rates the aquifer will likely not recharge this winter.

...We need to get some teeth back into the laws which govern fee simple property. The Stop Work Order for operating the LIBC well should be enforced by County and State. Federal officials and Department of Interior authorities are encouraged to withhold funds to LIBC until they correct their unfriendly activities toward SPIC. We need this violation of our civil and property rights, as guaranteed by the Constitution and Bill of Rights, to end.

A long term solution is still required. We need an independent off-reservation boundaries water source, without resistance from the LIBC, to augment our current water supply which has been seriously threatened.

This preliminary information prepared by:

Earle Baker, Chairman
Sandy Point Property Owners Committee

June 25, 1995

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA ROAD • BELLINGHAM, WASHINGTON 98226-9298 • (360) 384-1489
DEPARTMENT _____ EXT._____

FOR IMMEDIATE RELEASE Tuesday, September 24, 1996
Contact: Jewell "Praying Wolf" James or Frederick Lane, 202/ 628-1151

AFTER FIVE HUNDRED YEARS, INDIAN NATIONS STILL CONSIDERED INCOMPETENT TO GOVERN THEIR PEOPLE, THEIR LAND, AND THEIR DOMAIN

The Lummi Indian Nation and many of its peers from the Pacific Northwest, as well as other areas of the United States, are outraged over the current focus of a hearing before the Senate Committee on Indian Affairs, as demanded by Senator Slade Gorton (R-WA). During the 104th Congress, Gorton has introduced one anti-Indian rider after another to accomplish his anti-Indian goals - *"waiving Indian Tribal sovereignty"*.

During the Senate Appropriations Committee mark-up of the FY 1997 Interior Appropriations Bill, Senator Gorton introduced section 329, an expanded version of section 115 a rider attached to the FY 1996 Interior Appropriations Bill which will penalize the Lummi Indian Nation and other Tribes in the State of Washington if they deny non-Indians within their Reservations boundaries due-process. At this juncture during the proceedings, Gorton was asked by his fellow Senate colleagues to withdraw section 329. He agreed with the condition that the Senate Committee on Indian Affairs hold hearings on *"sovereign immunity"* which in and of itself was what the Tribes had always asked Congress do to - provide a forum for the Tribes, non-Indians, and government entities to bring forward mutual concerns and work together towards the resolutions - not use Congress as a killing field of Indians peoples' sovereign rights. Tribal governments had not been afforded an opportunity to address the concerns of the Congress, the States, or the non-Indians. Consultation was but a small request by Tribal governments prior to the seek and destroy attitude which has been the agenda of the anti-Indian sentiment in Congress during this session.

For the September 24th hearing, Senator Gorton has brought in special witnesses from several different states while only five tribal leaders, representing the several hundred Indian nations, and more than four hundred Alaskan Indian, Eskimo, and Aleut Nations were scheduled to testify .

According to Henry Cagey, Chairman of the Lummi Indian Nation - Bellingham, WA..."Tribal leaders recognize that many of the complaints are from non-Indians who willingly bought land inside Indian reservations and then demanded rights to develop the lands without regulation by tribal or other local governments. On the Lummi Reservation non-Indians have fought our tribe over the development of unstable shorelines, and no matter what we presented as justifiable evidence why this should not occur, they resisted our authority and have constantly filed lawsuits against our nation, claiming discrimination was the reason we did not authorize the extension of the impacted sewer facilities."

Chairman Cagey continued, "Indian leaders recognize that the primary question is whether or not we are competent to govern our lands, our people, and all civil actions within our domain. Non-Indians, and several U.S. Congressmen, do not believe Indians should have jurisdiction over non-Indians, regardless of the actions in question. All tribes contend that anytime anyone enters another governments' jurisdiction, they are subject to that governments' laws and regulations. It is no different when non-Indians enter reservations. When Indians leave the reservations the same principle applies to their actions. When you drive into the Lummi Reservation or buy land inside our boundaries, then you are subjected to our jurisdiction".

According to Gerald James, Policy Director of the Lummi Treaty Task Force, "The hearing is insulting because the debate is over five hundred years old. Right after Columbus discovered the new world the question was whether or not Indians had the capacity of reason to manage their own affairs. This hearing only proves that the question is not answered, and there are those who hold this legal fiction to be true. We have the same rights as non-Indians to develop our own government, based on the needs of our people".

Ron Allen, Chairman of the Jamestown S'Klallam Tribe and President of the National Congress of American Indians stated, "This hearing has the effect of undermining tribal sovereignty and implementing termination of tribal self-governance by legislative riders. This is an anachronism that is completely unacceptable. The Congress and Presidency have both issued numerous Indian Policy Statements that support tribal self-determination and self-governance. The policies were honorable, but using appropriation riders to secure a change in law without the benefits of public hearings is most definitely a denial of due process. In 1871 this was a tactic that denied the President and Senate their treaty-making powers; an appropriation rider of 1871. This appropriation rider tactic is the anachronism."

Merle Jefferson, Director of the Lummi Indian Natural Resources Department agreed with Mr. Allen. Jefferson said, "This is what happens when a 1996 Interior

Appropriations Bill rider is used to penalize Indian people for having water rights secured by Federal law and the non-Indians want the water for their personal use. The non-Indians made it look like they were the victims when, in fact, they were illegally taking Indian water. In addition the non-Indians did not have a state water permit. The Lummis were made to look like the villains, the non-Indians were the poor, little victims. This is called "stealing the injury".

Lummi Treasurer, Darrell Hillaire was quoted to say, "To remove the sovereign immunity of the Indian tribes would subject the tribes to endless and frivolous lawsuits by all citizens seeking to increase non-Indian real-estate ventures on Indian Reservations. Most of these lawsuits are driven by greed. One lawsuit can cost several million dollars and consume a couple of decades, as in the case of water lawsuits. All governments need the power to limit the ability to be sued. This is a critical power to the poverty stricken Indian governments".

Mr. James finally added, "The U.S. Congress created the land ownership problem on the Indian Reservations. The Indian Land Consolidation Act of 1984 did not resolve the problems. These hearings should prove that the U. S. Congress should issue a moratorium on land sales inside Indian Reservations, at least all sales made to or by non-Indians to non-tribal persons or corporations. This moratorium should continue until the Congress can correct the laws to protect the intent of the reservations.

The United States has negotiated over seven hundred treaties with the tribes, and ratified 367 of those treaties, and all under the power of the U.S. Constitution itself. These treaties are government-to-government contracts and binding upon both parties. This is a duty the United States owes to the tribes under the Trust Responsibility. The reservations were set aside for the Indians' exclusive use by special provisions of most of the treaties ratified by the U.S. Senate".

****

SOME SOVEREIGN IMMUNITY PROBLEMS
By Linnea Smith
8/17/96

Sovereign Immunity for Indian tribes has adversely affected so many areas of my life as a non-tribal fee land owner whose property lies within the exterior boundaries of the Lummi Indian Reservation.

1. Denied access to tribal laws (Codes, Ordinances, Resolutions) which affected non-Indians. Denied access to tribal years end financial reports. The accountability required of other governments (county, state and federal) through the Freedom of Information Act is not possible when sovereign immunity and the Indian Self-Government Act are in force.

In 1992 I wanted to read the tribal laws to follow up on a rumor. I had been told from several different directions that the Lummis were rebating the utility tax on phones and electricity, (which we all had to pay to the tribe) to tribal members, if they kept their receipts and turned them in at the end of the year. I was told that I had to make a written formal request, stating specifically what it was that I was looking for, and then there would have to be a formal determination whether I could access the material. I said fine, filled out the forms asking that I be allowed access to laws (ordinances, codes, resolutions) passed from 1985 to present (1992), and was denied twice. I then sent letters out to every political official and agency I could think of for help. The Washington State Governor's Office of Indian Affairs even tried to access the information for me, but they were told that Self Government Indian Tribes were not under the Freedom of Information Act or the Privacy Act, and did not have to respond with information. Finally the BIA agreed to send me copies of all the Lummi codes, resolutions, ordinances, etc. that they had on file for the period. (Immediately after, the tribe wrote and said I could access the information -- if I would tell them exactly what I was looking for, they would get it for me.)

I was again denied access to tribal laws and full tribal budget financial information in 1995. The tribal Squol Quol newspaper had reported that a payment made by the Sandy Point Improvement Company (I am a member) to the tribe was over $39,000.00 less than what I knew had actually been sent to the tribe. Additionally, tribal casino revenues were listed as "$0", when I knew that by reported contract they should have been at least $10,000 per month. In an earlier Squol Quol, in January of 1993, a tribal donation to the non-tribal fire department where I am a First Responder volunteer was published as being $20,000 when the amount actually received by the department was $10,000. The explanation by the tribal accounting office for these entries were astonishing.

According to Bob Williams of the Freedom Foundation, in his weekly report to a talk show program regarding waste in government spending, which I heard on my car radio this week, the State of Washington is losing approximately 53 million dollars in taxes on cigarettes sold to non-tribal members this year from sales on Indian reservations. This is up from 23 million in 1991. Apparently it is now believed that organized crime is finding this very attractive. According to Mr. Williams, the State Patrol and State Revenue Office both say that they have other priorities than to enforce this particular law under our present governor. The Governor apparently believes he is helping tribes by winking at the law. Instead, I believe that he is encouraging them in criminal behavior. Sovereign immunity encourages criminal activity when access to information is denied under laws which are not allowed under any other US government entity. Tribal councils are also business councils -- they are in business as well as in government -- and with sovereign immunity and no separation of powers required, it is not surprising that organized crime is becoming very interested.

2. Sovereign Immunity denies due process to non-tribal members.

There is no separation of powers between tribal administration and tribal court. Tribal judges are hired and fired by tribal council members I cannot vote for. Tribal laws are not accessible to non-tribal members. In 1991 I was served papers which demanded that I must appear in tribal court within four hours. When these papers are delivered by a tribal policeman with a gun on his hip, you don't

ignore them. When I did go to tribal court, I told the judge that I did not believe he had jurisdiction over me, that the notice was too short and the I had been able to reach only one of the Board members, so I could not speak for any of them. I had to listen to a long harangue from the tribal judge, stating that he did have jurisdiction over me, etc., and wanting information which I was unable to give, since I wasn't able to contact the Board members.

In 1993 our little water association of 38 members was sued by the tribe in tribal court. I am the Secretary-Treasurer. There was no court reporter. The tapes of the six hours of testimony at a pre-trial hearing, which had been very damaging to the tribe and which had been only in tribal possession, were all blanked. Depositions of tribal experts were very hard to come by (one partial one was finally taken, of the several asked for). Reports due to us under discovery process rules in other courts were denied by tribal attorneys. We had to ask for a hearing before the judge, and judge finally told the tribal attorney that we were due the information -- whereupon the case was dismissed by the tribal council that very evening. Sovereign immunity leaves no opportunity for redress of our expenses unless the tribe agrees!

After I purchased a set of tribal laws from the tribal court clerk in 1995, the clerk told me that she and the chief of tribal police were reprimanded, the code books were removed from the court clerk's office to the tribal attorney's office in town, and all requests for access to tribal laws now had to go through the tribal attorney. (Kind of nice to be tribal attorney and also be able to limit access to the laws!) When I called the law office to access the information, I was told that I must talk with one specific attorney, and he was out of the office.

Under sovereign immunity, cost to pursue litigation in non-tribal federal district court, should the tribe agree, is prohibitive. Federal District court is in Seattle. Local attorneys don't usually practice there, Seattle attorneys are more expensive. Travel time to Seattle becomes a big factor -- working people needing to testify or wishing to attend a proceeding must take a whole day off work (or several days) to pursue justice. Lack of access to the local court system is a denial to non-tribal members of the due process, equality, and fairness enjoyed by all other US citizens.

3. County and state laws and regulations for fee lands are ignored under sovereign immunity.

A tribal council member purchased land zoned rural 5 acres beside our single family residential zoned neighborhood and put in a trailer campground with 42 hookups. He told the neighbors he planned to do this. Neighbors complained to the BIA and asked that the land not go back into trust. The BIA checked with the tribal council member and the tribal planning department, both of whom said no such thing was planned at that time. Within months of the land going back into trust the RV trailer campground became a reality. Additionally, the tribal council member paid for only two sewer and water hookups.

Other instances of spot zoning by the tribe include locating a tribal fish processing plant, a casino, and a bingo hall, in the middle of a residential community that had a waiver by the county for only the existing small grocery store, restaurant and boat launch/storage business. Also a tribal gas station with in-ground storage tanks was place in the middle of a flood plain and agricultural area.

4. Non Indians have no recourse toward Tribal officials and their actions under sovereign immunity.

In 1993 our Georgia Manor Water Association drilled a replacement well. The tribal police served papers and demanded the drilling be stopped, even though we had all the necessary state permits to drill. When the sheriff backed us up, we and the well driller were served a summons to appear in tribal court at 4:30 that afternoon (the notice was served at 4:30!) We had a hard time getting a driller. Local ones had been threatened with confiscation of equipment if they drilled for a non-Indian on the reservation. Even with our letter from the prosecuting attorney's office as to how the sheriff would respond, they wouldn't drill. We had to go to the Seattle area to get the driller.

In 1994 the tribe drilled a well and put in a well house on a lot in the single family residential plat of Georgia Manor which was approximately 120 feet from our Georgia Manor Water Association well. Our well is on a well site behind the plat. They removed our water association's metal survey stakes which were driven into the ground when they put in a fence around their lot. (I noted the removal of the stakes to one of the workers -- they said it was all right -- they were replacing the stakes when they filled in the holes!)

As a former member of the tribal sewer and water district Board, I have been asked to help non-Indian property owners to help them get the service they are supposed to be able to get without problem from the district. For instance one lady had paid the sewer connection fee for her house at the beginning of the sewer district, and had been paying full sewer fees for nine years without receiving any sewer services, but was being told she must pay several hundred dollars more to have a sewer stub put in to service her house. The stub showed on the sewer "as built" plans, but was missing in actuality, when she tried to hook up to the sewer. Another instance was a lady who had paid stand-by charges for sewer for 10 years, but was denied hookup on the basis that she did not have a tribally approved water source. (The county had approved her water source -- a well on an adjoining property.)

My neighbor called me (I am on the County Sheriff's Citizen Advisary Committee) when a tribal officer chased visiting second graders from his wife's school class up his steps from the beach, telling them they were on tribal beach and couldn't be there. The officer stayed on the owner's property at the cliff top and argued for some time. The owner was very distraught and wanted to know if his understanding was correct that Georgia Manor owned the beach (we do -- to the mean high tide level). The officer was claiming ownership to the vegetation line -- the top of the cliff! I suggested the owner call and talk to the sheriff directly about the incident.

5. Sovereign immunity allows tribes to ignore EPA and other environmental regulations.

Tribal officials acknowledged on a Jeff Kent talk show that I listened to last year, that they did not have the environmental permits for the tribal gas station with in-ground gas tanks that they built at the comer of Slater and Haxton Way, (which would have been required of all other US citizens prior to building). The station is built on fill brought in to the middle of agricultural field crop land, is built on a flood plain that is several feet under water during flooding of the Nooksack River when the dikes overflow, and is surrounded with water during winter rains.

The tribe built a Head Start office building over the still-in-ground gas tanks from an old gas station, and when asked by the contractor if he shouldn't remove the tanks, as required by EPA, they said no, cover them up. EPA was contacted by our local fire chief at the time, and they did not do anything, according to the chief in a conversation I had with him several years ago. Later, I told the EPA representative who was out checking on our local fire department in-ground diesel tank which had to be removed, about the tanks. As far as I know, the EPA still did nothing.

The tribal Lummi Shore Road restoration project manager stated at a hearing I attended that the road would be built to "Lummi Nation environmental standard".

It seems very wrong and very counterproductive that tribes should be allowed standards different from the those required of the rest of the US. I believe that Sovereign Immunity is the biggest guarantee of continuing that lack of accountability or responsibility. Removing it would make tribes and their representatives more responsible, and would allow due process equality and recourse for those affected by Sovereign Immunity. We allow and encourage our children to grow up and take full responsibility for their actions. Why not tribes?

Sincerely,

Linnea G. Smith

2808 Leeward Way, Bellingham, WA 98226

STATE OF WASHINGTON
GOVERNOR'S OFFICE OF INDIAN AFFAIRS
605 11th Ave. S, Suite 112 • MS: PF-14
Olympia, Washington 98504
(206) 753-2411 • (SCAN) 234-2411

April 27, 1992

Ms. Linnea G. Smith
2808 Leeward Ways
Bellingham, WA 98226

Dear Ms. Smith:

The Governor has reviewed your letter of March 3, 1992, and asked me to respond on his behalf. Since receiving your letter from the Governor's Office, we have taken several steps to address your concerns.

We called the Lummi Indian Tribe and requested any and all laws that would prohibit them from disclosing the information you have requested. After several attempts to obtain this information, we received a letter from them citing the law which does, in fact, restrict access to the tribe's records, documents, and files.

The Lummi Tribe's letter cited Public Law 102-184, the Tribal Self-Governance Demonstration Project legislation. In that legislation, tribal governments are exempt from both the Privacy Act, 5 USC 552a, and the Freedom of Information Act, 5 USC 552. Article II, Section 7a of the Self-Governance Compact governs the disclosure of documents, and these exemptions allow the tribes unilateral ability to restrict documents of tribal origin. The State has no authority in this matter.

Under the terms of the Centennial Accord, the State of Washington has formally recognized the tribes on a government-to-government basis. We respect their right to be self-governing.

Sincerely,

Michelle Aguilar
Executive Director

MA:rn

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD • BELLINGHAM, WASHINGTON 98226-9299 • (206) 734-8180
DEPARTMENT FAX

RECORDS CENTER REQUEST/ACCESS ORDER

Requestor Name: Linnea Smith / (Agency)

Current LIBC Employee? | | yes | X | no

Department

Section

Phone

Address 3808 Leeward Wy. Bellingham, WA 98226

Phone ( ) 758-2183

Authorized to Access? Yes| | No| |

Signature on file? Yes| | No| |

My interest in the records is
X Personal ____ Business
____ Academic ____ Legal

ACTION REQUESTED

L.I.B.C. only: ____ Check out for ____ hour(s)

all requestors: ____ Inspection
____ Research (Hrs at $ per hr) $
____ Copy (Sheets at Cents pr Sheet) $
Total $

Athrzd Signature: Linnea Smith Fees Collected ____ Chrg ____

Describe records (series or title where ever possible): LIBC ordinances - 1985 - 1992 + resolutions

Additions or changes to Codes.

AGENCY RESPONSE:

____ Access allowed, records are open.

____ Access with deletions only to protect personal privacy rights.

____ Access will be decided be review of the records committee. You will be notified within 5 business days that they have been requested to review this case. (1-9-92 date mod.mailed).

__✓__ Access is restricted. Authorization by waiver is required.

__✓__ (ACCESS DENIED) Comment: Our attorneys have advised us that these records are restricted by federal and tribal laws to the use of the tribe & its appointed agents. (25 per C.F.) 1-11-92.

____ Access is permitted by waiver. See Attachment.

____ We do not have these records:

Request date: Jan 8 1992 Time: 11:15

Request taker: ____ Research done by ____

Carried by: ____ Requestor notified 10 A.M. 1-17-92

By Phone ____ Mail/Memo ✓ Message to: ____

1054

1809 Leeward Way
Bellingham, WA 98226
January 24, 1992

Ms. Sylvia Sauter
Manager, Records and Archives
Lummi Indian Business Council
2616 Kwina Road
Bellingham, WA 98226

Re: Denial of Request to access LIBC Ordinances, Resolutions, and Code Revisions

Dear Ms. Sauter:

I received your notification yesterday, regarding my written request of January 8, 1992, stating that I may not have access to the requested Lummi Indian Business Council ordinances, resolutions or changes in code from 1985 - 1992. The comment on the denial states that "Our attorney's have advised us that these records are restricted by federal and tribal law to the use of the tribe or its appointed agents. (SS per CF.) 1-17-92"

I doubt that there is such a federal statute, regulation, or ruling, or even a Lummi tribal regulation restricting access to those records by non-Indians (and I assume also barring Indians who are not Lummi tribal members from accessing them). If there are federal or LIBC regulations restricting access to the Lummi Indian Business Council rules, regulations, resolutions, ordinances and codes, will you please show me by sending copies of them and the citations for them, and I will certainly abide by the restrictions.

However, if there is no documentation regarding restriction, I would urge that you allow access.

Sincerely,

Linnea G. Smith

Linnea G. Smith

cc: Henry Cagey, Chairman, Lummi Indian Business Council

2808 Leeward Way
Bellingham, WA 98226
March 3, 1992

Sylvia Sauter
Records and Archives Manager
2616 Kwina Road
Bellingham, WA 98226

Re: Access to Lummi rules and regulations, resolutions, codes and ordinances

Dear Ms. Sauter:

I would appreciate anything you might be able to do to help me access the Lummi Indian Business Council resolutions, ordinances, codes, rules and regulations.

As you can see from the enclosed response by the Lummi Tribe to my request for access to information, they have refused access to these records because they say that they are prohibited by federal law from disclosing them. If the Tribe prefers to operate its government in secrecy and simply doesn't want to allow me or other non-tribal members access to their governmental decisions, that is one thing. But to say that they are prohibited by federal statute from allowing access to tribal resolutions, codes and ordinances, I find very hard to believe.

Enclosed is a copy of my request of January 8th to access records, and the Lummi Tribe's denial of access, which I received January 23rd. Also enclosed is a copy of my letter of January 24th asking that they send me copies of the applicable federal or tribal statutes and citations for them, which they referenced in their denial. To date, I have received no response to that letter. My final enclosure is a copy of my letter of March 3rd to the Tribe, again requesting access, and also indicating a willingness to abide by restrictions from access, if they do indeed exist.

I would appreciate anything you might do to help me access Lummi Indian Business Council governmental records.

Sincerely,

Linnea G. Smith

Linnea G. Smith

cc: Henry Cagey, Chairman, Lummi Indian Business Council--by certified mail

2808 Leeward Way
Bellingham, WA 98226
March 3, 1992

Mr. Henry Cagey, Chairman
Lummi Indian Business Council
2616 Kwina Road
Bellingham, WA 98226

Re: Access to LIBC resolutions Ordinances, and Codes

Mailed Certified -- Return Receipt

Dear Chairman Cagey:

Enclosed are copies of my January 8th request to access Lummi Tribal resolutions, ordinances and codes, the LIBC denial received by me on January 23, 1992, and my responding letter of January 24, 1992 asking that you allow access. I have had no response to my January 24th letter from you, from Ms. Sauter, or from the Lummi Indian Business Council.

I am renewing my request to access LIBC resolutions, ordinances, and codes. As stated in my January 24th letter, I doubt that there are federal or even tribal regulations restricting access to those records. If there are federal or LIBC regulations restricting access to the Lummi Indian Business Council rules, regulations, resolutions, ordinances and codes, will you please show me by sending copies of them and the citations for them, and I will certainly abide by the restrictions.

However, if there is no documentation regarding restriction, I request access.

Sincerely,

Lynnea G. Smith

cc: Sylvia Sauter, Manager, Lummi Records and Archives
Dana Rasmussen, Director, Region 10, EPA
William Black, Superintendent, Puget Sound Agency, BIA
Stanley Speaks, Superintendent, Portland Agency, BIA
Manual Luhan, Secretary of the Interior
Christine Gregoire, Director, Washington State DOE
Christine Gebbie, Director, Washington State DOH
Daniel Warner, Chairman, Whatcom County Council
Booth Gardner, Governor, Washington State
Ken Eikenberry, Attorney General, Washington State
Slade Gorton, Senator, Washington State
Al Swift, Representative, Washington State
Brock Adams, Senator, Washington State
Ann Anderson, Senator, Washington State Legislature
Dennis Braddock, Representative, Washington State Legislature
Pete Kremen, Representative, Washington State Legislature
Shirley Van Zanten, Whatcom County Executive
Judge Barbara Rothstein, Federal District Court

2808 Leeward Ways
Bellingham, WA 98226
March 3, 1992

William Black
Superintendent, Puget Sound Agency, BIA
3006 Colby Avenue
Everett, WA 98201

Re: Access to Lummi rules and regulations, resolutions, codes and ordinances

Dear Sir:

I would appreciate anything you might be able to do to help me access the Lummi Indian Business Council resolutions, ordinances, codes, rules and regulations.

As you can see from the enclosed response by the Lummi Tribe to my request for access to information, they have refused access to these records because they say that they are prohibited by federal law from disclosing them. If the Tribe prefers to operate its government in secrecy and simply doesn't want to allow me or other non-tribal members access to their governmental decisions, that is one thing. But to say that they are prohibited by federal statute from allowing access to tribal resolutions, codes and ordinances, I find very hard to believe.

Enclosed is a copy of my request of January 8th to access records, and the Lummi Tribe's denial of access, which I received January 23rd. Also enclosed is a copy of my letter of January 24th asking that they send me copies of the applicable federal or tribal statutes and citations for them, which they referenced in their denial. To date, I have received no response to that letter. My final enclosure is a copy of my letter of March 3rd to the Tribe, again requesting access, and also indicating a willingness to abide by restrictions from access, if they do indeed exist.

I would appreciate anything you might do to help me access Lummi Indian Business Council governmental records.

Sincerely,

Linnea G. Smith

Linnea G. Smith

cc: Henry Cagey, Chairman, Lummi Indian Business Council--by certified mail

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD • BELLINGHAM, WASHINGTON 98226-9298 • (206) 734-8180
DEPARTMENT EXT

March 26, 1992

Ms. Linnea G. Smith
2808 Leeward Way
Bellingham, WA 98226

Dear Linnea:

I have been asked to respond to your request for access to the tribal archives. The Tribe has a great many different functions and topics covered by its resolutions. Some of these are clearly privileged or confidential and are not released to any person. Others are freely available to anyone who asks. It depends a great deal upon the topic involved. For example, a resolution giving official direction to the tribal attorneys in specific litigation would clearly be privileged and not accessible to any person. Likewise, family history matters which often come up in enrollment situations have always been treated as confidential or private by the Tribe. On the other hand, copies of tribal ordinances are freely available to anyone willing to pay the costs of copying.

The tribal ordinances are quite extensive and copying them all for you would run into considerable expense. If you could specify the ordinances or areas with which you are concerned, copies will be made at your expense. For example, do you want a copy of the tribal juvenile code? If you do, you certainly can have it. Likewise, if you would specify the areas where you are interested in amendments or revisions of specific code sections or chapters that will help focus the search and make it easier to respond to your request.

A blanket or "shotgun" request for access to "all resolutions" for example, cannot be honored.

HENRY CAGEY
Chairman

LAVERNE OREIRO
Vice Chairman

JUANITA JEFFERSON
Secretary

VIRGIL WILLIAMS
Treasurer

SAM CAGEY
Councilman

BOB FINKBONNER
Councilman

JAMES HILLAIRE
Councilman

LE JEFFERSON
Councilman

RICHARD JEFFERSON
Councilman

VERN JENSEN, JR.
Councilman

JOE OREIRO
Councilman

Please respond either in writing or by telephone. Unfortunately, I will be out of the office for the next two weeks, but Dan Raas will be able to respond to your questions.

Very truly yours,

OFFICE OF THE RESERVATION ATTORNEY

Harry L. Johnson
Reservation Attorney

HLJ/jmc
cc: LIBC

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD. • BELLINGHAM, WASHINGTON 98226-9298 • (206) 734-8180
DEPARTMENT _____ EXT _____

July 26, 1994

Ms. Linnea Smith
2808 Leeward Way
Bellingham, Washington 98226

Ms. Lennea Smith:

On June 21, 1994 you submitted five (5) requests for information applications. Several circumstances have arisen that prevented us from responding any sooner. We hope this hasn't caused you any problems.

I have received authority from the council to address your requests.

In regards to permission to read and copy all Resolutions, Codes and Ordinances or Laws which apply to non-tribal persons, and your more specific request to assume to read and copy Resolutions, Codes, Ordinances and Laws regarding Violation of Trespass is being looked at now, and we will get back to you as soon as possible.

As to your other three requests for financial information, are being denied. This information is available to our tribal members but not to non-tribal members.

Thank you for your concern and interest. We will be in touch as soon as we can to inform you on how and when you can access the information on the Codes. Ordinances, Resolutions and Laws you requested.

Sincerely

G. J. James

G. J. James, Director
Office of Xwlemi Policy

2808 Leeward Way
Bellingham, WA 98226
June 29, 1994

Lummi Indian Business Council
2616 Kwina Road
Bellingham, WA 98226

Re: Requests for Information

Dear Sirs:

I went to the Lummi Tribal accounting department two weeks ago, as a member of Sandy Point Improvement Company, to ask Joe Mellon why the Sandy Point final payment to LIBC was listed as 495,000 in the 1994 tribal budget (published in the May Squol Quol) when the payment had been approximately 526,000 to 536,000. (I have checked since, and the payment was actually 534,160.61). Mr. Mellon was unavailable, so I talked with Mr. Penninger. He said that if a payment came in for more than the budgeted amount, it might be put on another line item that needed money. He then said that the 94 budget published in the tribal paper was only the projected revenues and not actuals, and could reflect only what they thought might be coming in as they haven't received it yet. When I told him that the payment had already been made, I thought in 1993, he then said that the actuals would accurately reflect the payment, if it was more than projected.

I also asked why there were no projections for Casino revenue in the 94 budget. He said that they were on Zero Based Budgeting, and weren't required to project revenues. Revenues could be collected into reserve funds and not budgeted as revenues until such time as there were offsetting expenses.

I then asked to see the actuals for 1993, as there were several tens of thousands of dollars difference in what was paid by Sandy Point and what was reflected in the budget. Mr. Penninger said that LIBC would have to authorize giving them out. He suggested that I go to the Communications Office, and they could probably give me the information because LIBC had authorized them to give out information.

The Communications Office said I should go to accounting, and gave me a copy of the May issue of the tribal paper which had the 1994 Budget Revenues (which had precipitated my request). When they heard that I had just come from accounting, they suggested that I go to Willie Jones, the Council Treasurer,

in the Council Operations Office and he could probably give me a copy of the 1993 actuals

At the Council Operations Office they said that Willie Jones was not available, and that I would have to fill out a Request for Information form for the information and submit it back to them. They also commented that I, as a non-tribal member, would also need to fill out a Request for Information form for everything, including looking at tribal resolutions. I said "Resolutions? You mean the tribal laws?" They said "Yes.". I said "You mean you have just put up big signs down the road claiming that everyone is subject to tribal laws, and you are now saying that we must make written requests before we can even look at the laws to which we are supposed to be subject?" They said "Yes." I said "I'll take two (request forms)."

On Wednesday, June 22nd, I returned to the Council Operations Office and tried to submit five Request for Information forms. The secretary at the Council Operations Office refused to take them. She told me that I would have to have a manager's signature on the Request for Information forms before she could accept them. She told me that Willie Jones had an office in the other building, and he could sign them. I went to the main building and asked for Willie Jones but was told that he was not available. The receptionist then said that most of the managers were in Washington DC this week. She said that Ed Jones was the only one available, but that he was out for the rest of the afternoon. She suggested that I come back in the morning for signatures, but I should call first.

Thursday morning, June 23rd, I called and was told that manager Ed Jones was in a meeting and not available. I was asked what I wanted. I explained that I needed signatures for the Request for Information forms and had been told to call first. I was asked what the requests were for. I explained that they were for permission to read any resolutions, codes, ordinances or laws etc. that applied to non-tribal members, and for copies of financial statements, etc. I was asked to hold and was then told that I would be put through to the Council Operations Secretary. After a long wait (I was not put through to the Council Operations Secretary), the receptionist came back on the line and said that none of the managers would sign anything -- that LIBC must authorize it first, because there might be litigation later over something a manager had signed.

I said, "Let me be sure that I have this straight. In order to even request information from LIBC I must first fill out a Request for Information Form. However, I must also have a manager's signature on that form before the request can be even be submitted to LIBC. But you are telling me that none of the managers are willing to give their signatures to the forms which request Information from LIBC." The receptionist told me "That's about it." At that point I said goodby and hung up.

My five requests are attached. I am respectfully submitting them to LIBC for consideration (even though they do not have the apparently required manager's signature), in hopes that they will be considered and approved by the LIBC. If they are denied, I request that I be sent a written explanation as to the reason for the denial.

Sincerely,

Linnea G. Smith

Linnea G. Smith

cc: BIA Office of Self Governance
US Dept of Interior

Request for Information

Requesting Office: Linnea Smith **Request submitted(date):** 6-21-94

Request filled(date):

Information requested: **Resolution#:**

Information from Council Minutes on the following date:

Information from Council Minutes: date unknown:

Other: Permission to read and copy as necessary all or desired

Reason for request: Resolutions, Codes, Ordinances, or "laws" which ~~the~~ apply to non-tribal persons.

Reason: Signs erected in June 1994 state "You are entering the Lummi Nation" and are "subject to the laws" of same — If I'm subject to these, I need to know what they are.

Date/Time Needed: Immediately. — Please send notice as to days & times available to access

Please call when information is available: **Phone#:**

Please mail the information to the address below: 2508 Leeward Way
Bellingham, WA 98226

1143

Request for Information

Requesting Office: Linnea Smith **Request submitted(date):** 6-21-94

Request filled(date):

Information requested: **Resolution#:**

Information from Council Minutes on the following date:

Information from Council Minutes: date unknown:

Other: All resolutions, Ordinances, Codes etc. related to trespass

Reason for request:

Concern about violation of trespassing ordinances

Date/Time Needed: ASAP

Please call when information is available: **Phone#:**

Please mail the information to the address below: 2505 Iowood Way
Bellingham, WA 98226

Request for Information

Requesting Office: Linnea Smith **Request submitted(date):** 6-21-94

Request filled(date):

Information requested: **Resolution#:**

Information from Council Minutes on the following date:

Information from Council Minutes: date unknown:

Other: Request to access and possibly copy any and all All information, from any source, related to HUD "Mutual Help" the project including but not limited to

Reason for request: grants applied for, received, work completed, inspection reports, grant money received, for the "Mutual Help" 40 new houses on scattered sites project begun 10-9-93.

Reason: Desire for accountability for my tax dollars

Date/Time Needed:

ASAP - Please send notice as to days and times available to access info

Please call when information is available: **Phone#:**

Please mail the information to the address below: 2808 Leeward Way
Bellingham, WA 98226

Request for Information

Requesting Office: Linnea Smith **Request submitted(date):** 6-21-94

Request filled(date):

Information requested: **Resolution#:**

Information from Council Minutes on the following date:

Information from Council Minutes: date unknown:

Other: Financial Report - Actuals - for 1993

Reason for request:

Verification of actual revenue and expenses

Date/Time Needed: ASAP

Please call when information is available: **Phone#:**

Please mail the information to the address below: 2515 Lincoln Way
Bellingham, WA 98226

Request for Information

Requesting Office: Linnea Smith Request submitted(date): 6-21-94

Request filled(date):

Information requested: Resolution#:

Information from Council Minutes on the following date:

Information from Council Minutes: date unknown:

Other: Financial Report - Actuals - for 1989 - 1992

Reason for request:

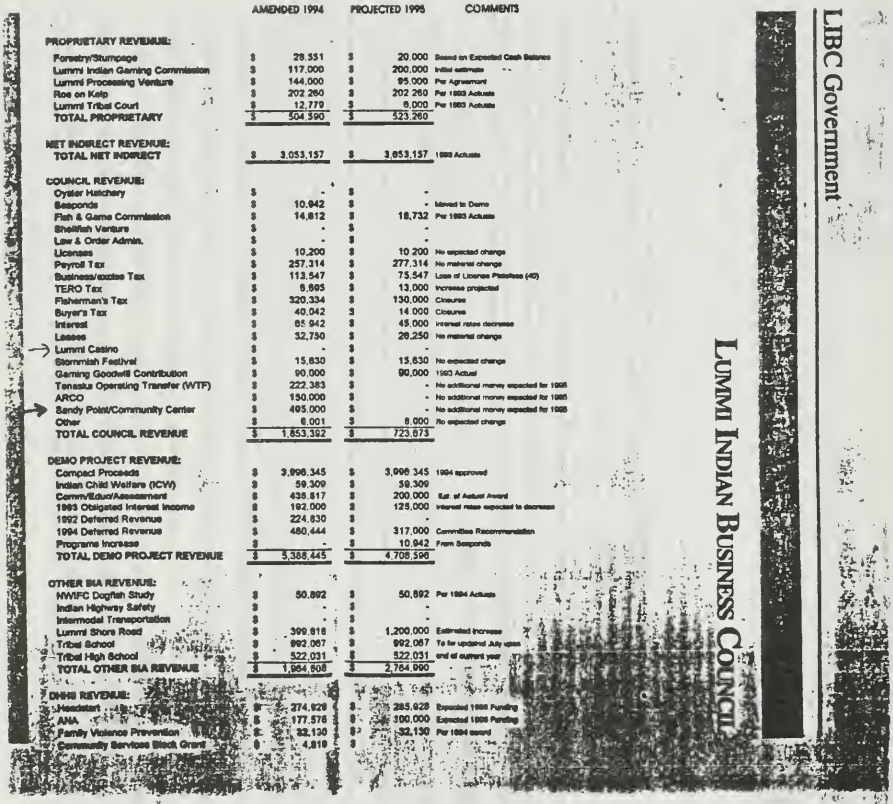
Verification of actual Revenue and Expenses

Date/Time Needed: ASAP

Please call when information is available: Phone#:

Please mail the information to the address below: 2588 Leopard Loop

Bellingham, WA 98226



LIBC Government

LUMMI INDIAN BUSINESS COUNCIL

	AMENDED 1994	PROJECTED 1995	COMMENTS
PROPRIETARY REVENUE:			
Forestry/Stumpage	$ 28,551	$ 20,000	Based on Expected Cash Balance
Lummi Indian Gaming Commission	$ 117,000	$ 200,000	Initial estimate
Lummi Processing Venture	$ 144,000	$ 95,000	Per Agreement
Roe on Kelp	$ 202,260	$ 202,260	Per 1993 Actuals
Lummi Tribal Court	$ 12,779	$ 8,000	Per 1993 Actuals
TOTAL PROPRIETARY	$ 504,590	$ 523,260	
NET INDIRECT REVENUE:			
TOTAL NET INDIRECT	$ 3,053,157	$ 3,053,157	1993 Actuals
COUNCIL REVENUE:			
Oyster Hatchery	$ -	$ -	
Seaponds	$ 10,942	$ -	Moved to Demo
Fish & Game Commission	$ 14,612	$ 18,732	Per 1993 Actuals
Shellfish Venture	$ -	$ -	
Law & Order Admin.	$ -	$ -	
Licenses	$ 10,200	$ 10,200	No expected change
Payroll Tax	$ 257,314	$ 277,314	No material change
Business/excise Tax	$ 113,547	$ 75,547	Loss of Licenses Fisheries (40)
TERO Tax	$ 6,595	$ 13,000	Increase projected
Fisherman's Tax	$ 320,334	$ 130,000	Closures
Buyer's Tax	$ 40,042	$ 14,000	Closures
Interest	$ 85,942	$ 45,000	Interest rates decrease
Leases	$ 32,750	$ 26,250	No material change
Lummi Casino	$ -	$ -	
Stommish Festival	$ 15,630	$ 15,630	No expected change
Gaming Goodwill Contribution	$ 90,000	$ 90,000	1993 Actual
Tenasika Operating Transfer (WTF)	$ 222,383	$ -	No additional money expected for 1995
ARCO	$ 150,000	$ -	No additional money expected for 1995
Sandy Point/Community Center	$ 495,000	$ -	No additional money expected for 1995
Other	$ 8,001	$ 8,000	No expected change
TOTAL COUNCIL REVENUE	$ 1,853,392	$ 723,673	
DEMO PROJECT REVENUE:			
Compact Proceeds	$ 3,998,345	$ 3,998,345	1994 approved
Indian Child Welfare (ICW)	$ 59,309	$ 59,309	
Comm/Educ/Assessment	$ 436,817	$ 200,000	Est. of Actual Award
1993 Obligated Interest Income	$ 192,000	$ 125,000	Interest rates expected to decrease
1992 Deferred Revenue	$ 224,830	$ -	
1994 Deferred Revenue	$ 480,444	$ 317,000	Committee Recommendation
Programs Increase	$ -	$ 10,942	From Seaponds
TOTAL DEMO PROJECT REVENUE	$ 5,388,445	$ 4,708,596	
OTHER BIA REVENUE:			
NWIFC Dogfish Study	$ 50,892	$ 50,892	Per 1994 Actuals
Indian Highway Safety	$ -	$ -	
Intermodel Transportation	$ -	$ -	
Lummi Shore Road	$ 399,818	$ 1,200,000	Estimated Increase
Tribal School	$ 992,067	$ 992,067	To be updated July upon
Tribal High School	$ 522,031	$ 522,031	end of current year
TOTAL OTHER BIA REVENUE	$ 1,964,808	$ 2,764,990	
DNHI REVENUE:			
Headstart	$ 274,926	$ 285,928	Expected 1995 Funding
AMA	$ 177,576	$ 300,000	Expected 1995 Funding
Family Violence Prevention	$ 32,130	$ 32,130	Per 1994 award
Community Services Block Grant	$ 4,818	$	

SANDY POINT IMPROVEMENT COMPANY
P.O. Box 1416 • Ferndale, Washington 98248
Phone: (206) 384-3921 (Sat. 9-1)

MEMO-LETTER

TO Linnea Smith
2808 Leeward Way
Bellingham, Wash. 98225

DATE December 9, 1994
SUBJECT Tideland Judgement Ck.

The information you requested is as follows:

1. Check #10053 in the amount of $534,160.61 made out to the "Clerk of U.S. District Court" dated 9/25/92 and cashed 9/30/92

   Note stated "payment plus interest on Tideland Lease Judgement C90-1732R

2. Another check #10054 in the amount of $236.70 made out to the "Dept. of Justice" dated 10/9/92 and cashed 10/19/92

   Note stated "balance in full tideland judgement"

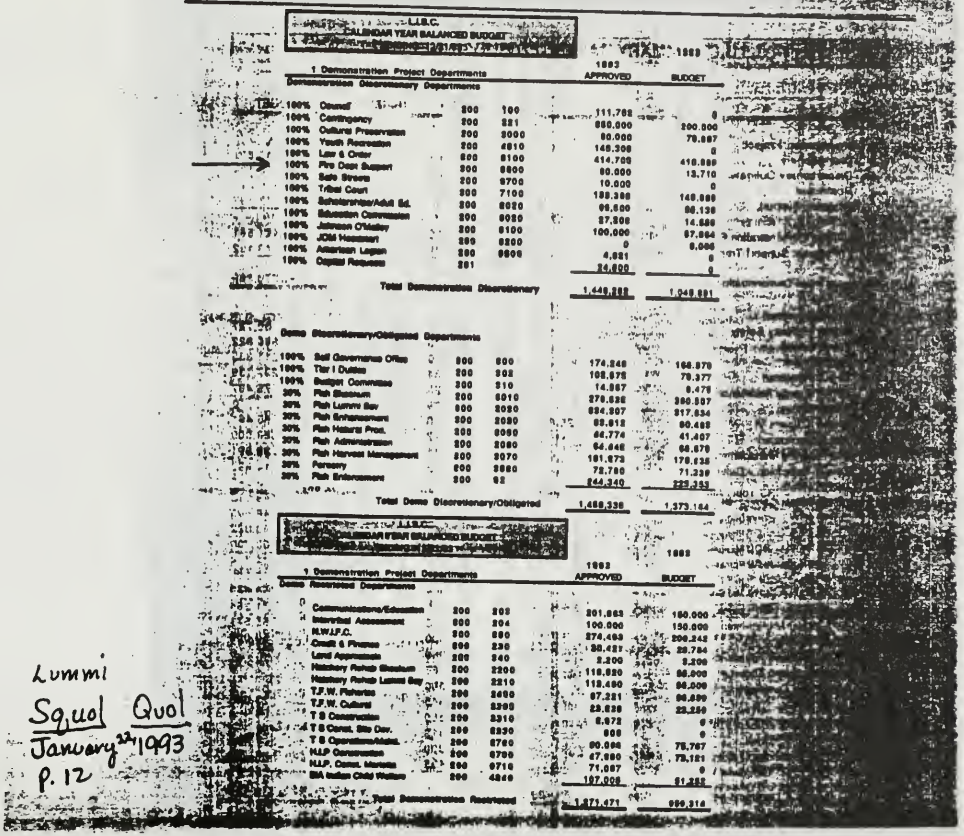
This second check must have been for additional interest,etc.

Should you have any comments or require further information please feel free to contact at the above address/number or at #206-592-5735.

Sincerely,
SANDY POINT IMPROVEMENT COMPANY
JENNIFER CLARK Ass't Sec/Treas

Item # ML4-N72 © Wheeler Group Inc.

1993 Budget



L.I.B.C.
CALENDAR YEAR BALANCED BUDGET

1 Demonstration Project Departments			1993 APPROVED	1993 BUDGET
Demonstration Discretionary Departments				
100% Council	200	100	111,762	0
100% Contingency	200	221	850,000	200,000
100% Cultural Preservation	200	3000	80,000	79,887
100% Youth Recreation	200	4610	148,308	0
100% Law & Order	200	6100	414,700	418,889
100% Fire Dept Support	200	6800	80,000	13,710
100% Safe Streets	200	6700	10,000	0
100% Tribal Court	200	7100	188,388	148,888
100% Scholarships/Adult Ed.	200	8020	98,500	98,138
100% Education Commission	200	8020	27,208	14,888
100% Johnson O'Malley	200	8100	100,000	87,864
100% JOM Headstart	200	8200	0	8,066
100% American Legion	200	8800	4,821	0
100% Capital Requests	201		24,800	0
Total Demonstration Discretionary			1,448,288	1,048,881
Demo Discretionary/Obligated Departments				
100% Self Governance Office	200	800	174,248	168,878
100% Tier I Duties	200	202	108,878	78,377
100% Budget Committee	200	210	14,867	8,478
30% Fish Shoreum	200	2010	278,628	380,807
30% Fish Lummi Bay	200	2020	824,307	317,834
30% Fish Enhancement	200	2030	88,812	80,488
30% Fish Hatchery Prod.	200	2060	44,774	41,407
30% Fish Administration	200	2080	64,848	68,878
30% Fish Harvest Management	200	2070	181,873	178,838
30% Forestry	200	2080	72,780	71,338
30% Fish Enforcement	200	82	244,340	228,353
Total Demo Discretionary/Obligated			1,488,338	1,373,184

L.I.B.C.
CALENDAR YEAR BALANCED BUDGET

1 Demonstration Project Departments			1993 APPROVED	1993 BUDGET
Demo Restricted Departments				
Communications/Education	200	202	201,863	180,000
Intertribal Assessment	200	204	100,000	150,000
N.W.I.F.C.	200	280	274,483	200,242
Credit & Finance	200	230	30,421	28,784
Land Appraisals	200	240	2,200	2,200
Hatchery Rehab Shoreum	200	2200	118,820	88,000
Hatchery Rehab Lummi Bay	200	2210	118,480	88,000
T.F.W. Fisheries	200	2400	87,221	88,880
T.F.W. Cultural	200	2300	23,828	23,250
T S Construction	200	2310	8,872	0
T S Const. Site Dev.	200	2320	800	0
T S Operations/Maint.	200	2760	80,088	78,767
H.I.P. Construction	200	2700	47,880	73,121
H.I.P. Const. Marietta	200	2710	71,087	0
BIA Indian Child Welfare	200	4840	107,008	81,282
Total Demonstration Restricted			1,271,471	959,314

Lummi
Squol Quol
January 22, 1993
p. 12

Gooseberry Point Volunteer Fire Department
Whatcom County Fire Protection District #15
2600 MacKenzie Road • Bellingham, WA 98226

December 20, 1994

Linnea G. Smith
2808 Leeward Way
Bellingham, WA. 98226

Dear Linnea,

I must apologize for the delay in answering your inquiry. As I stated at the meeting I don't believe we were ever formally promised any cash. At one time or another individuals made statements to the effect that the district would receive cash or equipment. Whether or not they had the authority to make such statements is unknown.

Here is a listing of what we have received from 1989 to date.

8-7-98	$ 850.00	Fire Safety Fees (A share of what they tax the Fireworks stand owners)
10-18-90	$ 950.00	Fire Safety Fees
06-11-91	$35,000.00	Lummi Indian Business Council
08-1991	6,000.00	Received Used aid car acquired through Tribe and St Lukes.
03-24-92	$ 1,000.00	Fire Safety Fees
→ 04-28-92	$10,000.00	Lummi Indian Business Council
09-30-93	$ 1,075.00	Fire Safety Fees
11-01-93	$13,710.00	Lummi Indian Business Council
01-04-94	$?	GSA Vehicle on loan

I hope this will be of help.

Sincerely,

Diane Trecker

Diane Trecker Secy.

GEORGIA MANOR WATER ASSOCIATION
P.O. Box 1268
Ferndale, WA 98248

May 25, 1993

Whatcom County Council
Marge Laidlaw, Chairperson
1000 North Forest Street
Bellinghae, WA 98225

Dear Whatcom County Council Members:

The Lummi Indian Nation has stated publically on several occasions that it dismissed its lawsuit against Georgia Manor Water Association in an effort to facilitate negotiations with the State and County and as a gesture of good faith by the Tribe. Please do not be fooled. The Tribe dismissed its lawsuit against Georgia Manor for no other reason than to avoid having to divulge any further damaging and embarressing information.

Prior to the Georgia Manor lawsuit being dismissed, the Tribe had been required to divulge various water studies prepared by outside consultants for the Tribe which contained information and conclusions contrary to the positions publically stated by the Tribe regarding the ground water resources on the Lummi Indian Reservation. For example, the Tribe has stated on numerous occasions that there is a ground water shortage on the reservation and also that the ground water resources are threatened by salt water intrusion caused by over pumping. However, in a water study prepared for the Tribe by Howard and Associates, the consultant concluded that there is no ground water shortage on the Lummi Indian Reservation and that "there does not appear to be a direct correlation in Zone 4 (Georgia Manor's zone) between pumping rates and induced sea water intrusion."

Further, in a deposition of the Tribe's water specialist, Harriet Beale, Ms. Beale conceded that the Tribe has no data concerning either the rate of recharge or the sustainable yields of the aquifers underlying the Lummi Indian Reservation.

The same day that the Tribe notified Georgia Manor that it was dismissing the Tribal Court lawsuit, there was a hearing held in Tribal Court which resulted in the Tribal Court Judge ordering the Lummi Tribe to produce documentation which had been requested by Georgia Manor and for the Tribe to also demonstrate to the Judge why the Tribe should not be required to produce information concerning a ground water study which the Tribe currently has in progress.

Again, it is abundantly clear that the Tribe dismissed the Georgia Manor lawsuit for no other reason than to avoid having to produce any further documentation which would be embarrassing to the Tribe's position.

With respect to the Tribe's claim that it is attempting to facilitate negotiations and demonstrate good faith toward the State and County, it should be noted that in the April 1993 issue of the Lummi Nation newspaper, the "Squal Qual" there is an article which appears on the front page wherein it is noted that the Tribe is currently in the process of seeking $700,000.00 from Congress for water litigation.

The Tribe obviously has no intention of resolving the water issues through negotiations and is simply buying time to complete water studies currently under way and to secure additional litigation funds before turning to the courts.

Further, the Lummi Indian Nation's true colors with respect to negotiations came through bright and clear when they insisted that the City of Bellingham reduce the rate charged to the Tribe for water purchased from the city, as well as requiring the City to to acknowledge the Lummi Tribe as the sole purveyor of water on the reservation as preconditions to entering into negotiations concerning the Nooksack River Basin. The preconditions which the Tribe laid out for the negotiations with the City were obviously designed to avoid meaningful discussion with respect to the Nooksack River Basin and was and obvious attempt to isolate the non-Indian water users on the reservation.

The City, County and State should be extremely cautious concerning negotiations with the Lummi Indian Tribe regarding water resources both as they pertain to the Nooksack River Basin and also water resources on the Lummi Indian Reservation. As demonstrated by the Tribe's performance (or more accurately non-performance) on the promises which it made approximately 13 years ago concerning a park at Point Frances, any settlement with the Tribe should also include a means for enforcing the terms of the settlement. This can only be insured if the Tribe is willing to waive its sovereign immunity. Again, Point Frances is a prime example that more than promises are needed from the Lummi Tribe as a condition of settlement.

Sincerely,

Roger L. Leischner

Roger Leischner, President
Georgia Manor Water Association

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Portland Area Office
911 N.E. 11th Avenue
Portland, Oregon 97232-4169

IN REPLY REFER TO

JUN 25 1992

Honorable Slade Gorton
Attn: Roy Atwood
3206 Jackson Federal Building
915 2nd Avenue
Seattle, Washington 98174

Dear Senator Gorton:

We have received your inquiry, dated June 16, 1992, on behalf of Mr. Tom Dudek concerning a request by Mr. Dean Williams to accept into trust status certain property located on the Lummi Indian Reservation.

Enclosed are copies of recent correspondence concerning this acquisition. As you can see, we have approved this acquisition after considering the factors required by federal regulations, including consideration of jurisdictional and land use issues. We have also asked Mr. Williams to clarify in writing his plans, if any, for the property he has requested be placed in trust. As you can see from his response he does not have any current plans. At this time, therefore, we are still intending to move forward with this acquisition.

With respect to any restrictive covenants which may be applicable to a portion of his property, Mr. Williams acknowledges their existence and that he will have to deal with them whether his property is acquired in trust or not. However, the BIA is not the proper forum for resolving issues of interpretation and enforceability of particular restrictive covenants. It is a judicial matter for the appropriate court to resolve if the affected parties are in dispute. Therefore, the BIA cannot tell Mr. Dudek whether or not any particular covenant is binding or "will be honored."

We hope this letter and its enclosures provide you with the information you need. If you have any questions, please contact Ron Appelbaum at (503) 231-6714.

Sincerely,

ACTING Portland Area Director

Enclosures

cc: Tom Dudek; 2905 Leeward Way; Bellingham, Washington 98226
Dean Williams; 2697 Lummi Shore Drive; Bellingham, Washington 98226-9242

Chronological summary of correspondence recieved by Tom Dudek regarding Dean Williams fee-to-trust conversion of parcels within Leeward-Northgate Water Association.

Nov. 25, 1991 — Leter from Shirley Van Zanten, County Executive, to William Black, Superintendent of BIA, Puget Sound Agency, responding to his request for information as to the taxes paid and governmental services of the two Williams lots. No mention of any kind of "approval" by the county is made.

Dec. 27, 1991 — A letter is sent to Superintendent Black by approx. 25 neighborhood residents voicing concern about the possibility of the Williams land being put into trust and the possibility of an RV park being built.

Jan. 2, 1992 — I wrote a letter to County Executive, Shirley Van Zanten with a copy of the Dec. 27th letter to Superintendent Black. I outlined the concerns regarding putting land into trust with the result being the circumventing of zoning ordinences and construction of a RV parking lot and asked her to let me know what her office can do to stop the action or at least require the BIA to allow input from the concerned land owners.

Jan. 21, 1992 — I recieved a letter from Shirley Van Zanten responding to my Jan. 2 letter. In her letter she said that the county can do very little to deny the fee-to-trust action and that her office can only provide information on taxes, services, zoning, etc. to the BIA. She then suggested that I contact Congressman Al Swift's office.

Feb. 12, 1992 — I and neighbors recieved a letter from Superintendent Black acknowledging reciept of our letters concerning the fee-to-trust conversion of property owned by the Williams. In his letter he said that the Williams did not state on their application that they were going to build and RV park. If that is their intent, they would be subject to tribal land use controls. He said he'd forward our letters to the Portland Area Director, who will make the final decision.

Mar 4, 1992 — I wrote a letter to Eunice Henry who is a subordinate under Superintendent Black at the Everate BIA office after discussing our concern about the covenants. In the letter I transmitted copies of relevant covenants and made note of the fact that Mr. Russell Carter of her office feels that if the parcels are put into trust that it should be stipulated that all of the current covenants should be coneyed with the land.

May 4, 1992 — A memorandum is written to Superintendent Black of the Puget Sound BIA Agency from the Acting Portland Area Director, George Smith (with instructions to contact his assistant, Ron Applebaum with any questions) stating that the request for fee-to-trust conversion is approved. It further goes on to say that although several property owners wrote letters regarding a "purported" future use as a Mobile Home Court, Mr. Williams indicated to this office that he had "no such plans". He also pointed out that Whatcom County "Provided no objections when informed of pending application for conversion. We did not recieve a copy of this letter until June 6, 1992.

June 3, 1992 — I wrote a letter to Mr. Sanley Speaks of Portland Area BIA mentioning my and my neighbors concern (we had not yet been informed of the approval above) for the covenants and requesting that the BIA require that the covenants are honored if the properties go into trust. I never got a response to this letter.

June 6, 1992 — I and the concerned neighbors recieved a letter from the Portland Area Director, dated June 3, 1992 with a copy of the May 4th memorandum approving the fee-to-trust conversion. The letter informed us that we had 30 days to appeal to the Interior Board of Indian Appeals.

June 6, 1992 — I and neighbors recieved a copy of a letter from the Portland Area Director, dated June 3, 1992, to Mr. Dean Williams which suspends the approval of fee-to-trust until Mr. Williams can answer questions regarding statements he made to certain neighbors that he indeed did intend to put in a R.V. Park. The letter went on to say that "OUR PRELIMINARY APPROVAL OF THE FEE TO TRUST TRANSACTION RELIED ON YOUR REPRESENTATION THAT YOU ONLY INTENDED TO BUILD A HOME ON THE PROPERTY"! Note that this action was prompted by my call on June 2nd to Ron Applebaum telling him of the conversation of neighbors George Johnson and Gene Bailif with Dean Williams wherein Dean Williams told them that he would be putting in an R.V. lot.

June 8, 1992 — I recieve a copy of a letter from Dean Williams to the Portland Area Office wherein he says "I do not have any current plans" and that his original intent when aquired was to use it as a home site. He never comes out and says he's not planning on an R.V. lot and when he mentions the covenants he states "I understand that I will have to deal with them" but doesn't say that he will honor them. His letter simply does not address the concern for which the approval was suspended.

June 25, 1992	I recieved a copy of a letter to Senator Slade Gorton from the Portland Area Director. This letter is in response to a letter sent to the Portland Area Director by Slade Gordon on my behalf inquiring about the fee to trust conversion. In the letter to Senator Gorton the Portland Area Director says that the conversion has been approved and that Mr. Williams has clairfied his plans for the property and that "he does not have any current plans". It also says that with respect to restrictive covenants, Mr. Williams acknowledges their existance, etc. and that the BIA is not the proper forum for resolving issues of intrepertation of covenants.
July 1, 1992	I sent notice of appeal to the Interior Board of Indian Appeals with help of attorney, Catherine Tucker.
July 7, 1992	I recieved a Pre-docketing notice from the IBIA with instruction the Portland Area Director to transmit records to the Board and notice that I will be required to show that I have "standing to pursue the appeal".
July 27, 1992	I recieved Notice of Docketing from the IBIA. States I have 30 days to file a opening brief.
July 31, 1992	Attorney Colleen Kelly filed "Notice of Appearance" on behalf of Portland Area Director.
Sep. 11, 1992	Attorney Harry L. Johnson filed "Notice of Appearance" on behalf of Dean Williams.
Sep. 11, 1992	Affidavit of Tim Hostetler of Lumni Planning in which he denies that he told me that Mr. Williams was planning a RV lot. He also says that "if the Williams elect to attempt to develop a recreational vehicle park on their property, they will need a variance or mayby a rezone under either Tribal or County zoning".
Sep. 11, 1992	Arguments of Dean Williams as to my appeal.
Sep. 14, 1992	Dean Williams files Affidavit as an interested party in which he states that when he aquired title, certain restrictive covenants applied to Parcel A, but not to Parcel B (east of Haxton). He asks for a bond to cover taxes and attorney's costs.
Sep. 23, 1992	I recieve notice to respond to Williams request for an appeal bond.
Oct. 5, 1992	Attorney Colleen Kelly wrote brief on behalf of Portland area director.
Oct. 14, 1992	I write response to motion for appeal bond.
Nov. 16, 1992	The appeal is dismissed by the IBIA.
Dec. 4, 1992	Letter to Williams from Portland Area Director saying that the suspension of the approval is lifted and that they will proceed with the fee to trust conversion. Their reason for allowing the fee to trust was that Williams response to their suspension "was unequivocall in stating "I do not have any current plans"". They also based approval on Mr. Hostetlers denial that he told me that Williams had plans to build an RV L

1078

June 23, 1992

INTERIOR BOARD INDIAN APPEALS
4015 Wilson Boulevard
Arlington, VA 22203

Dear Sirs:-

The purpose of this letter is to appeal the May 4, 1992 decision by the Acting Assistant Area Director, Program Services, Mr. George Smith to approve the Fee to Trust Conversion of Mr. Dean Williams of the Lummi Tribe. We received notice of this decision in a certified letter on 6/06/92. Copy of this notice is enclosed.

We hereby certify that copies of this appeal have been sent to (1)the Assistant Secretary - Indian Affairs, Washington, D.C., (2)all interested parties known to us and the (3)Portland Area Office of the Bureau of Indian Affairs.

The basis of this appeal is as follows:

1. The properties in question carry a number of restrictive covenants, specifically Whatcom County Auditors File Number AF145550 which restricts usage to "residential" development and specifies that "said premises shall not be used for any commercial...purpose" and further that these "covenants ....shall be ... incorporated in any instrument of conveyance" and that "every person who by deed becomes grantee of any of said property, shall be deemed to have accepted such deed...subject to all of the covenants..." A copy of this document is enclosed.
   Additionally, AF1637431 grants water well site and equipment to the Leeward-Northgate Water Association and restricts water usage to "residential development".

2. The undersigned own. fee simple property in Whatcom County, State of Washington, within the Nothgate or Leeward Short plats which are party to the above mentioned covenants and depend on those covenants for the protections listed therein.

3. The fact that Mr. Williams has so dilligently represented to the BIA that he does not intend to build a commercial development when it has been demonstrated that he in fact did simultaneously pursue the project (see notorized affidavits enclosed) indicates that the true purpose of the fee to trust action is most likely the circumvention of covenants and county zoning ordinances. Even though Mr. Williams has responded to the Portland office's request for an answer to the charge that he misrepresented his intention, with the statement that he only intends to build a residence, there was never any investigation or conclusion as to whether he had in fact missrepresented his intentions and it must be assumed that he still intends to pursue the commercial development.

4. From the above it can be concluded that the restrictive covenants that we rely upon will most likely be violated. We are requesting that the Bureau of Indian Affairs not be party to this violation in approving the Fee to Trust Conversion. Further, we believe that if damage does occur that the BIA should be held liable for all damages. If the BIA does approve the Fee to Trust Conversion, we request that proper wording be included in the title document that require the covenants to be honored and we further request that if the BIA does approve the Fee to Trust Conversion that it guarantees the undersigned that it will defend the undersigned in the event that the protective covenants are violated.

Sincerely,

Tom Dudek,
President, Leeward-Northgate Water Association
Owner, fee simple land in Leeward short plat
2905 Leeward Way
Bellingham, WA 98226

George Johnson
Owner, fee simple land in the Northgate short plat
3376 Northgate Rd.
Bellingham, WA 98226

Daniel Barrett/M.L. Groves
Owners, fee simple land in the Leeward short plat
2911 Leeward Way
Bellingham, WA 98226

Bill Haensly
Owner, fee simple land in the Northgate short plat
1015 Walton Dr.
College Station, TX 77840

June 8, 1992

UNITED STATES DEPARTMENT OF THE INTERIOR
Bureau of Indian Affairs
Portland Area Office
911 N.E. 11th Avenue
Portland, OR 97232-4169

RE: Dean and Sheri Williams Fee to Trust Transaction

Dear Sir:

This letter is in response to your June 3, 1992 letter which I just received. It has been almost exactly one year since I applied to have this land taken in trust, and I am getting very frustrated with the process. I note that your regulations provide that you will act "promptly" on the application (25 CFR 151.11). Instead of prompt action, what I have received is a reaction which seems much more concerned about the interests of non-Indians on my own reservation than in my rights as a tribal member to own and use land on my reservation.

In my view, the question you should be asking in any fee to trust transaction is whether the transaction will assist a tribal member in achieving economic independence and whether the transaction will carry out the purposes of the reservation to provide tribal members with a permanent home. I have never heard of the BIA turning down a trust to fee transaction on the grounds that it would adversely affect tribal interests. Yet you are apparently considering turning down this fee to trust transaction because it may have the potential for adverse impacts on non-tribal interests. Maybe you should change your name to the Bureau of Non-Indian Affairs.

In answer to your question regarding my current plans for the property, I do not have any current plans. As a property owner, I reserve the right to use my property for any lawful purpose. As I indicated in my original application, my original intent when I acquired the property was to use it as a home site or perhaps the site for several homes for members of my family. As you know, there are two parcels involved. One is Lot 4 of the Northgate

short plat. This parcel is approximately 1.85 acres in size. By contrast, the other three lots in the short plat total 1.25 acres. Each lot is approximately four-tenths of an acre. The lots in the Horizon Heights subdivision (directly north of my property) and the Georgia Manor subdivision (directly south of my property) are generally smaller than the lots in the Northgate short plat. My parcel is huge by comparison.

The second parcel is 2.92 acres and is located east of Haxton Way. It is not part of any short plat or subdivision, and it is not subject to the restrictive covenants in the Northgate short plat.

The two parcels together total 4.77 acres. If county zoning applied to my property it is my understanding that I could subdivide the property west of Haxton into eight lots. I have no present intention to do this, but it does give you an idea of what a non-Indian property owner could do with the land.

The form letter in opposition to my application which the BIA received earlier this year, claims that I am attempting to put land back into trust "in order to circumvent county zoning regulations." This is not only not true, it is a totally false issue. According to my attorneys, Whatcom County has no zoning jurisdiction over my land regardless of whether it is in trust status or not. They tell me that the Federal Courts have repeatedly held that state and county civil regulatory laws, such as zoning ordinances, have no application to Indians or Indian land located on a reservation, regardless of whether the land is in fee or trust status.

I note that the protest letter argues that, "Over 90% of the population in the plated residential areas in the immediately affected surrounding plats is non-Indian." There are a lot of criticisms I could make of the way the opponents have tried to manipulate the data to their advantage, but I will limit my response to one comment: If jurisdiction is going to depend on the number of Indians in the area, the BIA should be doing everything within its power to encourage tribal members to buy reservation fee lands and place them in trust. Too many Indians cannot find housing on their own reservations. Non-Indians should not be able to "buy" jurisdiction.

I am aware that certain restrictive covenants exist which may apply to at least a portion of my property. I understand that I will have to deal with those covenants regardless of whether the land is placed in trust status or not. I have asked my attorneys to review the covenants and advise me as to my rights and responsibilities under them.

I do not know what effect it will have on the covenants, but I would point out that the non-Indian property owners in the

Northgate plat do not--appear to have much respect for the covenants. After I bought Lot 4 of the Northgate plat, Sparky Haufle and two others, Mr. and Mrs. Haensly joined together to file a purported amendment of the restrictive covenantswhich would revoke paragraph 3 of the covenants. That covenant imposed an 18 foot height restriction and specifically benefited my property since all of the other lots in the short plat are located between my property and the salt water view. Mr. Haufle did not own any property in the short plat at the time he signed the amendment, and in fact, had sold his property to me. The apparent purpose of the amendment was to allow Mr. Tom Dudek of 2905 Leeward Way to build a house higher than the height restriction would allow. Mr. Dudek is one of the people who opposes my land going into trust status. Apparently, he feels the law should be applied to me but not to him.

To summarize, I have no current plan for the use of this property, although I have considered several alternatives and I have enquired about the potential lawful uses of the property. I intend to use my property lawfully. It is not my intent to evade county zoning by placing the land in trust. County zoning does not apply to the property now. I have met all of the standards for placing land in trust on the reservation, and I ask you to immediately approve my application.

Very truly yours,

Dean Williams 6-11-92

DEAN WILLIAMS

IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Portland Area Office
911 N.E. 11th Avenue
Portland, Oregon 97232 4169

JUN - 3 1992

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Dean Williams
2697 Lummi Shore Drive
Bellingham, Washington 98226-9242

Dear Mr. Williams:

The Portland Area Office's Realty Branch received a telephone call on June 2, 1992, from the local water users' association representative regarding your fee to trust transaction which is currently being processed by us. That individual indicated that you were on the property June 1st and indicated to your neighbor that you were looking to determine where the road should be placed as access to the mobile home court which you are planning to develop on the property. In your application for the fee to trust conversion you indicated that you currently used the property for a potential home site and that the land would be used for a future home, but that you had no proposed change at the time. Your application was dated June 10, 1991. In April of this year, you indicated to Ron Appelbaum of this office that you had no plans for a mobile home court and that any action would be to build a home on the property. Our preliminary approval of the fee to trust transaction relied on your representation that you only intended to build a home on the property.

We would appreciate you addressing your current plans for the property in a letter to us. Please discuss whether you intend to develop a mobile home court, or any other commercial activity, on this property. We are aware that you have contacted the Tribal Planning Department about developing a mobile home court on the property. Please also discuss this action in your letter.

At this time we are suspending all processing of your fee to trust transaction until we receive and consider your letter.

This decision may be appealed to the Interior Board of Indian Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203, in accordance with the regulations in 43 CFR 4.310-4.340. Your notice of appeal to the Board must be signed by you or your attorney and must be mailed within 30 days of the date you receive this decision. It should clearly identify the decision being appealed. If possible, attach a copy of the decision. You must send copies of your notice of appeal to (1) the Assistant Secretary - Indian Affairs, 4140 MIB, U.S. Department of the Interior, 18th and C Streets, NW, Washington, D.C. 20240, (2) each interested party known to you, and (3) this office. Your notice of appeal sent to the Board of Indian Appeals must

certify that you have sent copies to these parties. If you file a notice of appeal, the Board of Indian Appeals will notify you of further appeal procedures.

If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

If you have any questions, please call Ron Appelbaum at (503) 231-6714.

Sincerely,

ACTING Portland Area Director

cc: See attached list

IN REPLY REFER TO
Real Property
Management

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Puget Sound Agency
3006 Colby Avenue, Federal Building
Everett, Washington 98201

February 12, 1992

Mr. Edgar C. Hart
2809 Haxton Way
Bellingham, WA 98226

Dear Mr. Hart:

This is to acknowledge receipt of your letter concerning the fee to trust conversion of property owned by Dean and Sheri Williams. Mr. and Mrs. Williams did not state on their application that they were going to build an RV park on either of the parcels they wish to have placed into trust status. If this is their intent, they would be subject to tribal land use controls such as a comprehensive plan and zoning ordinance the Tribe has adopted.

In respect to whether or not an RV park would be detrimental to nearby residences would depend upon a number of factors including the following: which of the two parcels were developed for an RV park; what density it would be developed to; whether there was a full time on-site-manager and the design of the facility.

However, we are appreciative of your concern and response to the notice and will forward same to the Portland Area Director who will make the final decision.

Sincerely,

William A. Black
Acting Superintendent

BIA, Puget Sound Agency
3006 Colby Avenue
Federal Building
Everett, WA 98201

Dear Superintendent Black:

I am very concerned that Lummi Tribal members Dean and Sheri Williams are attempting to put land back into trust in my neighborhood within the exterior boundaries of the Lummi Reservation in order to circumvent county zoning regulations. They have told local residents that they plan to put in an RV park for casino gamblers. This would not be an accepted use for either of the two parcels in question at the corner of Northgate and Smokehouse Roads and Haxton Way. Present zoning is suburban residential for one parcel and rural/farming for the other. It should also be pointed out that these parcels are not yet free and clear according to current owner, Mr. Sparkie Hoffle.

According to Lummi Tribal member Bill Ballew of the Lummi Planning Office, in a phone conversation last week, the Lummis have no zoning or planning ordinances currently in effect. He stated that "Tribal members can do whateve they wish with the property at present". He said that the Tribe at one time had drawn up some ordinances which were never enacted by the Tribal Council, but that the grant funding for the old Planning Office ran out in the 1980's and those ordinances were never enacted. He further stated that the Lummis established a new Planning Office about a year ago, but "nothing has been done yet to activate the old ordinances and it will be quite a while before anythin is done and even longer before any enacted codes are enforced".

Over 90% of the population in the platted residential areas in the immediately affected surrounding plats is non-Indian. (The voting age population on the entire reservation, age 18 and older, is also significantly non-Indian -- 1267 White, Black and Other to 916 Eskimo, Indian, Aleut).

What protections do the BIA and federal government afford persons (who are not intruders in any sense, but reside in the area because of federal policies which actively solicited their presence over the past 100 years and who are th majority voting population in the area), from a tribal government, from which they are excluded, which does not enact or enforce land use codes or zoning with respect to tribal members on trust lands? Does the BIA and federal government trust responsibility extend to seeing that land uses for property being turned back into trust are compatible with and do not harm existing uses and zoning of surrounding fee lands?

Will the BIA allow this proposed RV park land use if the land goes back into trust? The potential for noise, rowdiness, burglary and theft from disgruntled gamblers and transients is a very real threat to our residential neighborhoods, and is a threat to the property values in the area. Will the BIA and federal government reimburse us for the monetary losses in our home and property values that we will sustain if the BIA and federal government allow this non-compatible development to go in?

I oppose using federal trust restrictions to abuse existing zoning in the area. Please let me know as soon as possible what the BIA plans to do and wha it feels the extent of its responsibilities to be in this case.

Signature_____ Date_____

Address_____

WHATCOM COUNTY PROSECUTING ATTORNEY
DAVID S. McEACHRAN

CHIEF CIVIL DEPUTY
Randall J. Watts

CIVIL DEPUTIES
Robert A. Carmichael
Karen L. Nelson

Civil & Domestic Relations Division
322 N. Commercial #302
Bellingham, WA 98225

DOMESTIC RELATIONS
ATTORNEY
Mary C. Summers

DOMESTIC RELATIONS
OFFICERS
Teresa VanderWoude
Patricia S. Hoyt

April 9, 1992

Mr. Ed Hart, President
Georgia Manor Water Association
P.O. Box 1268
Ferndale, WA 98248

Dear Mr. Hart:

I enjoyed meeting with you regarding your difficulties in locating a well driller willing to drill a well on your property pursuant to a state permit. Unfortunately, the County is not in a position to bring legal action against the Lummi Indian Tribe to uphold a state permit. As you know, the County does not regulate water rights. Because the permit was issued by the State, it is up to either the State or the Georgia Manor Water Association to bring any legal action necessary to uphold the validity of the permit.

The County Sheriff will continue to respond to calls and enforce the law on the Lummi Indian Reservation. This includes complaints of trespass and theft made by the Georgia Manor Water Association. Please understand, however, that the Sheriff's Office cannot be placed in the position of defying court orders, including orders issued by the Lummi Tribal Court. This means that if the Lummi Tribe obtains a court order concerning well drilling on Georgia Manor property, the Sheriff's Office will not prevent its execution without a court order of its own to rely upon.

If you have any questions or wish to discuss this matter further, please let me know.

Very truly yours,

DAVID S. McEACHRAN
Prosecuting Attorney

ROBERT A. CARMICHAEL
Civil Deputy Prosecuting
Attorney

RAC:pjp

Hayes Drilling inc.
556 Erhig Rd. Bow, Washington 98232
(206) 766-6110 FAX (206) 766-6133
Established 1940

9 December 1991

Linnea Smith, Sec. Treasurer
Georgia Manor Water Association
PO Box 1288
Ferndale WA 98248

Dear Members;

The letter we are sending you is a copy of a result from drilling a well within the original boundaries of the reservation without first obtaining a permit from the tribe.

It is our position at Hayes Drilling, Inc. that we will only drill on properties that are in question when a valid permit is presented to us or a legal determination given and a waiver from the tribe obtained.

Our firm does a lot of business with Indian tribes and The Indian Health Service and we do not want to jeopardize our position with them.

Thank you,

Dean Hayes, Sr.
President/Owner of Hayes Drilling, Inc.

DH/yl

cc: file

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD. • BELLINGHAM, WASHINGTON 98226-9298 • (206) 734-8180
DEPARTMENT EXT

November 21, 1991

Mr. Ken Fowler
Dahlman Pump and Well Drilling, Inc.
P.O. Box 422
Burlington, WA 98233

Dear Mr. Fowler:

This correspondence is in response to the Lummi Nation's position on the drilling of wells within the boundaries of the Lummi Indian Reservation.

The Lummi people are very concerned that both the quantity and quality of the reservation's aquifers are being degraded by continued withdrawal of the resource by non-Indian individuals and groups (i.e, water associations). Further depletion of this finite resource will have a direct impact on the health and welfare of the Lummi Nation.

As such, on August 23, 1990, the Lummi Indian Business Council (LIBC), the legally-elected entity representing the Lummi people, voted to prohibit any further non-Indian withdrawal of groundwater from the reservations aquifers (see enclosure). This does not restrict further withdrawal for activities that benefit the Lummi people (e.g., Indian Health Service programs).

The reservation was created for the Lummi people through the Treaty of 1855. As such, the Lummi Nation is definitely the senior, and thus, superior water right.

Sincerely,

Henry Cagey, Chairman
Lummi Indian Business Council

cc: Lummi Resource Planning Division
Lummi Department of Natural Resources
LIBC files

HENRY CAGEY
Chairman

LAVERNE ORDIRO
Vice Chairman

JUANITA JEFFERSON
Secretary

VIRGIL WILLIAMS
Treasurer

SAM CAGEY
Councilman

BOB FINKBONNER
Councilman

JAMES HILLAIRE
Councilman

LEVI JEFFERSON
Councilman

RICHARD JEFFERSON
Councilman

VERN JOHNSON Jr.
Councilman

JOE ORDIRO
Councilman

LUMMI INDIAN BUSINESS COUNCIL
2616 KWINA RD. • BELLINGHAM, WASHINGTON 98226-9206 • (206) 734-8180
DEPARTMENT EXT

RESOLUTION #90-108 OF THE LUMMI INDIAN BUSINESS COUNCIL

WHEREAS, the Lummi Indian Business Council is the duly constituted governing body of the Lummi Indian Reservation by the authority of the Constitution and By-Laws of the Lummi Nation of the Lummi Reservation, Washington, as approved on April 10, 1970, by the Assistant Commissioner of Indian Affairs; and

WHEREAS, The People of the Lummi Nation find that all Reservation natural resources are interconnected: and that the water resource has cultural, spiritual and economic values that guide the appropriate use, management and protection of that resource and the conditions of all water and land use activities in the watersheds, drainage basins of the Reservation and all usual and accustomed areas; and

WHEREAS, The Lummi Nation find that ground water are directly interconnected by the hydraulic cycle of the region and the Reservation, and therefore water is a unitary resource, whether occurring as surface water, springs, mineral water, soil moisture, precipitation, percolating water, recharge, drainage water, or otherwise; and

WHEREAS, The Lummi Nation recognize that clean water is vital to the health and welfare of the Reservation residents and to the vitality of the Reservation economy. Because resource uses may contribute to the degradation of water supply and quality, it is necessary to protect the environmental quality and integrity of all surface and ground water; and

WHEREAS, The Lummi Nation find that all waters reserved by treaty are held by them in trust for the benefit of the People of the Lummi Nation, as an essential attribute of sovereignty, the power to determine the proper uses of said waters and the management thereof is the Lummi Nations alone; and

NOW THEREFORE BE IT RESOLVED, that the Lummi Indian Reservation has no surplus water for additional non-Indian development and that all water present on the Lummi Indian Reservation is subject to the sole regulatory authority of the Lummi Indian Nation.

BE IT FURTHER RESOLVED, that the Chairman (or the Vice Chairman in his absence) is hereby authorized and directed to execute this resolution and any documents connected therewith, and the Secretary (or the Recording Secretary in his absence) is authorized and directed to execute the following certification.

SAMUEL McCAGEY
Chairman

WILLIAM F. JOHNS
Vice Chairman

VIRGIL T. WILLIAMS
Secretary

RICHARD F. JEFFERSON
Treasurer

HENRY M. CAGEY
Councilman

JAMES A. HILLAIRE
Councilman

GERALD L. JAMES
Councilman

ERNEST J. JEFFERSON
Councilman

MERLE B. JEFFERSON
Councilman

VERN JOHNSON JR.
Councilman

JOE ORCHIS
Councilman

2808 Leeward Way
Bellingham, WA 98226
June 15, 1992

Lummi Tribal Sewer and Water District Board
2156 Lummi View Drive
Bellingham, WA 98226

Re: Missing Sewer Stub to existing house at time of sewer construction

Dear Lummi Tribal Sewer and Water District Board Members:

Mrs. Nelson told me about her letter to the sewer board regarding her missing sewer stub, and showed me the District's response, which was to simply send her a copy of the District's sewer stub policy (which has board member's names on it--including mine), but included no cover letter of explanation. She had sent the copy down to her son so that he might consult his attorney, as she felt that the policy did not apply to her situation. Mrs. Nelson felt she had explained her situation thoroughly in her letter. I suggested that she wait and try the sewer district one more time before taking legal action.

Since none of the present board members were on the board at the time of the policy discussion, I hope that the following information may help reach a mututally satisfactory conclusion to Mrs. Nelson's request.

The discussion, as I remember it, was that under the circumstances, the District would not be obligated to provide sidesewer stubs to new construction which occurred after the installation of the sewer mains. The board's decision was that, since in many places only existing houses at the time of the sewer construction had been provided with a sidesewer stub, and that was an a fact of construction which could not be changed, that any new construction would be obligated to pay the cost of installing a stub if one did not exist. Page 2 of the draft minutes of the August 25, 1988 sewer board meeting, which board members received, is enclosed from my records. Also enclosed is a copy of the Lummi Sewer District attorney's letter of April 1988, which is referenced in the minutes, giving possible solutions to the stub problem we were experiencing, since the draft minutes don't reflect the nature of the discussion.

I called Dan Walker about this, and he reminded me that the Frank Moss house on MacKenzie Road at Gooseberry Point had had the same problem, and had precipitated the policy. The District paid for Mr. Moss's stub.

It is my understanding that Mrs. Nelson explained in her letter to the sewer board that she was not present in her home at the time of sewer main installation on Leeward Way because of her husband's being ill in an out of town hospital; that she explained that she had paid the original $400.00 hookup charge to the sewer district (that charge went up to $600 for those who did not pay within the first three months); and that she explained that she has been paying the full monthly $18.00 charge for sewer service each month, from the beginning, even though she has not been receiving the sewer service; and that she wants to hook up to the sewer, but wants the district to pay for the cost of the installation of the missing stub, which, Mrs. Nelson told me, does show as having been installed on the "as-builts" for the sewer.

I am hopeful that an amicable solution may be reached before either the District or Mrs. Nelson incur legal costs which may not be necessary.

Sincerely,
Linnea G. Smith
Former Board Member 1986-1990

cc: Mrs. Al Nelson

Lummi Tribal Sewer District
2156 Lummi View Drive
Bellingham, Washington 98226-9208
(206) 758-7167 or 384-6996

LUMMI TRIBAL SEWER DISTRICT
BOARD OF DIRECTORS
P O L I C Y

Sewer Stub Policy

The Lummi Tribal Sewer District cannot anticipate the exact nature of the future subdivision, so as to assure a sidesewer stub for each future lot. Even in existing plats, the District did not obligate itself to provide stubs for every lot, just those with actual structures. Since the property owners did not participate in the funding of the original system, the system was essentially free to everyone, thus the District is not obligated to provide sidesewer stubs. Therefore, the Board of Directors of the Lummi Tribal Sewer District do not guarantee sidesewer stubs to lot owners and that one of the costs of connection to the system may be the installation of the stub.

This policy was passed at the August 25, 1988 Board of Directors meeting which was attended by:

Dan Walker, Vice-Chairman
Linnea Smith, Secretary-Treasurer
Victor Solomon, Board Director
William Jones, Board Director

4/88

FILE:SEWSTUB.PLC

Rec 6-2-92 from Celia Nelson.
(1st time DCD seen this version)

ownerships, 2 have two owners, which are the same two owners for

each parcel, 1 has four owner, 1 has five owners, 1 has 51 owners, and 1 has 69 owners. For the parcels with multiple owners a cover letter with the bill should be sent to each owner and a notice put into the Squal Quol, stating the policy for Standby and backcharges.

WATER ORDINANCE
It was decided to set a date for another review of the Water Ordinance. Time was set for September 15, 1988 at 7:30 at the Cove Restaurant.

FINANCIAL REPORT
Dave reported that the reports are regular and pretty much on target. Linnea commented that she is still requesting that the Merrill Lynch Account be transferred to the Connection Fee Fund. Dan asked if the final audit report included a manager's letter. Dave replied no the only other correspondence in the package was a proposal for the upcoming audit. Dave said he would look into it.

SALISBURY APPEAL
Dave began by introducing Mrs. Mackenzie to the Board. She is Leonard Salisbury's daughter and is appealing in her father's behalf, Mrs. Mackenzie explained that her father hasn't been well and is hoping that the Board will drop all charges owed on the trailer park during the time of his ownership. He is afraid Ron Mace could sue him for misrepresentation. After a lengthy discussion the Board decided that the lawsuit against both, Mace and Salisbury, should proceed as indicated.

PMX LETTER
Dave reported that he had sent PMX a letter explaining, now is the time to install the air relief stations before the weather ges bad, and also asked for a break down of their cost estimates for the project. Carl stated that the District should push them to resolve the issue before the EPA audit is conducted. The Board expressed some concerns which will be expressed in a letter Skip will draft for the Board to PMX.

MISSING STUB POLICY
After a lengthy discussion, it was decided that the Board would set policy on said subject.
MOTION: Linnea made a motion to adopt proposal #1, of the three options drafted up by Skip. Seconded by Victor. Motion carried to establish this policy as part of the Administrative Code.

PERSONNEL POLICY
Dave reported that the District's Personnel Policy was never approved by LIBC Council. Dave also stated that he had a meeting with Willie & Al Scott, conerning the matter. This whole issue was brought to the attention of Dave when Dan left the District

RAAS, JOHNSEN, GARRETT & STUEN
ATTORNEYS AT LAW
1503 E STREET
P.O. BOX 5746
BELLINGHAM, WASHINGTON 98227-5746

DANIEL A. RAAS
HARRY L. JOHNSEN
DEBORRA E. GARRETT
THOMAS E. STUEN

TELEPHONE
(206) 647-0234

April 27, 1988

TO: Lummi Sewer Board
FROM: Harry L. Johnsen
RE: "Missing" sewer stubs

The Board could approach the question of the missing or non-existent stubs in several different ways, depending on the policy decisions the Board makes. There does not appear to be any clear direction in the Sewer Ordinance that would require a certain approach. The alternatives:

1. The Board could take the position that stubs are not guaranteed to lot owners and that one of the costs of connection to the system may be the installation of a stub. That will certainly be the case where a large parcel with substantial frontage on a collection line is subdivided. Obviously the District cannot anticipate the exact nature of a future subdivision so as to assure a stub for each future lot. It will mean that some intallations will be more expensive than others, but that is just a matter of luck. Even in existing plats, the District did not obligate itself to provide stubs for every lot, just those with actual structures. Since the property owners did not participate in the funding of the original system, they cannot complain that some people received a slightly better deal than others since the system was essentially free to everyone.

2. The Board could assume that a certain number of lots will be missed by the sewer contractor and simply factor that into the connection fee for everyone. The District would then pay for the stub on each lot of record, with future subdivisions still being subjected to payment by the owner, either at the time of subdivision or at the time of actual connection. That would have the effect of treating everyone equally, although the District's actual costs of connection for lots having a stub would be less than for the lots without stubs. In essence, the lot owners with existing stubs would be paying a little more than necessary for their connection while those without a stub would be paying less than their actual costs. Since connection fees are necessarily average costs anyway, it wouldn't make any legal difference.

3. The Board could simply include the cost of the stub in every connection charge, including those for new subdivisions on existing lines. This would appear to be the most "equal" treatment, but actually it would be a subsidy to the larger parcels.

While some Districts have a flat, undifferentiated connection fee, other Districts divide their "connection fees" into various components. For example, there might be the physical connections costs (either actual or

averaged), a "buy in fee" which covers the prorata share of the historic cost of the existing system already paid for by the existing customer base, an admistrative or permit fee, and perhaps a reserve for future expansion. This last category is not allowed under Washington state law, but it is used in some other states.

The stub question focuses attention on the components of the District's existing connection fee. It appears that fee was originally set at a level that would guarantee start up expenses for the District and now it is used to provide for future non-routine maintenance. Many districts, regardless of how they compute their fees, place them in a separate fund for future construction. Even in Washington where the law does not allow future capacity to form a part of the rationale for the fee, there is no restriction on earmarking the money for future projects once the fees are collected. After all, you can't very well spend the money on projects you have already paid for, even if you are required to set the fee based on the cost of those projects.

2808 Leeward Way
Bellingham, WA 98226
October 22, 1993

Eugene DeCoteau, Manager
Lummi Sewer District
Bellingham, WA 98226

Re: Filbert Sewer Hookup

Dear Gene:

June and Fred Filbert have called and asked that I help in pursuing a sewer hookup for their property. They are going to be gone for a few months, and they asked if I would be able to follow up for them on their request to you.

I received the enclosed request from them in the mail today, and I am sending it along to you.

Sincerely,

Linnea G. Smith

Linnea G. Smith

19 Oct 1993

To whom It May Concern:
as we will be out of state,
we, the undersigned, Fred and June
R. Filbert, give Linnea Smith, the
right to speak for us in regard
to hooking up to the Kenmore
Indian Sewer System. The lot in
question is: Lot 13, except the north
22.01 feet thereof, together with Lot 14,
Block 4, plat of Cape Horn Lake, according
to the plat thereof recorded in Vol. 7 of
Plats, page 30, records of Whatcom Co. Wa.
See attached statement for reason
to give this authority.

Fred O. Filbert
June R. Filbert
1682 Monroe Dr.
Bellingham, Wa.
98225

19 Oct 1993

To: Lennea Smith
Lummi Sewer Board

On 19 Oct. 1993, my husband, Fred Fillberg and I went to the Lummi Planning Office and spoke with Jim Hostetler, the Land Planner. We asked to hook up to the Lummi Sewer system for ~~water~~ we have paid the original assessment and the monthly charge since the inception of the system, approx. 10 years.

Mr. Hostetler informed us we could not hook up now as our water line is not acceptable to the Lummis. It is acceptable to Whatcom Building and Codes Dept.

We are asking for sewer hook up, not water.

We feel discriminated against as sewer lines are being installed now on Lummi Shore Road and we are being denied hookup.

Also, we had to record a code of

1099

property because the buyer was [illegible] hook up. The sewer line with a connector runs directly in front of the property.

This has caused much hardship, stress and inconvenience to us.

We ask that we be allowed to hook up.

June R. Gilbert
1682 Marine Dr.
Bellingham, Wa. 98225

Legal description of lot for which hook up is asked: Lot 13, except the north 22.01 feet thereof, together with lot 14, Block 4, Plat of Pepe Howa Illahe, according to the plat thereof, recorded in Vol. 7 of plats, page 30 records of Whatcom Co. Washington

ROY and SANDY CALLERO
2821 Leewind Way
Bellingham, WA 98226
(206) 758-7758

August 30, 1994

Sheriff Dale Brandland
Whatcom County Courthouse
311 Grand Avenue
Bellingham, WA 98225

Dear Sheriff Brandland:

On June 4, 1994, my family had a confrontation with Lummi Law Enforcement "officer" E. Hillaire. I sent you copies of my correspondence to Lummi Law Enforcement with a cover letter.

They promised an internal investigation and a report to me explaining what was found and what was being done about it. I was assured personally by both Bruce Haley and Lt. Sutton, when I talked with them after the meeting which you attended at the Gooseberry Point Fire Hall, that an answer was forthcoming very soon .

I called Bruce Haley and was told on August 22, 1994, that his Lieutenant would notify me with information as to what the status is. I am now convinced that they don't really intend to follow through with this matter.

I am requesting that you please contact them regarding this issue. I would like their official position on this matter and on the beach rights in this area. I would like to know if their "officer" was acting on behalf of the Lummi Tribal position and within his authority. I would like to know what is being done to rectify this situation. I would like a letter of apology to me and my wife, to whom the frustration and humiliation occurred. This is not a "government to government" issue.

Thank you in advance for your attention to this matter.

Sincerely,

Roy Callero

Roy Callero

WHATCOM COUNTY SHERIFF'S OFFICE
Public Safety Building - 311 Grand Avenue
Bellingham, Washington 98225

DALE BRANDLAND
Sheriff

September 8, 1994

Roy Callero
2821 Leeward Way
Bellingham, Washington 98226

Dear Mr.Callero:

Enclosed is a copy of my letter to Bruce Haley asking to be advised of their internal investigation. This department just spent a considerable amount of time and effort to create a policy for dealing with tidelands issues. This policy was created to give our deputies a clear understanding of how to deal with these complicated problems.

I am enclosing a copy of this policy for you. If you have any further questions or comments please feel free to call.

Sincerely yours,

Dale E. Brandland

DALE E. BRANDLAND, Sheriff

DEB/nh

WHATCOM COUNTY SHERIFF'S OFFICE
Public Safety Building - 311 Grand Avenue
Bellingham, Washington 98225

DALE BRANDLAND
Sheriff

September 8, 1994

Bruce Haley, Director
Lummi Law and Order
2616 Kwina Road
Bellingham, Washington 98226

Dear Bruce:

I am enclosing a copy of a letter from Roy Callero. He is asking that you send him the results of your internal investigation and because this incident occurred within our jurisdiction I would also like to know the results.

I will be sending Mr. Callero a copy of this letter and a copy of our policy on issues concerning tidelands and trespass.

Respectfully yours,

DALE E. BRANDLAND, Sheriff

DEB/nh

WHATCOM COUNTY SHERIFF'S OFFICE
OPERATIONAL POLICY AND PROCEDURE

DATE ISSUED: September 1, 1994 **NUMBER: 94-01.01**

DISTRIBUTION: All Deputy Sheriffs

SUBJECT: *Lummi Reservation Trespass Enforcement Issues*

I. PURPOSE

The purpose of this memorandum is to clarify the enforcement stance of the Sheriff's Office for deputies that become involved in issues related to the enforcement of trespass laws associated with matters involving "disputed rights" of both tribal and non-tribal citizens on the Lummi Indian Reservation.

II. OPERATIVE PRINCIPLE

To equally protect, from a neutral basis, the personal rights and property interests of all individuals, and legally constituted groups, within the Lummi Indian Reservation.

III. PRIMARY ISSUES

Tide Lands Issue The tide lands issue involves disputed ownership of, and access to, tide lands where private non-tribal fee simple land is involved. What constitutes "tide lands" is based on the "mean high tide line". Generally, the Lummi Tribe claims exclusive ownership of "the tide lands" including control of all land on the water side of the "extreme high tide line". This claim includes "unobtrusive and non-destructive" access for tribal members, their vehicles, and boats across all lands and property to access tide lands. In contrast to the Tribe's claim, "mean high" is the generally accepted standard for determining "tide lands" by most legal sources.

South Cape Property Issue The second issue is the right of tribal members to enter upon and use the private fee simple property known as the South Cape of Sandy Point, on the Reservation, in the furtherance of their "right of access" to the tide lands. Currently, the owner of the Cape, Paul "Johnny" Murray-Jones, has posted the property with "no trespassing" signs with the intent to bar access to all unauthorized individuals from access to the Cape.

Non-Treaty Issue Trespassing Complaints Infrequently, the Sheriff's Office receives complaints of persons trespassing, or remaining on the property of another without permission. These cases may involve tribal members, non-tribal members, or both. Such matters do not involve disputed treaty rights or any other tribal issue. These matters should not be confused with either of the above noted types of conflicts.

IV. OPERATIONAL POLICY

Until further notice, the Sheriff's Office will implement the following operational policies when handling "tide land" and "South Cape" trespassing complaints on the Lummi Indian Reservation.

A. **Responses to Tide Lands Complaints** Sheriff's deputies will respond to trespassing complaints related to areas known as the "tide lands" on the Lummi Indian Reservation as provided below

1. Deputies will respond to tide lands-related trespass complaints on the Lummi Reservation for the purpose of preserving the peace, providing information to the involved parties, and to establish a neutral mediating presence to protect the rights of the disputants

   a. In these matters, deputies will not arrest or cite the accused individual. Such matters will be addressed as any other non-criminal civil matter would be addressed. Responses to such incidents will be to document the incident and collect appropriate identifying information. Deputies shall not take sides, or express any point of view, but will remain completely neutral to all parties

   b. If any of the involved parties decline to provide requested identifying information, deputies will note such refusal in their report and take no further action to gain the information. It will be the responsibility of the complaining party to gain declined information.

2. Deputies shall not make physical arrests, or cite any tribal member accused only of trespassing for the purpose of accessing tide lands across the private property of another, as long as the means of gaining access was reasonable, unobtrusive, and did not cause any damage, undue disruption or physical harm to the property, or person of the property owner.

   a. Reasonable access shall be deemed to be made on foot across open land that is unobstructed by fences or structures.

   b. Unreasonable access shall include opening gates, climbing over fences, entering into enclosed structures, crossing a lot with a residence, or by driving or towing a vehicle or boat. Such conduct is deemed to be unreasonable and actionable as a trespassing violation.

   c. Such "unreasonable" instances, will be fully documented and the report referred to the Office of the Prosecutor for a charging decision.

B. **Responses to South Cape Complaints** Sheriff's Personnel will respond to reports of trespass on the private property located in the area known as South Cape on Sandy Point as follows.

1 Upon contacting individuals, who are not tribal members, on the South Cape property, such persons will be advised that they are trespassing and identifying information gathered. The person shall be advised to leave property immediately. The information will be referred to the Office of the Prosecutor for a charging decision.

a. Deputies will also advise such individuals that second or successive contacts will result in the issuance of criminal citations for trespass

b. Enforcement action should only be taken against individuals, during an initial contact, who are committing a criminal violation other than simply being physically present on the South Cape property

c. Individuals possessing a letter of permission issued by the property owner, or his designee, shall be deemed to be legally on the property

2. Tribal members will be permitted to walk across the South Cape property to facilitate their access to the tide lands, and for no other purpose

a. Tribal members accessing tide lands shall not be permitted to enter the property with vehicles, launch or retrieve boats, spread nets, moor boats in the canal, or loiter on the South Cape property

b. The commission of any of the above noted acts (a), combined with physical presence, will be sufficient to sustain a charge of trespass against a tribal member. The information shall be documented and referred to the Office of the Prosecutor for a charging decision.

c. Tribal members who are simply walking across on the aforementioned property to access tidelands, without any other inappropriate conduct, will not constitute a basis for any immediate enforcement action.

d. Tribal Police should be called to assist in handling these matters if a tribal member is resistive, uncooperative, or refuses to leave.

e. Tribal members possessing a letter of permission issued by the property owner, or his designee shall be deemed to be legally on the property.

C. **Responses Involving Custody Trespass Arrests** Deputies investigating trespassing complaints on the Lummi Reservation who are confronted with individuals who are uncooperative, or refuse to cease a trespassing violation and leave the protected area, may be subject to physical arrest at the discretion of the Sheriff's shift supervisor

1. Uncooperative individuals who decide to cooperate to avoid physical arrest may be issued a citation charging the appropriate violation in lieu of completing a physical arrest.

D. **Responses to Non-Treaty Issue violations** Sheriff's personnel remain fully authorized to take appropriate enforcement action against any individual who is involved in criminal conduct, including trespass in any area of the Lummi reservation known to be fee simple land where tide lands access or treaty rights are not at issue

E. **Documentation Required** Due to the potential for civil litigation that is associated with these types of cases, all contacts, responses and actions will be fully documented via the Department's normal reporting process

F. **Dissemination of Unauthorized Information** Under no circumstances, are Sheriff's personnel authorized to distribute information, documents or memoranda developed by any other individual, agency or entity regarding court decisions, opinions or interpretations of law related to tribal rights, claims, or legal authority without the expressed permission of the Sheriff, or his administrative designee

G. **Professional Neutrality** Sheriff's personnel shall, in all contacts with individuals, groups and agencies regarding these issues, remain neutral and positive

1. Deputies must not allow themselves to be drawn into an argument, or "take sides" regarding these volatile issues Sheriffs' personnel have an absolute responsibility to serve the legitimate interests of citizens of Whatcom County within the context of the law in an unbiased manner.

2. All reasonable step should taken to preserve the positive professional and working relationships with the Lummi Tribal Police

H. **Administrative Referral** Any problems or complaints arising form the implementation of this policy shall be referred to the Sheriff's administration via normal departmental channels for review. Individuals wishing to file a complaint against an officer, this policy or its application, should be, likewise, referred

V. DURATION

This operational policy shall remain in effect until revised or revoked by order of the Sheriff, or his administrative designee.

Dear Sheriff Brandland,

On June 4, 1994, My family had an unfortunate experience with a Lummi Law Enforcement officer. I contacted Lt. Sutton at Lummi Law and Order and discussed this matter with him. He sent Detective Gary Myers to take statements from me and my wife. My daughter and my son-in laws also sent him short written statements .

I was very pleased and impressed with their response to this matter. They are going to do an internal investigation and said they would notify me of the results.

I asked that Mr. Hillaire not be allowed to "set foot on my property ever again" and both Lt. Sutton and Det. Myers agreed that "that was my right".

I feel that you should have a record of this incident and I have enclosed a copy of my written statement.

Thank you for your attention to this matter.

Sincerely,

Roy Callero

Roy Callero
2821 Leeward Way
Bellingham Wa. 98226

MR. BRUCE HALEY
LT. SUTTON
DET. GARY MYERS

LUMMI LAW ENFORCEMENT,

Saturday, June 4,1994, approximately 2 P.M. I had a very upsetting experience with one of your "officers". My wife's 2nd grade class was enjoying a day at their teachers home. We had a small beach fire which was being watched temporarily by a 5th grade helper. Adults were in the immediate area.

The 5th grader (Eric Ingram) heard someone yell for him to put out the fire. He looked up to see a man in a rainsuit. Eric told the man that he couldn't but he would get the owner. He was yelled at again to put out the fire and again responded that he would get the owner. The man said something to the effect of "Don't argue with me he isn't the owner!". Eric ran up the beach stairs yelling "Mick!,Mick!, (my nickname). The man saw two 2nd grade boys near the top of the stairs and yelled at them to put out the fire. When the second graders said they would get the owner, he got upset with them.

I met the man at the top of my beach stairs. He told me I had to put out the fire. I responded "Why? Is there a burn ban I didn't know about?" He told me that wasn't my property and I had to put out the fire. The man appeared to be a Lummi member who was very upset. By this time we had myself, my two Son-in-laws, three or four other adults, and 23 second grade students looking on. We had a rather heated discussion regarding property rights and this man told me the Lummis owned the beach to the vegetation line.

I finally got frustrated enough to inform the man that he was on my property and steps, and I wanted him to leave. He told me he had a right to be there and wouldn't leave.When I asked what made him think he had a right to be there he said he was an officer. We(myself and two-son-in-laws) looked at him and said "Your'e what"? He opened his raincoat to show us his uniform (unbuttoned half way down) and a badge. I asked how we were supposed to know he was an "officer". About then my adult daughter ran up and said "It's O.K. I'm going to call the police". We informed her He apparently was the police. His name is E. Hilliard.

The "officer" told me he could call the Sheriff on me. I responded that I wished he would call them, and he proceeded to tell me it was his choice and He was not going to call them. To stop this senseless arguing I told him I would put out the fire and started to go down the stairs. He stood his

ground on the top step. I looked up, looked at him, and repeated myself firmly:" I will go and put out the fire!" He moved aside and I put it out. By this I was provoked to the point that my son in-law told me I should leave, and I knew he was right so I did.

After I was away from this person, I remembered that he was the same "officer" that stopped me in my car on Haxton Way two or three years ago. He was in a Fisheries four wheel drive car.

In both instances, this "officer" was not enforcing the law as much as he was harassing and attempting to intimidate. In my opinion, this "officer" is a danger to himself and to the general public. In both instances I felt he wanted me to respond physically. That is not very smart when standing on the top step with your back to a 60 foot embankment.

I want to thank you in advance for the concern and attention you are giving this matter.

Sincerely,

Roy Callero

Roy Callero
2021 Leeward Way
Bellingham, Wa. 98226
758-7758

9-19-82

Hallauer

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

LUMMI INDIAN TRIBE, et al., Plaintiffs, and UNITED STATES OF AMERICA Plaintiff-Intervenor, vs. WILBUR HALLAUER, Director of Washington State Department of Ecology, et al., Defendants.	Civil Action No. C79-682R CONSENT DECREE

THIS MATTER comes on before the Court upon joint motion of the parties to this settlement agreement for entry of this Consent Decree. The Court being fully advised in the premises, having considered the Decree presented and agreed upon by the parties, hereby finds as follows:

1. This action was commenced on June 6, 1979, by the Lummi Indian Tribe, and six individual plaintiffs: William E. Jones, Larry G. Kinley, Samuel M. Cagey, Vernon Lane, James McKay, and James Wilson. Four types of defendants were named:

(a) 'State Defendants' including the State of Washington, its Department of Ecology, and certain state officials, some officially and individually, and one spouse and the official's and his spouse's marital community;

(b) 'County Defendants' including Whatcom County, Washington, one of its Commissioners in his official and individual capacity and his spouse and their marital community, and the County Engineer.[1]

(c) 'District Defendants' including Whatcom County Sewer District No. 2 (SD2), Whatcom County Water District No. 11 (WD11), Whatcom County Water District No. 15 (WD15), their commissioners, the commissioners' spouses, and the

[1] By Agreed Order issued October 30, 1980, plaintiffs' claims against Whatcom County and the County Engineer were dismissed with prejudice.

COPY

LAW OFFICES OF
JONSON, JONSON & HAMACK, P. S.
300 CENTRAL BLDG
SEATTLE, WASHINGTON 98104

commissioners' respective marital communities; and

(d) Individual Defendants' including Mrs. Vera Armstong, Douglas A. and Grace Marie Fuhs and the Fuhs' marital community, and Fred and June Filbert and the Filbert marital community.

2. On March 20, 1980, the United States was given leave to intervene as plaintiff. The United States named as defendants the State of Washington, its Department of Ecology and the DOE Director, SD2 and its commissioners, and WD 11 and its commissioners.

3. The plaintiffs and plaintiff-intervenor sought various injunctive and declaratory relief and damages against the defendants.

4. The State of Washington filed a counterclaim against plaintiffs on July 2, 1979, seeking equitable relief, and filed a cross-claim against district and individual defendants on July 26, 1979.

5. The District and Individual Defendants filed counter and cross claims, which were completed in an Amended Counterclaim and Amended Cross-Claim filed October 6, 1980. Named as counter-defendants were the Lummi Indian Tribe, the Lummi Indian Business Council, the members of the Lummi Indian Business Council, their spouses and their respective marital communities, certain other tribal officials, the United States Environmental Protection Agency and certain of its officials in their official and individual capacities.[2] This counterclaim sought declaratory and injunctive relief, and damages. The cross-claim was filed against the State and County defendants.[3]

6. On November 6, 1980, the Court entered a Partial Judgment on Consent Decree resolving all of plaintiffs' and plaintiff-intervenor's outstanding claims among plaintiff, plaintiff-intervenor and the State Defendants.

7. On February 5, 1982, the Court entered a partial judgment on the issue of tribal jurisdiction, declaring that the Lummi Indian Tribe had the authority to construct and operate a sewer system serving all persons residing on trust or fee

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[2] On July 9, 1981 and December 17, 1981, the court entered summary judgments in favor of EPA and its officials on all claims against them.

[3] By agreed Order issued December 23, 1980, the cross-claim against the County defendants was dismissed.

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JONSON, JONSON & HAMACK, P. S.
300 CENTRAL BLDG
SEATTLE, WASHINGTON 98104

land, within the boundaries of the Lummi Indian Reservation and requiring all such persons to connect to the system and to pay service fees. The District and Individual Defendants have appealed this Order to the United States Court of Appeals for the Ninth Circuit.

8. The issues remaining before the Court are (1) the claims for injunctive and declaratory relief and damages by plaintiffs against the District and Individual Defendants and against Terry Unger, his wife and the Unger marital community; (2) the claims of the United States against the District Defendants; (3) the Cross-Claim of the State Defendants against the District Defendants; (4) the claims for injunctive and declaratory relief and damages by the District and Individual Defendants against the plaintiffs, third-party defendants, and State Defendants.[4]

9. All parties to this Decree[5] against whom claims have been filed deny the allegations. However, these parties have conferred and agree that the entry of this consent decree is proper and further does not constitute an admission or adjudication of liability, negligence or other wrongdoing, or of a violation of any civil, statutory or constitutional right of any person or entity.

10. The parties hereto have further conferred and agree that the remaining claims in this cause among the plaintiffs, plaintiff-intervenor and the remaining defendants (other than Unger) should be resolved without the necessity of a trial. Accordingly, the parties hereto have applied for the entry of the following order.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

11. All parties hereto, their officers, agents, employees, servants, attorneys, assigns, and successors in office commencing immediately shall, except to the extent limited by subparagraph (h):

(a) Not make any dwelling within the Lummi Indian Reservation unavailable to any person on account of race, color, religion, creed, sex, national origin or political affiliation except that the Lummi Housing Authority may continue to grant preference to Indians in the provision of housing only, according to its charter

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[4] This consent Decree does not resolve plaintiffs' claims against Terry Unger, as County Commissioner and individually, his wife, and the Unger marital community, nor does it resolve the claims among the District, Individual and State Defendants.

[5] The parties to this decree are the plaintiffs, the plaintiff-intervenor and the District and Individual Defendants.

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and applicable laws, rules and regulations. However, this provision shall not affect any other provision in this decree.

(b) Not interfere with the provision of sewer services to any person on account of race, color, religion, creed, sex, national origin, or political affiliation.

(c) Not coerce, intimidate, threaten, or interfere with, or attempt to coerce, intimidate, threaten, or interfere with, any persons in the enjoyment or exercise of, or on account of his/her having exercised or enjoyed, or on account of his/her having aided or encouraged any other person in the exercise or enjoyment of the right to housing secured by 42 U.S.C. §3601 et. seq. or other applicable laws.

(d) Not deny, attempt to deny, or abridge the rights of any person to make and enforce contracts, or to enjoy the full and equal benefit of all laws for the security of persons and property as is enjoyed by white citizens of the United States;

(e) Not deny, attempt to deny, or abridge the rights of any person to hold, purchase lease, sell, or convey real property;

(f) Not act, under color of state law, so as to subject, or cause to be subjected, any person to the deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States or of the State of Washington;

(g) Not conspire for the purpose of depriving, or deprive, any person of the benefit of the equal protection of the laws, or the equal privileges or immunities under the laws.

(h) The provisions of paragraph 11 shall bind the United States only to the extent applicable by law.

12. The Court finds and hereby rules, that all claims revolving around the Lummi Reservation Sewer System or otherwise arising out of this litigation made by the parties signatory to this Consent Decree are hereby merged and resolved in this decree, except that the Court retains jurisdiction over the subject matter and parties hereto as specifically set forth hereinbelow, and except to the extent that the District and Individual Defendants shall have the right to appeal the issue of tribal jurisdiction, either through the appeal currently filed, or through appeal after the entry of this decree by the Court.

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13. An award of $800,000.00 in favor of the plaintiff Lummi Indian Tribe is entered against SD2, WD11, and WD15, jointly and severally. The Plaintiffs and District Defendants agree that these defendants shall pay this award as set forth in subparagraphs (a) through (e), except to the extent limited by subparagraph (f). The payment of this award whall be in lieu of assessments for the Lummi Sewer System, as currently designed and under construction, against landowners in the districts. However, it shall not be construed to bar the collection of sewer connection charges by the Tribe against all landowners connecting to the Lummi Sewer System. All such charges shall be on a non-discriminatory basis and the sama fee shall be paid by Indians and non-Indians connecting to the sewer system, within the same class of service.

(a) WD11 and SD2 shall amend their respective Comprehensive Plans as may be necessary to provide for the action hereinafter set forth.

(b) WD11 and SD2 shall each form a U.L.I.D. coextensive with the District boundaries; however, land owned by the plaintiffs or by the United States in trust for Indian people or the Tribe shall not be included within the U.L.I.D. The U.L.I.D. shall be for the purpose of levying assessments against all property in each district which will benefit from the Lummi sewer system and such monies collected by each district and used to pay the award entered herein in favor of the Tribe. Each U.L.I.D. shall be initiated by adoption of a resolution of intent by each Board of Commissioners, with provisions for hearings regarding assessments as provided in RCW 56.20.020, provided that if the owners of land comprising more than forty percent (40%) of the land within the applicable U.L.I.D. file written protests to attempt to divest the commissioners of the authority to proceed with the formation of this U.L.I.D., the hearing on such protests shall be recessed and resumed before the United States District Court for the Western District of Washington, or a master appointed by such court to conduct such hearing and determine the basis for the objection. The Court, after such hearing, may suspend the provisions of RCW 56.20.020 for the purposes of such matter and may direct the formation of the U.L.I.D. notwithstanding these protests, and may further order the correction of any inequities which may exist in each such proposed assessment roll and direct the filing of a final assessment roll as provided by RCW

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56.20.020. The U.L.I.D. and assessment rolls shall further provide that the districts' award shall be paid, and assessments made, in 1983, 1984, and 1985 in equal installments, together with the appropriate interest accrued upon the indebtedness, with the right of prepayment.

(c) Each district may also provide for payment of indebtedness to engineers and attorneys in computing the amount of assessments on the property to be assessed.

(d) Interest on the unpaid balance of the award shall be computed in accordance with 28 U.S.C. §1961.

(e) The commissioners of each U.L.I.D. shall take action in accordance with the Revised Code of Washington to collect delinquent assessments, and the Tribe has the right to require that the commissioners enforce collection of said delinquent assessments by an application to the Court.

(f) Plaintiff Tribe agrees not to pursue any other rights it may have as a creditor to collect the indebtedness owed to it pursuant to this decree so long as payment upon the award is made by the districts in a timely manner as set forth herein. The award in this pargraph 13 is not contingent upon the method of collection set forth herein, except to the extent limited by this paragraph (f).

14. A separate award in favor of the plaintiff Lummi Indian Tribe is further entered against each of the fifteen individuals named as District and Individual Defendants in the amount of Four Hundred ($400.00) dollars. Payment of these awards shall not be due until the earlier of the filing of the final assessment roll for the formation of the first U.L.I.D. to be formed by either WD11 and SD2 under paragraph 13 hereof or January 1, 1983. Interest shall be computed on the unpaid balance in accordance with 28 U.S.C. §1961.

15. All the District and Individual Defendants' payments shall be paid into the registry of the Court through the Office of the Clerk for the United States District Court for the Western District of Washington. If the Clerk is unable or unwilling to accept the payments, then all payments shall be mailed to counsel for the plaintiffs at the Office of the Reservation Attorney, 2616 Kwina Road, Bellingham, Washington 98226 or such other location as counsel shall direct in writing.

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All payments by the District and Individual Defendants shall be deemed received by the Tribe as of the date of the postmark on the envelope containing any payment. If a payment is made in person rather than by mail, it shall be deemed received when it is delivered to the Clerk of the Court or counsel for the Tribe.

16. Within ninety days after entry of this order the Tribe shall make good faith application to the United States Department of Housing and Urban Development ('HUD') and any other appropriate federal, state, or local agency for new tribal housing upon the Lummi Indian Reservation. This application shall be for at least the average number of units per year for which application was made during federal FY 1976, 1977, 1978 and 1979. The Tribe shall also make a similar application in each year of the next two federal fiscal years following the entry of this Decree. A copy of each application shall be filed with the Court.

(a) If within three years of the date of the initial application the Tribe receives grant funds for housing for one hundred (100) units or less, as the term 'unit' is defined by HUD regulations, then the Tribe retains all of the monies paid under paragraphs 13 and 14 of this decree.

(b) If within three years of the date of the application the Tribe receives grant funds for housing in excess of one hundred (100) units as the term 'unit' is defined in HUD regulations, the Tribe will refund fifty cents ($.50) for every one dollar received in excess of the one hundred units to the District and Individual Defendants in proportion to their respective contributions to the monies set forth in paragraphs 13 and 14 of this decree.

(c) If the Tribe fails to make good faith application as above, it shall refund in full to the District and Individual Defendants all and any monies received.

17. The plaintiffs agree that none of the funds collected pursuant to this Decree shall be used to oppose the plans or activities of the District and Individual Defendants regarding utility services.

18. All connections to the Lummi Reservation Sewer System, within the capacity of the system, shall be made on a non-discriminatory and first-come, first-served basis. The Lummi Indian Tribe shall amend the Lummi Sewer Ordinance to insure this connection priority and file a copy with the Court.

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19. On or before the date on which the Lummi Reservation Sewer System becomes operational, the Court directs and the Lummi Indian Tribe agrees to amend the Lummi Sewer Ordinance to permit the adjudication of disputes regarding the right to use the sewer system, refusal or failure to provide service, operational problems affecting service, and other service related issues in the following manner:

(a) Such disputes shall first be presented to the Lummi Sewer Board. The Lummi Sewer Board shall hear the dispute, and cause a verbatim record to be kept and transcribed. The Sewer Board shall issue a written decision. Both the written transcription of proceedings and written decision shall be public records and open to inspection during business hours for copying if desired. This decision shall be subject to review by the Lummi Indian Business Council only for the purposes of ascertaining whether a fair hearing was allowed.

(b) Any parties to a dispute dissatisfied by the decision of the Lummi Sewer Board and the Lummi Indian Business Council may appeal to the Lummi Reservation Court. The Lummi Indian Tribe shall amend the Lummi Sewer Ordinance to permit such appeal. The Reservation Court shall conduct a review upon the written record, and the standard used in such review shall be whether there was substantial evidence in the record to support the decision of the Lummi Sewer Board. The Reservation Court shall issue a written decision.

(c) Any parties to a dispute dissatisfied with the decision of the Lummi Reservation Court may invoke arbitration under the rules and auspices of the American Arbitration Association. The arbitrator shall conduct a de novo review upon the written record before the Reservation Court and issue a written decision.

(d) As a condition of appealing to each of the above steps, the party wishing to appeal shall first pay all costs of the step at which it lost. Costs shall include, but not be limited to, the preparation of a written transcript of each hearing or meeting, reasonable filing fees, and other costs; however, costs shall not include attorneys or spokesperson's fees for any of the above stages of proceeding.

(e) A copy of the ordinance enacted by the Lummi Indian Tribe and a sample connection sewer contract shall be filed with the Court.

(f) Operational problems or complaints of a minor nature may, at the option of the complaining party, be resolved informally through contact with the

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300 CENTRAL BLDG
SEATTLE, WASHINGTON 98104

manager of the Lummi Sewer System. The use or non-use of this informal, direct contact shall not affect a complaining party's right to pursue the formalized provisions contained herein for the settlement of disputes.

(g) For a period of five years after the date of this decree, the United States District Court shall retain jurisdiction over the matters in this paragraph for the purpose of enforcing the arbitrator's awards. The review of the arbitrator's award shall be on a basis of arbitrary and capricious action by the arbitrator. Any Order or Judgment enforcing or altering an arbitrator's award shall include a reasonable attorney's fee to the prevailing party for attorney time spent in the District Court action only. Fees, costs, and other expenses paid or incurred prior to the District Court action shall not be awarded as part of the District Court Order. The Lummi Indian Tribe waives sovereign immunity and shall amend the Lummi Sewer Ordinance or other appropriate ordinance to provide for a waiver of sovereign immunity for itself and for the Lummi Sewer Board sufficient to implement this paragraph 19 and shall file a copy of said ordinances with the Court.

(h) All sewer contracts for connection to the Lummi Sewer System shall be made available by the Tribe for inspection during normal business hours.

20. No housing unit which has been connected to the Lummi Reservation Sewer System shall be disconnected without the written agreement of the owner of the housing unit.

21. Nothing herein shall prevent the District and Individual Defendants from appealing the February 5, 1982 judgment of the District Court on the "jurisdiction issue". This Decree expresses no opinion on the appealability of any prior Order of this Court.

22. (a) If the District and Individual Defendants prevail on the jurisdiction appeal, then (1) the Tribe agrees to enter into contracts with SD2 and/or WDII for the wholesale treatment of sewerage within those districts' boundaries, and (2) the Districts agree not to annex additional territory without the approval of the Tribe which shall not be unreasonably withheld, and which shall be determined on the basis of engineering feasibility or non-feasibility of service on a gravity system basis from the tribal sewer district or SD2 or WDII.

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(b) If the districts are ultimately unsuccessful in reversing the jurisdiction ruling, then (1) SD2 shall be dissolved and cease to exist save for the collection of assessments sufficient to pay its indebtedness entered in this action, and (2) neither WD11 nor WD15 shall exercise any powers to provide sewer service under any circumstances, save for the collection of assessments sufficient to pay its indebtedness entered in this action, without the permission of the Tribe, which permission may be withheld for any reason.

23. An award of attorneys fees and costs shall be discussed by the parties hereto, but, if no agreement can be reached, the entitlement and amount of such an award shall be set by the Court.

24. This Consent Decree may be altered or modified only by written agreement of all parties hereto, and approved by the Court. However, for good cause shown and upon motion to the Court by any party, the Court may enter such further Orders as may be necessary or appropriate to effectuate the purposes of this Decree.

ORDERED this _____ day of August, 1982.

BARBARA J. ROTHSTEIN
UNITED STATES DISTRICT JUDGE

The undersigned attorneys agree to the entry of this Order.

Carl A. Jonson
Jonson & Jonson, P.S.
300 Central Building
Seattle, Washington 98104
Attorney for District and
Individual Defendants and
Third-Party Plaintiffs

Daniel A. Raas

Harry L. Johnsen
Office of the Reservation Attorney
2616 Kwina Road
Bellingham, Washington 98225
Attorneys for Plaintiffs and
Third-Party Defendants

Abigail Ellas
U.S. Department of Justice
Civil Rights Division
Washington, D.C. 20530
Attorney for the United States
Plaintiff-Intervenor and Third-Party
Defendants.

IN THE US DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
CIVIL ACTION NO. C79 - 682R

BETWEEN

SOUTH CAPE PROPERTIES LIMITED	MOVANT
AND	
THE LUMMI INDIAN TRIBE	PLAINTIFF
THE LUMMI INDIAN BUSINESS COUNCIL	CROSS-DEFENDANT

AFFIDAVIT OF LT COMMANDER P.J. MURRAY-JONES

I, Paul Johnnie MURRAY-JONES, of 8A Hatton House, 15 Kotewall Road, in the British Crown Colony of Hong Kong, on behalf of the above named Movant, South Cape Properties Limited, do make oath and say as follows :-

1. I make this Affidavit in support of the motion before this Honourable Court for an order to enforce the terms and conditions of the Consent Decree of 8th December 1992 in Civil Action No. C79 - 682R. All the facts deposed herein are true to the best of my knowledge and belief unless otherwise stated. It may be that some of the matters averred to in this Affidavit will be found to be superfluous to the central reason for this motion, but they have been included so as to give as complete a background picture of the situation as possible.

2. (a) I am the beneficial owner of all that piece of land known as the South Cape property on the peninsula of Sandy Point, Ferndale, Washington, hereinafter referred to as the land, as more particularly described in EXHIBIT I, which was acquired by me on

10th November 1983. A map, EXHIBIT II, shows the position of the South Cape property on the Sandy Point peninsula.

(b) I hold this property through South Cape Properties Limited, a company incorporated in Hong Kong. I have also applied to register the company in Washington. A certified copy of the Certificate of Incorporation is enclosed herewith marked as EXHIBIT III.

(c) The Lummi Indian Business Council has, in contravention of the provisions of the Consent Decree, wrongfully overruled the approval given by the board of the Lummi Sewer and Water District on 29th April 1993 for the extension of the sewer to my property. I am unable to complete the development, despite it having been approved by the Department of Ecology and Whatcom County, until the sewer is provided.

3. HISTORY OF THE PROPERTY

(a) The peninsula known as Sandy Point, of which South Cape forms a part, was granted to one Frank Finkbonner, believed to have been a German who married a Lummi girl and thus became a member of the tribe, on 28th March 1907. A copy of this grant is shown as EXHIBIT IV.

(b) On 8th April 1953 Finkbonner sold the land, including the tidelands, to William P. Wood and Jasmine P. Wood. EXHIBIT V.

(c) On 27th May 1953 the Woods sold the land to C. V. Wilder and Jessie Wilder.

(d) On 7th August 1959 the Wilders sold the land to Sandy Point Gravel Ltd.

(e) On 15th May 1963 Sandy Point Gravel sold the land to Bellingham Marine Inc.

(f) On 4th May 1966, Bellingham Marine sold the land to Campbell Investments Company.

(g) On 10th November 1983 Campbell Investments sold the land to South Cape Properties Limited.

4. CHANGES TO THE TOPOGRAPHY OF SANDY POINT

(a) Until the property came under the ownership of a Canadian company, Sandy Point Gravel Ltd, in 1959, it was a solid land mass, as evidenced by EXHIBIT VI. Between then and 1963 gravel was excavated, and the present harbour and canals were thereby formed. Photographs showing this development are attached as EXHIBIT VII.

(b) Thus it will be seen that the harbour was man-made, some thirty-one years ago, being formed out land that was then, and still is, non-Indian owned in fee simple.

5. SANDY POINT TIDELAND AND ENTRANCE LEASES

(a) The former leases for the tidelands and the entrance to the man-made harbour, are pertinent to the actions of the Lummi Indian Business Council and thus to this motion, and the background to them is as hereinafter related.

(b) In 1959 the Sandy Point Gravel Ltd, with permission from the Lummi Tribe, dredged a channel across the tidelands to enable the upland gravel deposits to be removed by barge from the basin which had been formed by the excavations, and shipped to Canada. As the excavating and dredging progressed, the inner canals were created, which automatically became, like the harbour, navigable waterways. The U.S. Coast Guard and the U.S. Army Corps of Engineers claim federal navigational servitude on the former tidelands under the entrance channel, regardless of ownership.

(c) To avoid costly litigation and Tribal harassment, the residents of Sandy Point decided to enter into two leases. In 1963 a 25 year lease for the tidelands was negotiated by the Sandy Point Improvement Company, initially for the sum of $2,000.00 per annum. In 1965 a 23 year lease was agreed with Bellingham Marine for the entrance channel for $500.00 per annum. Because of the small sums involved at first, the residents did not trouble to find out if the tidelands are, in reality, held in trust for the Lummi Tribe, which is open to doubt - see 3(b) above - or if they were owned by the upland owners or by the State.

(d) Nor did they initially investigate whether, even assuming the tidelands are held by the U.S. Government in trust for the Tribe, any lease was required, or if the public still has a right to use the tidelands and the harbour.

(e) These two leases expired on 31st March 1986, and were not renewed because of the extortionate demand by the Tribe for $269,000.00 per annum for a combined entrance and tideland lease, on which it refused to negotiate.

(f) Actuated by the unacceptably high cost of renewing the leases, residents then became aware that the harbour was, and had been since it's formation, subject to navigational servitude and under the control of the U.S. Coast Guard and Army Corps of Engineers, and was thus available for use by all and sundry. It is a useful harbour of refuge for small craft in time of bad weather. Thus no entrance lease had ever been required. The harbour and canals are, incidentally, widely used by Lummi fishing boats by amicable arrangements with the upland owners.

(g) As for the tidelands, since they are unattractive for recreation, the residents were content not to walk on them if to do so meant paying such an exorbitant sum, particularly since they believe they have a legal right to use them anyway. Furthermore,

a United States Supreme Court decision, Phillips Petroleum et al v Mississippi 484 U.S. 371, 49L. Ed 1089, 108 S. Ct. 791, 98 L. Ed 2d 877 (1988), ruled that the traditional basis of navigability as the determinate of public use is not the full intent of law - the Justices were of the opinion that public rights extended "to all lands under waters subject to the ebb and flow of the tides, regardless of navigability in fact".

6. REASONS FOR LUMMI OBJECTIONS TO SOUTH CAPE DEVELOPMENT

(a) By 1988 there had been some 600 lots developed at Sandy Point and at no time had the Tribe ever tried to interfere with Whatcom County's sole right to zoning and planning jurisdiction over such non-Indian owned land, on which taxes are paid to the County. This is evidenced by the letter from the Hearing Examiner to the Whatcom County Deputy Prosecuting Attorney of 8th June 1989, referring to Lummi objections to my development, in which he says that Whatcom County has :-

"never been issued a similar challenge before, to shoreline or zoning matters." EXHIBIT VIII.

(b) It eventually became quite clear that the Lummi were not going to be allowed by the Coast Guard and the Corps of Engineers to block the harbour entrance, as they had declared they would do, EXHIBIT IX, and that the lease of the tidelands, which the Tribe had posted as being out of bounds to non-Indians, was not going to be renewed.

(c) Faced with the loss of $269,000.00 "unearned" income, pressure was then put on me, both orally by Mr. G.I. James, LIBC General Manager, and Mr. Marc Russell, Land Manager, and in writing, to persuade the residents to renew the leases, as hereinafter particularized :-

(i) A letter dated 3rd July 1989, EXHIBIT X, was received from Mr. Marc Russell, LIBC Land Manager, in which he expounded at considerable length on the tidelands and entrance leases, and discussed the possibility of a separate tidelands lease for my property. He also refers to my application of 29th June 1989 for a Tribal Shoreline Permit, EXHIBIT XI. Not then being fully aware of the ins and outs of the situation, I had applied for such a permit as the result of a telephone conversation with Mr. Russell on 28th July 1989, in which he urged me to do so, so that I could complete my development. In the last paragraph of this letter of 3rd July 1989 he says, in reference to my application :-

"You can expect a detailed response within the next two weeks".

No such response was ever received, which leads me to the conclusion that no procedure then existed for the issue of such permits.

(ii) A copy of a letter dated 14th February 1990 from G.I. James, EXHIBIT XII, regarding the possibility of a separate lease for my lots, confirms this. In this letter, he says :-

"It is true that we will not approve any further developments at Sandy Point without establishing long term lease commitments for the affected Tidelands".

(iii) On or about 24th July 1992, the tribal attorney, Mr. Johnsen, said to Mrs. Margaret Curtis of Wilson Engineering, my engineers, that the resolution of the tidelands lease "will go a long way" to obtaining tribal approval of the subdivision. EXHIBIT XIII.

(iv) This was reiterated a year later, when a letter dated 24th March 1993 was received from Darrell Phare, Chairman, Lummi Planning Commission, in which he says :-

"The Sandy Point Tideland lease(s) are still unresolved. Thus, the Commission feels that it would be premature for the Lummi Nation to negotiate a lease agreement with you prior to resolving the other Sandy Point Tideland issues; leasing of Tidelands must be looked at in it's entirety".

He ends up by saying :-

"Until these water and Tidelands issues are addressed, the Lummi Planning Commission will not grant approval of this project". EXHIBIT XIV.

(v) An undated draft resolution of the LIBC of June or July 1993, EXHIBIT XV, denying the extension, refers to the entrance lease as follows :-

"In addition, the applicant has not made suitable arrangements for the use of tribal lands, including tidelands comprising the Sandy Point Channel. Therefore the application to extend sewer service to the South Cape area of Sandy Point is denied".

(d) It is thus beyond all shadow of doubt that, right up to the present day, the basic reason for the refusal to extend the sewer in order to block the development, is the unexpected loss of an income of $269,000.00 per annum, and that the Lummi must originally have hoped that by so doing I would be compelled to persuade the residents to renew the leases.

(e) A secondary aim is to block further non-Indian development, as stated in a document entitled "Water Resources Inventory Phase III" prepared by the LIBC in 1981, which states:-

"Another goal is to minimize growth of non-Indian land ownership and residence on the reservation. In theory, utility extensions can be used as a method of growth control."

(f) A Lummi publication, Squol Quol for 1987, states :-

"It is the goal of the LIBC to acquire all land sold out

of trust ...."

7. PRELIMINARY PLAT APPROVAL - 20TH MARCH 1992

The development received final preliminary plat approval by Whatcom County on 20th March 1992, several shoreline matters having been resolved to the satisfaction of the Department of Ecology beforehand.

8. EXTENSION APPROVED BY SEWER DISTRICT - 29TH APRIL 1993

On 29th April 1993, the board of the Sewer District approved the extension by a vote of two in favour, none against, with one abstention. EXHIBIT XVI.

9. SEWER DISTRICT APPROVAL OVERRULED BY THE LIBC - 14TH JULY 1993

(a) Two and a half months later, on 14th July 1993, I received a letter of the same date from Henry Cagey, Chairman, LIBC, EXHIBIT XVII, in which he says that the LIBC had met on 15th June 1993 and denied the Sewer Board approval of the sewer extension for the following three reasons :-

(i) The project had not been approved by the Lummi Planning Commission.

(ii) There was no assured supply of domestic water to the project which "complies with the Lummi Nation laws and policies."

(iii) The landform is "unstable and subject to ongoing erosion and flooding and is vulnerable to damage from seismic activity."

(b) These "reasons" were presumably put forward because it was realised that the position of linking the sewer extension to

the renewal of the leases was untenable, and that therefore other reasons for withholding the sewer had to be invented, to cloak the reality. All these "reasons", incidentally, which are zoning and planning matters, are baseless, as explained in EXHIBIT XVIII. Also, the term "Lummi Nation Laws and policies" in 9(a)(ii) hereinabove is incapable of precise interpretation and thus meaningless.

(c) I was invited by this letter to submit information for a hearing before the LIBC, but declined to do so because I know that Whatcom County is the sole planning and zoning authority and that the LIBC has no such powers over land owned by non-Indians in fee simple. To have attended would have been tantamount to acceptance of the non-existent authority of the LIBC over the land.

(d) I replied on 16th July 1993 to Mr. Cagey, pointing out that according to Clause 19 of the Consent Decree [and Section 14.02 of the Sewer Ordinance], the power of the LIBC is limited to reviewing a decision of the Sewer Board "for the purposes of ascertaining whether a fair hearing was held." EXHIBIT XIX.

(e) Furthermore, according to Section 14.02 of the Sewer Ordinance, if the LIBC decides to review a decision by the Sewer Board, such review "shall" take place within 30 calendar days, and failure to act within this period shall be deemed an affirmation of the Sewer Board's decision. Hence, even if the review by the LIBC did take place on 15th June 1993, a period of 47 days had elapsed since the Sewer Board's approval of the extension on 29th April 1993. Thus, the resolution passed by the LIBC on 15th June 1993 is invalid, by reason of its failure to comply with the provisions of Section 14.02 of the Sewer Ordinance. Accordingly, the original approval of the board of the Sewer District made on 29th April 1993 for the extension of the sewer to my property must stand.

(f) It is also interesting to note that the LIBC wrote to me on 14th July 1993, a month after the meeting allegedly held on 15th June 1993. As the LIBC has a duty to notify an applicant forthwith, it is likely that this meeting of the LIBC did not even take place until 14th July 1993. No explanation was offered by the LIBC for the delay.

(g) I also note that in the draft LIBC resolution referred to in 6(c)(iv) hereinabove, it is significant that the date of the Sewer Board meeting is erroneously given as 28th May 1993 instead of 29th April 1993. This is clearly an attempt on the part of the LIBC to cover up its procedural defects and bring the date of the review to within the 30 day period, so as to validate its overruling of the approval by the Sewer Board for the extension.

10. MEETING ARRANGED WITH MR. HENRY CAGEY, CHAIRMAN LIBC - 21ST AUGUST 1993

(a) I arranged for a one-to-one meeting with Henry Cagey, whom I had never met, for 13:00 on 21st August 1993, hoping that such a meeting face to face might be mutually beneficial. I reconfirmed the meeting that morning with a Miss Natalia Calhoun.

(b) On my arrival at the LIBC offices, I was first told that I was to meet a "Chief Oliver" instead, but was eventually ushered into a conference room where I found Mr. Johnsen, Tribal Attorney, Miss Harriet Beale, Water Resource Manager, Mr. Tim Hostetler, Resource Planning Specialist, and an Indian water engineer whose name I did not catch.

(c) I made it very plain that I was displeased at this subterfuge to get me to attend such a meeting, when the Tribe had no jurisdiction over my property, but agreed to let those present have my views on the situation on the understanding that it was all

off the record and no "meeting' was deemed to have taken place.

(d) On 26th July 1993 I wrote to Mr. Cagey regretting not having met him, a friendly and constructive letter which ended with a hope that we might meet for lunch or dinner. EXHIBIT XX.

11. REQUEST FOR GEOLOGICAL SURVEYS - 30TH JULY 1993

On or about 30th July 1993 I heard from my Engineer, Mrs. Margaret Curtis of Wilson Engineering, that Mr. Johnsen had asked her for the geological survey reports on the property, carried out for the Department of Ecology to confirm the stability of the land. I refused this request by letter dated 2nd August 1993, on the basis that such matters were the concern of the County and the State and not of the LIBC. EXHIBIT XXI.

12. FURTHER LETTER TO MR. CAGEY - 24TH AUGUST 1993

On 24th August 1993, having just obtained a copy of the Lummi Tribal Sewer and Water Ordinance, I wrote to Mr. Cagey in furtherance of my letter to him of 26th July 1993, pointing out that the position stated in his denial letter of 14th July 1993 was inconsistent with both the Consent Decree and the Sewer Ordinance. EXHIBIT XXII.

13. REPLY BY MR. CAGEY - 16TH SEPTEMBER 1993

(a) On 16th September 1993, EXHIBIT XXIII, Mr. Cagey replied to my letter of 26th July 1993 - but without mentioning my letter of 24th August 1993 - in which he raised a completely new "reason" for the denial of the sewer extension, namely, Section 1.18.4 of the Ordinance. This requires an extension proposal by the Sewer

Board to be "accompanied by an amendment to the Facilities Plan", which the Sewer Board had apparently failed to do.

(b) This omission on the part of the Sewer Board is just a procedural matter capable of being corrected very simply, if it is in fact necessary. However, I am very reliably informed by my engineer, Mrs. Curtis, that hitherto no such amendments to the Facilities Plan had been made in relation to earlier additions to the system.

(c) Again, if this was such an all important requirement, it is strange that it was not mentioned as one of the "reasons" for the denial of the extension in the letter of 14th July 1993 referred to in paragraph 9(a) hereinabove, instead of being suddenly brought up five months after the application for the extension was approved by the Sewer Board and three months after the Sewer Board decision was overruled by the LIBC.

(d) In any event, the extension had already been examined in great detail by the Sewer District, which had published an Engineering Report by the Sewer Engineer, Mr. Carl Reichardt, dated 18th April 1988 some five years earlier, EXHIBIT XXIV. The District Manager also wrote a very comprehensive and helpful letter addressed to me dated 10th January 1989, EXHIBIT XXV. It is thus abundantly clear that the Sewer District was expecting to extend the sewer to my property from 1988 onwards, and had no problems with so doing.

(e) Mr. Cagey also refers - yet again - in his letter of 16th September 1993 to Section 4.08 of the Sewer Ordinance, EXHIBIT XXVI. This has no bearing whatsoever on the issue, as it is only concerned with connections to "structures", i.e. houses, and not to extensions of the sewer line itself. It may be appropriate to invite the attention of this Honourable Court to the fact that this Section's provisions for compliance with applicable tribal zoning,

subdivision, and other tribal codes, means that the LIBC could frustrate the intentions of the Consent Decree as long as these provisions are in their present form, as the provisions can swallow the rule of non-discrimination. Thus, even though the extension was laid, the LIBC could still refuse to connect to the houses when they are built, even though they comply to Whatcom County's requirements.

14. REPLY TO MR. CAGEY - 21ST SEPTEMBER 1993

On 21st September 1993 I replied to Mr. Cagey's letter of 16th September 1993, pointing out the inadvisability of maintaining the present course of the LIBC. My letter was friendly in content and meant to be, as always, both sensible and helpful, EXHIBIT XXVII. However, I now began to realise that "negotiating" with the LIBC was pointless, as not only was the playing field not level, but the goal posts were always being moved - or even removed altogether.

15. LUMMI OFFER TO PURCHASE THE LAND - 25TH OCTOBER 1993

On 25th October 1993, Mr. Cagey, presumably by then realising that the leases were not going to be renewed, wrote to my former attorney seeking to purchase the land for a sum which would give me" a reasonable return" on my investment. I replied myself by letter on 3rd November 1993, offering the property at its sell-out value after development, less future construction costs. Predictably, the reply dated 30th November 1993 rejected the offer. I believe this was just another delaying tactic designed to make the "negotiations" drag on interminably, in the misguided hope that it would wear me down and make me give up the struggle. This would

have tied in with the LIBC's stated aim of purchasing non-Indian property on the reservation and returning it into trust, had it not been unlikely that funds would be available, given the parlous state of the Tribe's finances, for such a purchase.

16. WATER SUPPLIES AT SANDY POINT AS AN EXCUSE FOR DENIAL OF SEWER SERVICE

(a) The Sandy Point Improvement Company [SPIC] supplies water from it's own wells to some 600 non-Indian homes and over 50 Indian customers.

(b) SPIC acknowledges that it has a contractual liability to supply water to my South Cape property.

(c) SPIC is certain that it has sufficient water to meet all existing and future requirements at Sandy Point and that the Lummi claims that withdrawals from, SPIC's aquifer are depleting, or affecting the quality, of reservation water supplies are unfounded.

(d) A building moratorium has been imposed at Sandy Point until the water situation has been resolved.

(e) In the letter from the LIBC of 14th February 1990, previously referred to in paragraph 6(d) hereinabove, it is stated that :-

"Your plan to develop lots at South Cape cannot be approved unless you develop an alternative plan to supply water to those lots that does not rely on reservation ground water."

(f) In a letter dated 4th April 1991 from the Director of the Department of Ecology to the President of the Lummi Property Owners Association, it is said that :- "Our opinion is that sewer service should not be withheld solely on the basis of invalid water rights" EXHIBIT XXVIII.

(g) To short circuit the arguments over well and river water sources, and solve this problem, I proposed to the Department of Ecology that I should install a Reverse Osmosis system, which takes seawater and turns it into fresh water of purer quality than any well or river water. It is very widely used in the United States, particularly in Florida and California, as well as all over the world and in virtually every ship afloat. [For example, one R.O. installation completed in 1992 provides 6.7 million gallons per day for the municipality of Santa Barbara, California].

(h) Without the slightest possibility of contradiction, it can be said that an R.O. system, taking in seawater and discharging it at a slightly higher salinity, does no harm whatsoever to the most fragile ecosystem, even to delicate coral beds, as is well known wherever such systems are in use. EXHIBIT XXIX.

(i) Predictably, by letter dated 15th September 1993, the Lummi protested to DOE my application on ecological grounds - as a matter of course - instead of welcoming it as an eminently sensible solution to the alleged water problem, as would normally have been expected. This alone proves the fact that one of the aims of the Lummi is simply to block the development, for which any "reason" will do, however bizarre and inapplicable it may be. EXHIBIT XXX.

(j) In the letter of protest referred to in (i) above, it is noted that LIBC claims that :-

"Marine waters and the tidelands of the Reservation are the property of the lummi Nation".

This would seem to be in direct contradiction to the statement made by the Solicitor General of the United States in United States v Winans, 198 U.S. 371, 49 L. Ed 1089, 25 S.Ct. 662 (1905), in which he said :-

"The States control navigable waters, including the soil under them and the fisheries within their limits, subject only to the rights of the General Government under the Constitution in the regulation of commerce".

The LIBC claim also seems to fail to recognise that any tidelands which may be attached to the reservation are owned by he Federal Government in trust for the Tribe and not owned by the Tribe itself.

(k) The Department of Ecology, by letter dated 7th June 1994, gave approval to proceed with the development and install an R.O system without procuring a water right.

17. SEWER EXTENSION NOT DEPENDANT ON WATER SUPPLY

(a) As has been seen in 16(e) hereinabove, one of the purported reasons given by the LIBC for not approving the sewer extension is an alleged lack of water.

(b) Even if there was in truth no water available, there is no reason to deny the sewer extension, as it could be laid "dry" and kept capped.

(c) However, in this instance, when it is laid and connected, the extension will be able to serve the existing 5 homes on South Cape, which presently use septic tanks, which do not form part of my development, and which are, of course, supplied with water by SPIC already.

18. LUMMI TRIBAL CODES-CHAPTER 16

(a) Chapter 16 of the Lummi Tribal Codes, attached herewith, with enclosures, as EXHIBIT XXXI, covers the operation and regulation of the Sewer District and Sewer Board, in as much detail

as the Lummi Tribal Sewer and Water District Ordinance.

(b) However, as will be seen, it does not contain any of the provisions which have been incorporated into the Sewer Ordinance in accordance with the requirement of the Consent Decree.

(c) From the enclosures, EXHIBIT XXXII, it is stated unequivocally by the LIBC that this is :-

"the code book the Lummi is currently operating under".

(d) Since this code presumably takes precedence over the Sewer Ordinance, it would appear that this is yet another cause for concern.

19. WIDESPREAD CONCERN OVER RACIAL DISCRIMINATION PRACTISED BY THE LIBC

That I am not alone in my belief that the LIBC is practising racial discrimination is evidenced by the fact that a number of persons, namely :-

(a) Mrs. Marlene Dawson - Whatcom County Councillor

(b) Mrs. Linnea Smith - Former Sewer Board Member

(c) Mrs. Kistine Heintz - Sewer Board Member

(d) Mr. Jeff McKay - Sewer Board Member

have all felt constrained to write to this honourable Court regarding violations of the Consent Decree. There are, of course, many others, whom I know, who feel just as strongly, but who have not put pen to paper to voice their concerns.

20. FUNDING OF THE SEWER BY GRANTS FROM E.P.A. AND DOE

(a) In 1978, the EPA and DOE provided $4,636,658.00 and $927,323.00 respectively to fund the sewage collection and treatment facilities for the Lummi Indian Tribe. A further

$618,221.00 was provided by HUD, IAS, and Loan Funds, making $6,182,211.00 in total.

(b) For the Federal Grant of $4,636,658.00, the EPA required LIBC to sign an "Assurance of Compliance for Title VI of the Civil Rights Act of 1964 and Section 13 of the FWPCA Amendments of 1972." This was duly signed by William Jones, Vice Chairman for the Chairman, LIBC, on 20th April 1978. A copy of this document is provided herewith as EXHIBIT XXXIII.

(c) It will be seen from a copy of 40 CFR Ch. 1(7-1-92 Edition) herewith as EXHIBIT XXXIV, that there are explicit prohibitions on discrimination, on the basis of race, color, national origin or sex, and any person who believes that he or she has been discriminated against may complain to the EPA. The EPA will then instruct the Office of Civil Rights, which will try to settle the complaint. As a last resort, the OCR can refer the violation to the Department of Justice.

(d) The Department of Ecology do not have a non-discrimination agreement, but non-discrimination by a recipient of a grant is mandatory in regard to any grants made by DOE.

21. LAND OWNED BY NON-INDIANS NOT SUBJECT TO INDIAN REGULATION

(a) When land is sold by an Indian to a non-Indian in fee simple, it comes under the jurisdiction of the County, to which property taxes are paid. In this regard, a letter from the Bureau of Indian Affairs dated 6th August 1990 states that :-

"... the United States has no further interest in the property and it becomes taxable and subject to the laws of the State of Washington the same as any other non-restricted land in

(b) There have been a number of recent court cases confirming that Indians do not have any regulatory control over non-Indian owned land on a reservation. These Court cases are :-

(i) MONTANA V UNITED STATES 450 US 544 (1981);

(ii) BRENDALE V CONFEDERATED TRIBES AND BANDS OF THE YAKIMA NATION 492 US 408, 109 S. Ct. 2994, 1090 L. Ed 2d 343, (1989);

(iii) SOUTH DAKOTA V BOURLAND 113 S. Ct. 2309, 61 US LW 4632 (1993).

The essence of the findings in the above case is that when land is transferred to non-Indians, "the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control", Id at 4636.

(e) That this state of affairs is recognised by Whatcom County is shown by an opinion given to the County in 1990 by Robert A. Carmichael of the Prosecuting Attorney's Office, viz :-

"Based on the recent United States Supreme Court case of Brendale v Confederated Bands of the Yakima Nation et al, the characteristics of the Lummi reservation and the extent of fee ownership thereon, it is the opinion of the Prosecutor's Office that Whatcom County has zoning authority over non-trust land on the reservation".

This opinion was given before the Bourland decision, which confirmed and reinforced the Brendale findings.

22. CONCLUSIONS

1. From the foregoing, it will be evident that the LIBC is seeking to assert control over my property and block the development by the denial of sewer service, which is :-

(a) Racial discrimination in violation of the Consent Decree.

(b) Racial discrimination in violation of the undertaking given to the Environmental Protection Agency.

(c) Racial discrimination in violation of the known requirements of the State of Washington in relation to the grant from DOE.

(d) Racial discrimination in violation of my civil rights as a landowner and taxpayer.

(e) A challenge to Whatcom County as the sole authority for zoning and planning jurisdiction over non-Indian land owned in fee simple, since all the stated objections are zoning and planning issues.

(f) In complete disregard of the decisions reached in the Montana, Brendale and Bourland cases regarding jurisdiction over non-Indian owned land.

(g) In complete disregard to the findings in Phillips Petroleum and Winans regarding public access to tidelands.

2. As the result of the unlawful acts of the LIBC in denying the sewer extension as hereinabove related, I am unable to complete my development, despite it having been approved by the State and the County.

Consulate General of the)
United States of America) SS:
at Hong Kong)

Sworn by LT COMMANDER P.J.)
)
MURRAY-JONES at the 21st day)
)
of October 1994)

Before me,

SANTIAGO BUSA JR.
AMERICAN CONSUL

This document consists of 21 pages, each Initialed by the affiant(s):

IN THE US DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
CIVIL ACTION NO. C79 - 682R

BETWEEN

SOUTH CAPE PROPERTIES LIMITED

MOVANT

AND

THE LUMMI INDIAN TRIBE

PLAINTIFF

THE LUMMI INDIAN BUSINESS
COUNCIL CROSS-DEFENDANT

****

AFFIDAVIT OF LT COMMANDER
P.J. MURRAY-JONES

****

Bernard J. Gamache
7820 Ashue Road
Wapato, Washington 98951
(509) 865-56020
17 September 1996

Honorable John McClain
Chairman, Committee on Indian Affairs
U.S. Senate
838 Hart Senate Office Building
Washington D.C. 20510
Page 1 of 4

Honorable Chairman, members of the Committee;

My name is Bernard Gamache. I am a parent and farm manager from the Yakama Indian Reservation, Yakima County, Washington State. This has been home for my family for three generations and the location of our successful family farming operation.

Thank you for this opportunity to present testimony. You need to be aware of the true situation that exists on the Yakama Indian reservation.

I must assume that most of you have been or are parents with children. Do you remember that last "goodbye" that you said to your child? I do. I can picture that moment.

It was October 25, 1994, 6:45 AM. Jered and Andy, two of my sons, were ready to leave the house on their way to school that day; My wife and I were also preparing to leave. We were to deliver Father-in-law to Seattle for his heart surgery schedueled early the next morning.

Andy was the first to walk out of the house. "Goodbye" he said, "See you when you get back". Then Jered. "Goodbye", "See you in Yakima thursday after your meeting. I will meet you there at the office". I can never forget that moment.

My wife and I also left, the house stocked with prepared meals for the kids while we tended to Father-in-law during his operation. We had not traveled but three quarters of a mile when we observed a Yakama Tribal Police vehicle pass a stopped school bus at a high rate of speed, no lights and no siren. We said to each other, "Some day They (the Tribal police) are going to kill Someone!" Reckless driving by the Tribal Police was seen regularly on that road.

Fifteen hours later, Someone was killed. That Someone was our son Jered, age eighteen years and eleven days. Andy age 16; beaten to the point of near death by a public servant.

A Yakama Tribal Police officer, Tiffany Martin, chose to drive her Police vehicle through an intersection against a red light. Her estimated minimum speed at point of impact was 68 MPH. Jered's speed was calculated to be 17 MPH as he crossed the roadway; his vision blocked by a nine passenger van on his left.

Why did this happen? Sovereign Immunity is the underlying problem. Would this happen again? Yes! It is only a matter of time. Sovereign Immunity is the underlying problem. Even though the actions of officer Martin were prohibited by the Tribes own Law and Order Code, the collision still occured. Neither the Tribal Police officers nor the Tribe need have concern about the safety of the general public for they are protected by Sovereign Immunity. The message sent by the Tribal Council to their police is that there will be business as usual. There is no need to change our ways. We have the right to police and govern.

Jered was not the first to be killed. Someone else is going to die at the hands of the Tribal Police for no other reason than they insist on the right to act as they wish. After all, they are a Sovereign Nation.

Please hear my plea for change. I have delivered in person a formal complaint to BIA secretary Bruce Babbitt. That letter was forwarded to the office of Deputy Commissioner Hilda Manual, Indian Affairs. (EXHIBIT A)

The Government response to my complaint, a complaint from the public is one of disagreement and disbelief. I have explained the unsafe conditions here on the Yakama Reservation, that public funds should be withdrawn for police and jail operations under the PL93-638 contracts. Sovereign Immunity prevented the necessary leverage to cause change and the removal of contract funds would probably provide incentive for the needed improvement.

Deputy Commissioner Manual's response to my letter stated that it is important to realize that Tribes are semi-sovereign entities who govern themselves. This is based on longstanding constitutional, legal and political principles. I understand this to mean that Non-Indians must be legal and political sacrifices. I didn't raise my children to be sacrificed for a political concept.

Commissioner Manual goes on to say that " We cannot agree with your assertion that the entire Yakama Tribal Police Department is unacceptable to the community and that the 638 contract with the Tribe should cease.

The entire Tribal Police department is unacceptable because they have very little knowledge of State Laws (EXHIBIT B) and because they don't recognize the States safety standards nor do they follow their own. There's a problem with interpretation. Public Safety has a much different meaning to the Tribe. A concept of "The end justifys the means", is quite acceptable to the Tribal Police and that is demonstrated frequently when they respond to calls. (EXHIBIT C)

This reservation community is home to 27,000 residents; 8,600 are enrolled Yakama's. Sovereign Immunity causes a shift in liability. Local and State governments pick up the load as well as business and the local population. Mutual Aid programs between the County Sheriff or any law enforcement agency won't work because those agencies carry 100% of the liability. Members of this community have petitioned the county sheriff to cease attempts at such a Mutual Aid agreement until the Tribe is answerable to elected State officials. (EXHIBIT D) Sovereign Immunity prevents incentive for change. Sovereign Immunity must be waived.

Commissioner Manual states that "We share your concern for fair and equal law enforcement services for any person and if this doesn't occur, then the processes are in place to rectify matters, including citizen complaints to government officials and through civil and criminal forums. Sovereign Immunity blocks civil and criminal forums against the Tribe.

The Deputy Commissioner also states that "We cannot and will not terminate our contract with the Yakama Tribe based solely on what you have described". My letter was a citizen complaint to a government official and one of the processes in place to rectify matters, but the commissioner won't act based solely on what I have described. How many bodies does She want to see? People are hesitant to speak out for fear of retaliation from the Tribe. However, they will speak if the need be to accomplish positive results. (EXHIBIT E)

My personal discovery while working with this case for Jered reveals a circular pattern of "Pass the Buck". Neither the Tribe nor the BIA will accept responsibility.

Telling me that the Tribes are semi-sovereign entities who govern themselves is not going to prevent loss of life nor improve public safety in the Yakama Reservation Community. This is why I present this testimony.

Sovereign Immunity must be waived to protect the people of the Yakama Reservation Community. I am speaking of all people, not just Non-Indians. Jered's death and Andy's injury was not just an accident. A quote from the book "A Grace Disguised" by author Gerald L. Sittser sums up the true situation.

"These losses are not random, like a freak accident or the occurance of a natural disaster. They are the consequences of the malicious, foolish, or incompetent behavior of people who could have or should have behaved differently." Sittser describes the human feeling and frustration of injustice. "Most victims of wrongdoing want justice to prevail after their loss... They know intuitively that there is a moral order in the Universe. The violation of that order demands justice. Without it the moral order itself is undermined. Simple rights and wrongs are made irrelevant, and people are given license to do whatever they want. Anything becomes possible and permissible."

That, Honorable chairman and members of the commission, is the result of Sovereign Immunity on the Yakama Reservation Community. "Anything becomes possible and permissible." That includes activities that took my son Jered's life and caused Andy's injuries.

Sovereign Immunity gives the Yakama Nation Council the license to do what ever they want. Only until legislation is created to deny permission will the Tribe cease to use Sovereign Immunity as a sheild agaist wrongdoing and start acting responsibly to the community. To continue with Quasi-government organizations that are granted Sovereign Immunity, will only cause an increase in struggle and strife. The absence of Sovereign Immunity will not devastate the individual lives of the Yakama Indians. There are many individuals who have rejected the coverage of Immunity and are prospering.

No one, either resident or visitor to the Yakama Indian Reservation, should have to live with the hurt of that "last goodbye". Dissolve Sovereign Immunity. That is my plea.

Bernard J. Gamache

Bernard J. Gamache
Resident, Yakama Indian Reservation

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO

MAR - 4 1996

Law Enforcement
BCCO 5048

Mr. Bernard J. Gamache
6371 Fort Road
Toppenish, WA 98951

Dear Mr. Gamache:

Your letter dated January 29, 1996, to Secretary Babbitt has been forwarded to this office for response. First, please let me express our sincere sympathy for the death of your son, Jered. By all accounts he was an outstanding young man.

In your letter, you outline numerous concerns involving the Yakama Nation and its self-government. It is important to realize that tribes are semi-sovereign entities who govern themselves. This is based upon longstanding constitutional, legal and political principles. The administration of law enforcement is a very important part of any government, and we are confident that the Yakama Tribal Government is capable and willing to face its legal challenges.

We cannot agree with your assertion that the entire Yakama Tribal Police Department is unacceptable to the community, and that the 638 contract the Federal government has with the tribe should cease. If you believe the tribal police are doing wrong, we urge that appropriate tribal officials be contacted. You may also report suspected police wrongdoing to the Federal Bureau of Investigation. The FBI is empowered to look into civil rights violations involving any police department.

We have checked with Mr. Jeff Sullivan, Deputy County Attorney, Yakima County, and he has informed us that his office has not made a final prosecutive determination on the matter concerning the death of your son. It would be inappropriate for us to discuss the specifics of the case.

We share your concern for fair and equal law enforcement services for any person. If this does not occur, then processes are in place to rectify matters, including citizen complaints to government officials, and through civil and criminal forums. This includes the Yakama Tribe.

We cannot and will not terminate our contract with the Yakama Tribe based solely on what you have described. By copy of this correspondence, we are requesting that our Portland Area Director share your concerns with tribal officials.

Thank you for bringing your concerns to our attention.

Sincerely,

Hilda A Manuel

Deputy Commissioner of Indian Affairs

BERNARD J. GAMACHE
6371 Fort Road
Toppenish, Wa, 98951
29 January 1996
509/ 865-6422
FAX 509/ 865-6423

Hilda A. Manuel
Deputy Commissioner
Bureau of Indian Affairs
Department of the Interior
1849 "C" Street
Washington, D.C. 20240

Re: Grass roots complaint from resident of
Yakama Indian Reservation

TO: Hilda A. Manuel

Dear Commissioner,

I am compelled to write this communication to you concerning the inappropriate activities of the Yakama Indian Nation, particularly the performance of their Public Safety Division.

My name is BERNARD J. GAMACHE. I live and work within the boundaries of the Yakama Indian Reservation, located in the State of Washington, Yakima county. Along with my brothers, we operate a family farm that first started in 1913. This has been our way of life for three generations now with the fourth generation nearing completion of their college requirements in Agri-business.

We farm over 1000 acres of land on the reservation, part of which we own and the rest we lease through the Bureau of Indian Affairs and the Yakama Tribe. The crops that we raise are Hops, Apples and Grapes all of which are labor intensive. We are fortunate to be farming in this area and we are pleased to be successful enough to pay taxes in support of this country of the United States.

There are however, some serious problems here on the reservation, problems of flesh and blood, life and death. Problems brought on by distant regulations governing the activities of Indian Non-Indian interaction, which is the subject of this letter.

My wife and I have three children, Darren age 21, Jered age 19, and Andrew age 17. Two are living, one is dead.

On October 25, 1994 10:00 PM, Jered was killed and Andy received near fatal injuries while returning home from a school function. A Yakama Tribal Police officer ran a red light at the intersection of US Highway 97 and South Wapato Road and crashed her car into my sons pickup. (EXHIBIT "A1-A7") An investigation concluded that Jereds speed was 17 MPH as he crossed the highway and the speed of Tiffany Martin, the tribal police officer, was a minimum of 68 MPH. The remaining details of the incident are irrelevant at this point of discussion with the main focus on the double set of standards being allowed by "Self Determination" and the "Soverignty" Issue.

There are laws in the State of Washington to prevent such senseless tragedies, laws that were paid for by the blood of others before us. The Yakama's tribal government and their tribal police choose not to abide by those laws nor do they choose to follow their own Law and Order Code. (EXHIBIT "B") Section 50.03.13: pgs 159 & 160 clearly outline the operational proceedure for an emergency vehicle yet the record shows that those rules were blatantly disregarded.

It is also apparent that with little to no legal recourse between the Tribe and Non-Indian citizens and the jurisdictional differences between Indian and Non-Indian law enforcement, the pattern of insensitivety toward Public Safety will continue. There is absolutely no incentive for progressive change by the Yakama Indian Nation. They simply wait for the problem to go away. Incidently, the location of this mentioned tragedy occured within a special Safety Emphasis area established in 1993 and named "The US Highway 97 Corridor Safety Zone".

My rights, the rights of all the Non-Indians living on the reservation under the Fifth and Fourteenth Ammendment of the US Constitution have been neutralized. The 1990 Bureau of the Census counts the population on the Yakama Indian Reservation to be 27,522 and 146 on Yakama Trust lands. Approximately 8600 of those are enrolled Yakamas. (EXHIBIT "C")

Activities considered to be a Public Danger cannot be addressed when Soverignty is frequently used as a legal defense shield. (EXHIBIT "D1-D5") This is more than a jurisdictional problem, it is a social problem.

Since the opening of our business office in 1990, on the Fort Road, six miles west of Toppenish, we have observed many instances of non-professional activities and total disregard for Public Safety just from that vantage point. There are other citizens here on the reservation who will bear witness to these activities and we have all felt the same about it. That

"Something needs to be done; those Tribal Police are out of control; they are going to kill someone some day."

My wife and I repeated the same comment, "Someone is going to get killed" when we saw a tribal police car carry out a high speed pass around a stopped school bus. I remember that day well. It was October 25, 1994 7:30 AM. Fifteen hours later that someone, our son Jered was dead; Andrew nearly killed. The Yakama Indian Nation and their Police had defiled Public Safety. They are exacting their retardation policies on the reservation population and have become a public danger.

My family and this community have paid a tremendous price for this deficiency in Federal and Indian policy. I am committed to find change. This experiment of Self Determination should not be carried out at the expense of human life. Our building of a family legacy has been depredated.

My three sons are the investment that my wife and I are preparing to return to society. Two to replace us and one to increase our numbers. That act of October 25, 1994 has deprived us and this community of our investment property, investment opportunity and personal property.

The Treaty of June 9 1855 between the United States and the confederate tribes of the Yakama Indian Nation has provided a proceedure for grievances under Article VIII which states... that the confederate tribes and bands of Indians "promise to be friendly with all citizens thereof and pledge themselves to committ no depredations upon the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proved before the Agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of the annuities."

I am prepared to prove before the Agent those depredations against my family property, the economic and community impact of which is currently being calculated. Congress has obligated the Agent through the Treaty of 1855 to intervene by making the tribe financially accountable for some limited activities.

In addition, it is obvious that the Yakama Indian Nation Tribal Police have operated in violation of the PL 93-638 contract which allows for Police & Jail operations. (EXHIBIT "E") I can say that these activities have resulted in the loss of life.

Simply and fundamentally they are not acceptable in this community for neither Indian nor non-Indian.

Even though PL 93-638 is considered a mature contract, I urgently and with emergency request that the funding be deleted from the Yakama Tribe and channeled to the Yakima County Sheriff to provide law enforcement services on the reservation for all 27,668 residents and visitors too.

I also would like to state that my interest in public safety on this reservation is driven by all that has happened and could possibly happen if conditions are allowed to continue. I am willing to assist with the task of correcting the double standards of law that currently exist and am serious about wanting to improve the quality of life for all who reside here.

Please consider the seriousness of this issue and the obligation of the Yakama Indian Nation as partners in a realistic modern society by allowing this avenue of Article VIII for redress of my grievances.

Sincerely,

Bernard J. Gamache

BERNARD J. GAMACHE

Father of: JERED M. GAMACHE (Deceased)
Father of: ANDREW X. GAMACHE

cc: Bruce Babbit, Secretary of the Interior
Hilda A. Manuel, Bureau of Indian Affairs

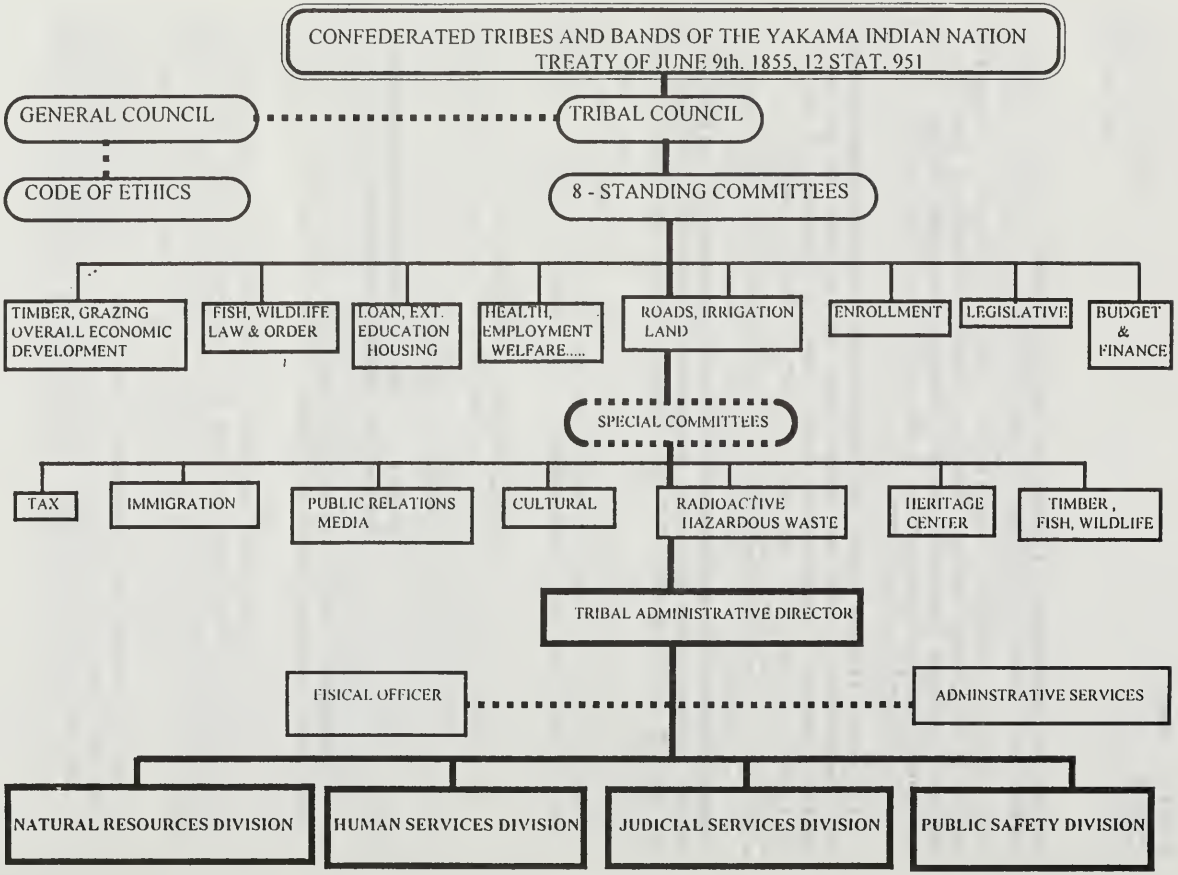
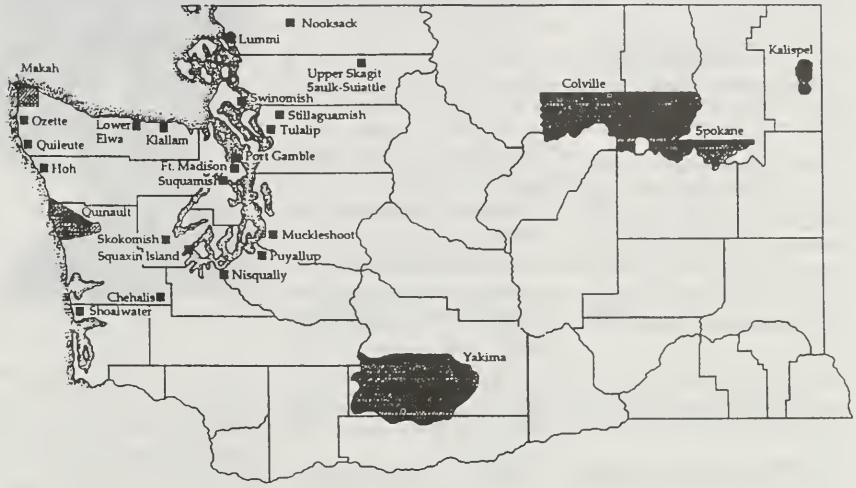

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA INDIAN NATION
TREATY OF JUNE 9th, 1855, 12 STAT. 951
GENERAL COUNCIL
TRIBAL COUNCIL
CODE OF ETHICS
8 - STANDING COMMITTEES
TIMBER, GRAZING OVERALL ECONOMIC DEVELOPMENT
FISH, WILDLIFE LAW & ORDER
LOAN, EXT. EDUCATION HOUSING
HEALTH, EMPLOYMENT WELFARE.....
ROADS, IRRIGATION LAND
ENROLLMENT
LEGISLATIVE
BUDGET & FINANCE
SPECIAL COMMITTEES
TAX
IMMIGRATION
PUBLIC RELATIONS MEDIA
CULTURAL
RADIOACTIVE HAZARDOUS WASTE
HERITAGE CENTER
TIMBER, FISH, WILDLIFE
TRIBAL ADMINISTRATIVE DIRECTOR
FISICAL OFFICER
ADMINSTRATIVE SERVICES
NATURAL RESOURCES DIVISION
HUMAN SERVICES DIVISION
JUDICIAL SERVICES DIVISION
PUBLIC SAFETY DIVISION

EXHIBIT A1 JERED M. GAMACHE STUDENT/MUSICIAN

EXHIBIT A2 ANDREW X. GAMACHE STUDENT/PILOT

WASHINGTON STATE INDIAN RESERVATIONS



POPULATION ON INDIAN RESERVATIONS

	1990 Census*
Chehalis Reservation	491
Colville Reservation	6,957
Hoh Reservation	96
Jamestown Klallam Reservation	8
Jamestown Klallam Trust Lands	14
Kalispel Reservation	100
Lower Elwha Reservation	137
Lower Elwha Trust Lands	0
Lummi Reservation	3,147
Makah Reservation	1,214
Muckleshoot Reservation	3,841
Muckleshoot Trust Lands	0
Nisqually Reservation	578
Nooksack Reservation	19
Nooksack Trust Lands	537
Ozette Reservation	12
Port Gamble Reservation	552
Port Madison Reservation	4,834
Puyallup Reservation	32,392
Puyallup Trust Lands	14
Quileute Reservation	381
Quinault Reservation	1,216
Sauk-Suiattle Reservation	124
Shoalwater Reservation	131
Skokomish Reservation	614
Spokane Reservation	1,502
Squaxin Island Reservation	0
Squaxin Island Trust Lands	157
Stillaguamish Reservation	113
Swinomish Reservation	2,282
Tulalip Reservation	7,103
Upper Skagit Reservation	180
Yakima Reservation	27,522
Yakima Trust Lands	146

* 1990 Census population counts are subject to possible correction for undercount or overcount.

Source: Bureau of the Census, US Department of Commerce

EXHIBIT C

Wapato High School mourns tragic losses

By Jamie Macke, Andrea Redman and Marah Traub

Over the past few months, students and teachers at Wapato High School have suffered from two tragic losses. In the course of one month, two WA-HI seniors, Jered M. Gamache and Ines Lora, Junior, have passed away.

Both Lora and Gamache were very involved at Wapato High School. Lora's main emphasis at WA-HI was with the Indian Club. He was vice president his sophomore year and took an active part in the club all four years. He traveled to San Diego, California, to perform as an Indian Club Dancer. He helped organize Native American Day at WHS, held on Sept. 30.

"This was his last year in Indian Club and he wanted it to be the best," commented senior Jamie Johnson, Indian Club president. "He wanted to do lots of things."

According to Johnson, Lora tried to get people to work with him. He will definitely be missed because he was always counted on to get things done. "Whenever they needed to get something done they would call him," Johnson stated. "They knew he would get it done."

Gamache was extremely active in the Fine Arts Department at WA-HI. He played tenor saxophone in the concert, pep and marching bands and was also in the award-winning Jazz Band. He helped to design this year's Homecoming halftime show.

Ines "Junior" Lora

"Besides his exceptional musicianship," Pilgrim said, "Jered also had an extremely good sense of humor, a fast wit and the ability to make people around him comfortable and happy. He was willing to take creative risks. Because of that he really did live his life to the fullest."

Gamache was involved in the Drama Department and was a Three Star Thespian. He became head of the Technical Crew his sophomore year and ran lights on almost all school-related productions. Although he was usually involved in back stage production, he stepped on stage his sophomore year as Master of Ceremonies with Kevin Fulker at the Variety Show. His most memorable acting role was that of Orin Scrivello, the demented dentist, in last year's musical, "Little Shop of Horrors."

"Without Jered, a lot of the productions would not have been possible," Drama Advisor Dana Lemieux stated.

Gamache was also known as "Commercial King" during his sophomore and junior years. Gamache and many others designed commercials for major school events such as the Bean Feed, the Senior Class Taco Feed, and the Canned Food Drive. They used humor and crazy actions to promote what they advertised, and the commercials became a sort of tradition at WA-HI.

Gamache lettered in golf two years. He also participated in Lettermens Club, National Honor Society, Drama Club and Science Club.

Both Gamache and Lora were dedicated to activities outside of school. Gamache was very involved in music of all kinds. He was a part of the Yakima Valley Community College Jazz Band, where he played tenor saxophone. He also traveled to Port Townsend for a summer jazz session.

"Jered was in every group I've ever conducted from concert band, jazz band and the pit orchestra for "Little Shop of Horrors" to playing in the YVCC jazz band," Pilgrim stated. "I saw him a lot and I really miss him and all he added."

Jered M. Gamache

Lora was very involved in the All Tribes Christian Church and many Native American youth programs. He was chairman of the Yakama Nation Youth Council. This led him to attend a conference in Minnesota and take part in the Listen Together Program. Lora was also involved in Unity, a drug and alcohol awareness program for Native American youth that encouraged them to say no to drugs and alcohol. He was chairman of the Residential Youth Council, which tried to involve youth who lived in the Indian Project Housing in positive activities and encouraged them to say "no" to drugs. Lora also organized a food drive for Thanksgiving and Christmas. Lora told Johnson his reason for doing this was because it felt good to do something for other people.

Lora was described as a "competitive leader." He competed very hard for leadership positions, but he had no hard feelings if he didn't get them. "I thought he would leave his mark, that he would leave something behind," acknowledged Johnson, "but I will always remember his smile."

Gamache and Lora added much to life at WA-HI with their personal qualities and their involvement. Both will be missed greatly by all who knew them

EXHIBIT A7

SECTION 50.03.11: PERSONS WORKING ON HIGHWAY RIGHT-OF-WAY - EXCEPTIONS

Unless specifically made applicable, the provisions of the chapter except those contained in Section 50.09.01 through Section 50.09.13 shall not apply to persons, motor vehicles and other equipment while engaged in work within the right-of-way of any highway or roadway but shall apply to such persons and vehicles when traveling to or from such work.

SECTION 50.03.13: AUTHORIZED EMERGENCY VEHICLES

(1) The driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual suspected violator of the law or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(2) The driver of an authorized emergency vehicle may:

(a) Park or stand, irrespective of the provisions of this chapter;

(b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation:

(c) Exceed the maximum speed limits so long as he does not endanger life or property;

(d) Disregard regulations governing direction of movement or turning in specified directions.

(3) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of visual signals except that:

(a) An authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from in front of the vehicle;

(b) Authorized emergency vehicles shall use audible signals when necessary to warn others of the emergency nature of the situation but in no case shall they be required to use audible signals while parked or standing.

(4) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

CHAPTER 50.05 TRAFFIC SIGNS, SIGNALS AND MARKINGS

SECTION 50.05.01: OBEDIENCE TO AND REQUIRED TRAFFIC-CONTROL DEVICES

(1) The driver of any vehicle and every pedestrian shall obey the instructions of any official traffic-control device applicable thereto placed in accordance with the provisions of this Title, unless otherwise directed by a traffic or police officer, subject to the exception granted the driver of an authorized emergency vehicle in this chapter.

(2) No provisions of this chapter for which signs are required shall be enforced against an alleged violator if at the time and place of the alleged violation an offical sign is not in proper positior and sufficiently legible or visible to be seen by an ordinarily observant person. Whenever a particular section does not state that signs are required, such section shall be effective even though no signs are erected or in place.

(3) Whenever official traffic-control devices are placed in position approximately conforming to the requirements of this Title, such devices shall be presumed to have been so placed by the official act or direction of lawful authority, unless the contrary shall be established by competent evidence.

(4) Any official traffic-control device placed pursuant to the provisions of this Title and purporting to conform to the lawful requirement pertaining to such devices shall be presumed to comply with the requirement of this Title, unless the contrary shall be established by competent evidence.

SECTION 50.05.03: TRAFFIC-CONTROL SIGNAL LEGEND

Whenever traffic is controlled by traffic-control signals exhibiting different colored lights, or colored lighted arrows, successively one

IN REPLY REFER TO:

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
YAKIMA AGENCY
P. O. BOX 632
TOPPENISH, WA 98948

October 28, 1988

Mr. Leo Aleck, Secretary
General Council
Wanity Drive
Toppenish, WA 98948

Dear Mr. Aleck:

In response to your questions October 21, 1988 concerning employee responsibilities and the distribution of funds in the P.L. 93-638 Contract for Police and Jail Operations the following is provided:

1. All P.L. 93-638 Contract employees are tribal employees.
2. All contract employees are subject to the tribe's policies and procedures (meaning they are under the tribe's personnel manual). There is one exception to this general rule and that is that police personnel are afforded the same rights and protections as BIA police personnel when adverse actions are involved.
3. There are both tribal and BIA funds in the police and jail program.
4. The Chief of Police position is one that is funded with contract funds.
5. A copy of the position description for the Chief of Police can be obtained from Tribal Personnel.

I hope I have answered all of your questions. If you still have need of greater detailed information I would suggest you contact the Tribal Council Chairman. (When we contract, we contract with the Tribal Council and refer specific requests to the council.)

Sincerely,

Edward R. Lyons
Administrative Officer

EXHIBIT E

TO: Honerable John McCain 60918.3
Chairman Indian Affairs Committee

FROM: Rene E. Gamache
AMBROSE GAMACHE FARMS, INC.
6970 Fort Road
Wapato, WA 98951

DATE: September 18, 1996

RE: Anecdotal Testimony Pertaining to Yakama Indian Nation Tribal Police

I work for a family farm located within the boundaries of the Yakama Indian Nation. This testimony pertains to conduct by a Yakama Nation Police Officer, who I identify as "Sam".

Our company employs Jose Garcia. Jose is our lead irrigator. He is dependable; he is reliable. Because of our support, he acquired a current, valid Washington State Driver's Liscense. His new, current, valid Washington State Driver's Liscense and the Yakama Nation Police Officer - "Sam" - cause this testimony.

One, clear, summer morning we instructed Jose on his daily irrigation assignments. Because of the amount of work, he had Juan to assist. They entered one of our pickup trucks; drove to Fort Road (SR222); stopped; entered traffic in front of Sam.

I was enroute to other duties; entered traffic behind Sam. We drove to a nearby traffic intersection. There, Jose signalled a left turn; paused for oncoming traffic; turned left. Then, Sam did a strange thing -- he also turned left. After a short distance, Sam used his bar lights to signal Jose to stop.

Because my men had done nothing wrong; because the vehicle driven by Jose had properly operating stop lights and turn signals; because our work schedule could be affected by this stop; I followed. I passed Sam and Jose. And, stopped.

Sam - in English - asked Jose questions. Jose, via verbal responses and hand gestures indicated; "I don't know. I don't know. I don't know." Because Jose does not write or speak English, his words were true.

Sam eventually responded to my inquiry as to why he stopped my personnel and a vehicle I owned. He did not observe a valid or any license plate on the back of the truck.

I pointed to a "Q sticker" mounted on the front windshield of the stopped vehicle. Sam did not know the "Q sticker" grants farm exempt status to vehicles operating within a limited number of miles of their garaged location.

My concerns about Sam's conduct:

- police officer's "should" know about the laws they are enforcing
- police officer's "should not" be surprised or frustrated when encountering non-English speaking personnel in this region
- tribal jurisdiction does not extend to non-tribal personnel
- tribal jurisdiction does not extend to non-tribal vehicles

What was Sam doing? It wasn't his duties.

Sincerely,

Rene E. Gamache

Rene E. Gamache

Kevin Riel
Harrah WA.
17 September 1996

Honorable John McClain, Chairman
Committee on Indian Affairs
U.S. Senate
838 Hart Senate Office Building
Washington D.C. 20510
Page 1 of 2

RE: Tribal Police Activities

TO: Honorable John McClain

Dear Sir,

On Friday 2 August 1996 at around 7:00 PM my partner and I were nearly envolved in an accident that would be classified as a near miss.

We are members of a local volunteer fire department and we were finishing up work at an accident scene just North of the town of Harrah at the intersection of North Harrah road and Progressive road. An Indian motorist had failed to stop at the stop sign and came to rest in a ditch. The Yakama Tribal Police were present at the scene.

We left the scene in the emergency vehicle that we responded in and returned to the Harrah station for more supplies. An accident had been reported over the monitor and we anticipated that we would be responding.

We were dispatched to that scene at the intersection of Fort road and Shaker Church road. Fireman Jim Morford was driving the Rescue truck and I was a passenger.

Approximately three quarters of a mile South of town we encountered a pedestrian walking on the narrow shoulder of the road. We were traveling 55 to 60 MPH in response to the call and the driver partially moved the fire truck into the North bound lane to avoid hitting the pedestrian. Our lights and siren were active.

Suddenly a Yakama Indian Nation Police vehicle passed from behind. He was traveling so fast that we did not notice his approach nor could we hear his siren over the top of our own.

The Tribal vehicle had to use the North bound shoulder for passage to avoid a collition with our Rescue truck and his vehicle caused rocks and dust to be thrown onto the roadway. It appeared that he was having difficulty maintaining control of his vehicle.

At the accident scene, the incident was reported to the training officer from the County. He and the both of us went to talk to the Tribal officer.

The Tribal officer agreed that "it was a close call", "stated that he didn't see the pedestrian untill it was to late", and "that he gave it more gas to get around quicker".

He did not deny that he was traveling in excess of 80 MPH. When we asked him if he felt that his actions were safe, he stated "that the State Patrol pursues at 80 all the time". When reminded that he wasn't in pursuit, he stated that "he was first aid and CPR certified and that when he responds, he steps it up, that he passes ambulances all the time, he has been of the force for 21 years, puts his life on the line every day and has taken a bullet."

This officers role at the scene was traffic control. The opinion of the training officer from the county was that trafic control was necessary, but did not need an emergency response to the scene, just for traffic control.

The Tribal Police officer's attitude was that he would continue to operate as usual.

Kevin Riel
Volunteer Captain/EMT-O

Bernard J. Gamache
7820 Ashue Road
Wapato, Washington 98951

Sheriff Doug Blair
Yakima County Sheriff's Dept.
128 North 2nd Street
Yakima, Washington 98901-2631

18 Feb. 1995

Sheriff Blair,

My name is Bernard Gamache, a farm operator from Wapato in Yakima county. I live and work within the boundaries of the Yakima Indian reservation with my family. And I provide jobs to others encouraging them to travel to and from my place of business.

I am writing to you to express my concerns about your plan to deputize the Yakama Indian Nation tribal police to assist the Yakima County Sheriff Department with law enforcement on the reservation. This communication is in opposition to your proposal and I submit this letter for the public record.

In the United States, you are the chief law enforcement officer of a county charged in general with the keeping of the peace and the execution of court orders.

The people who live within the boundaries of the Yakama Indian Reservation deserve the same quality of peace keeping and application of law as all other citizens of the County and State. Your proposal would severely compromise your responsibilities to us the residents of this county. The laws between Indians and non-Indians is biased and unfair. There is no legal recourse when the Tribal Police cause damage, injury or death due to their misconduct. A life is discarded like some bit of garbage upon the ground.

The county sheriff should not hold the county responsible for the actions of personnel who are not accountable to the laws of the State of Washington. It would be extremely inappropriate to enlist personnel to enforce our laws who are not subject to those same laws. A "do as I say not as I do situation". An agreement or compact is always one sided because of the Soverignty issue.

A plan to deputize the Tribal Police would leave the reservation area without any real law enforcement. I believe that existing sheriff deputys would be reassigned to off reservation arenas

leaving us, the non-Indians, at the mercy of this inept organization of immitations. I predict an increase of harassment of non-Indians by Tribal Police using not only their soverignty shield but also hiding behind the sheriff badge.

How am I to distinguish between the trained and the untrained Tribal Police. I believe it to be best to not interact for fear of my personal safety and rights violations without legal recourse. It is best that tribal members who are truely dedicated to law enforcement become Yakima County sheriff deputies, subject to the laws of the State and then be enlisted to help serve the purpose of the County Sheriff Department. Only when the Tribal Police qualify as sheriff deputies, only when they wear the same uniforms as sheriff deputies, only when they are subject to the same laws as all other state citizens will they be able to provide adequate law enforcement to those on the reservation.

The county needs this, this community demands this. Anything less jeopardizes the peace and safety of the citizens of the state who reside on this reservation. Community morale is at an all time low. The Tribal Police have earned very little respect and a great deal of mistrust. Their past and present performance record clearly demonstrates this. To increase the interaction between Tribal Police and non-Indians would be a terrible mistake; the discrepancies must be taken care of first. I fear for the safety of my remaining family, my neighbors and my work crews, not from crime but from the Yakama Tribal Police.

To use the Tribal Police as a cure is worse than the crime. There is no doubt that the Yakama Tribal Police have made their contribution to the loss of life of innocent citizens within this county.

I commend you Sheriff Blair, for trying to find a solution for us here on the reservation, but there can only be an increase of frustration and grief with your plan. A better solution would be a funding plan similar to the special levy adopted by the city of Toppenish designed to provide for additional trained law enforcement officers. Then, we the citizens of the county, would be able to dictate by vote the level of law enforcement we want in addition to that allocated to us by the County Commissioners.

Those communities located within the boundaries of the Yakama Indian Reservation deserve better for their part in contributing to the local, State and Federal economies.

Sincerely,

Bernard J. Gamache

Sheriff Blair,

We here the undersigners fully support the letter written to you by Bernard J. Gamache regarding the deputizing of Yakima Tribal Police.

Landon Lommers
Matt Lommers
Susan Lommers
[illegible] Worrell
Adrian C. Lommers
Gregg Nelson
[illegible]
[illegible] Lommers Jr.
John Lommers III
Glenna Lommers
Steven J. Gamache
Eric Gamache
Gary Gamache
Jocelyn Gamache
Ryan Gamache
Ronald F. Gamache
[illegible] Gamache
Kevin A. Gamache
[illegible]

Barry Halvorson
Gleana Halvorson
Henry Lommers

Sheriff Blair,

We here the undersigners fully support the letter written to you by Bernard J. Gamache regarding the deputizing of Yakima Tribal Police.

Richard R. Lommers
Sharon Young
Katie Young
Steven M. Perrott

BERNARD J. GAMACHE
6371 Fort Road
Toppenish, Wa, 98951
26 February 1996
509/ 865-6422
FAX 590/ 865-6423

Harry A. DeLashmutt
BUREAU OF INDIAN AFFAIRS
Law Enforcement Services
1849 C ST. NW. MS-1342
Washington D.C. 20240
202/ 208-5786
Fax 202/ 208-6170
Page 1 of 2

Re: Public safety violations; PL 93-638 infractions by
Yakama Indian Nation Tribal Council, Law and Order
Committee, Public Safety Division and the YIN Tribal Police

TO: Harry De LaShmutt

Dear Sir,

As per your request, I am submitting a list of individuals who have experienced and/or witnessed activities enacted by the Yakama Indian Nation Tribal Police that are contrary to public safety and the PL 93-638 contract. There is however another group of individuals who are concerned about retaliation from the Tribe and are not yet willing to comment.

I will be the first to claim standing by beginning this list with my name. The Tribe's arrogant attitude has caused the death of my son Jered and near fatal injuries to my second son Andrew. That day has initiated the vigilance that has led to the determination that the Yakama Indian Nation Tribal Police cannot be allowed to continue operations as such or more death and suffering will surely follow.

I continue to urge that the Bureau Of Indian Affairs act with emergency in responding to my plea. Delete the funding that provides for police and jail operations of the Yakama Indian Nation through the PL 93-638 contract.

Bernard J. Gamache	509 865-6422	Agriculturalist
Norm Cleveringa	509 829-5636	Field Man/scout
Dan Clements	509 865-3763	Equipment Salesman
Doug Blair	509 574-2600	Yakima County Sheriff
Paul Gamache	509 865-2962	Agriculturalist
Rene Gamache	509 865-2964	Mechanical Engineer
Harvey Waggener	509 877-2311	Machine Fabricator
Mitch Underwood DVM	509 865-3435	Veterinarian
Jody Hert	509 848-2622	Food Service
Steve Hert	509 848-2622	Fire Department Volunteer
Aric Gamache	509 332-1934	Student
Larry Nelson	509 848-2814	Zone Chief, Gamache Fire Department

Thank you for your consideration in acting on my complaint. Awaiting to hear from you about your investigation of this matter.

Sincerely,

Bernard J. Gamache

Bernard J. Gamache

Harry,

Today's paper ran this article.

This man, YIN Police Chief Davis Washines, is the same man who was in control of the tribal police and their department at the time of my son Jered's death. His position is supported by PL93-638 contract funds. He is directly responsible for Jered's death. Two additional claims that this man should be charged with are negligent homicide and public endangerment.

Also, please note that two of Washines brothers sit on the tribal council, which presents a problem of nepotism ethics.

Finally, though the Yakama Indian Nation filed the complaint, it appears that the tribal council is trying to shift blame to Washines.

The tribal council does have governing authority over the police as is outlined in their government structure flow chart.

Sincerely,

Bernard J. Gamache

Tribal police chief put on leave after embezzling charges

By WENDY HARRIS
Of the Herald-Republic

TOPPENISH — Yakama Indian Nation police Chief Davis Washines has been placed on administrative leave following a criminal complaint that he embezzled money from a police yard sale and unauthorized fish sales.

WASHINES

According to Yakama Tribal Court documents, the Yakima Indian Nation filed a complaint filed Feb. 6 accusing Washines of two counts of fraud, one count of theft and one count of embezzlement.

Washines could not be reached for comment, and tribal officials have declined to discuss the situation.

The three-page complaint alleges that in October 1990, Washines induced tribal conservation officers to sell Yakama Nation-owned fish and give him the cash. The complaint also alleges that in February 1991, Washines took $1,931 in proceeds from a police yard sale.

According to the complaint, Washines made "false representations" that he would use proceeds from the fish sale to purchase police equipment. The document does not say how much cash was involved in the fish sale.

Tribal police Officer Ned Tillequots was named acting chief Feb. 23 when Washines was placed on administrative leave.

Tribal court officials, who said they are not authorized to release any information, verified the complaint had been filed but would not say whether Washines had been arraigned.

Tribal leaders, including Tribal Council Chairman Jerry Meninick and several other council members, have refused comment on the matter.

Washines is the brother of Tribal Councilman Arlen Washines and General Council Vice Chairman Tony Washines.

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